

No. 19-1039

IN THE
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,
Petitioner,

v.

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

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

**BRIEF OF THE PENNSYLVANIA
MANUFACTURERS' ASSOCIATION AND
THE NEW JERSEY BUSINESS & INDUSTRY
ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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March 23, 2020

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STATEMENT OF INTEREST

The following parties respectfully submit this brief as *amici curiae*.¹

Since its founding in 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for business and manufacturing in Pennsylvania. From its headquarters in the Frederick W. Anton, III, Center, across from the steps to the State Capitol Building in Harrisburg, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs. PMA has forcefully advocated for forward-looking strategies that will take full advantage of the Commonwealth's tremendous reserves of natural gas, and ensure a secure, stable supply of market-priced energy for Pennsylvania's businesses and citizenry.

Located in Trenton, New Jersey, the New Jersey Business & Industry Association ("NJBIA") is the nation's largest statewide employer association. Its members employ more than a million people, and represent every industry in New Jersey, including manufacturers, contractors, retailers and service providers. For 110 years, the NJBIA has championed a competitive business climate, both locally and globally, and facilitated partnerships among business,

¹ Pursuant to Sup. Ct. R. 37.2(a), *amici curiae* have provided counsel of record for both Petitioners and Respondents timely notice of *amici curiae's* intent to file this brief, and all parties have consented to its filing. In accordance with Sup. Ct. R. 37.6, *amici curiae* state that no party, counsel for a party, or person other than *amici curiae*, their members or counsel authored any portion of this brief or made any monetary contribution intended to fund this brief's preparation and submission.

government and academia. Because New Jersey must import much of the natural gas it uses via interstate pipelines from Pennsylvania and elsewhere, NJBIA believes that the decision of the court below could lead to serious disruptions in New Jersey's energy supply.

SUMMARY OF ARGUMENT

The federal government's eminent domain power derives from the federal government's sovereignty; it was assumed to be within the scope of enumerated powers; and it predates the Eleventh Amendment's adoption. The federal power of eminent domain is complete in itself. Its use to condemn State-owned property does not depend upon the State's consent, and States do not enjoy Eleventh Amendment immunity from its exercise. Congress may delegate the federal eminent domain power, and that delegation carries with it the ability to condemn state-owned property interests. Congress made such a delegation in Section 7(h) of the Natural Gas Act ("NGA"), to allow the holder of a certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission ("FERC") to acquire the property needed to construct an interstate pipeline. The lower court erred by declaring that the holder of a certificate of public convenience cannot condemn property owned by a State in federal court because Section 7(h)'s delegation of the federal eminent domain power did not carry with it a delegation of the federal government's Eleventh Amendment immunity.

By allowing a State to block the construction of an interstate natural gas pipeline, the lower court's decision will upend the manner in which pipeline developers have done business for 80 years, and undermine the nation's security and economy in at least four ways. First, it will severely impede the continued

orderly development of critically needed natural gas infrastructure. Second, it will render large reserves of natural gas in states like Pennsylvania unavailable to meet the growing energy needs of states like New Jersey. Third, by slowing or potentially halting interstate pipeline development, it will deprive the nation of the substantial economic activity associated with both the construction of the pipelines themselves, and the upstream and downstream users of the natural gas they transport. Finally, by introducing delay and uncertainty into the approval process, and casting into doubt the utility of a FERC-issued certificate of public convenience, it will make pipelines more difficult to finance and more expensive to build.

For these reasons, the Court should grant the Petition for Certiorari and review the decision of the lower court.

ARGUMENT

1. THE DECISION BELOW INCORRECTLY ENABLES A STATE TO ASSERT ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT TO LIMIT THE FEDERAL GOVERNMENT'S EXERCISE OF ITS EMINENT DOMAIN POWER

As this Court recognized 145 years ago in *Kohl v. United States*, 91 U.S. 367 (1875), the right of eminent domain “is inseparable from sovereignty,” it was “well known when the Constitution was adopted,” and it may be exercised by the federal government. *Kohl*, 91 U.S. at 371-372. Although the “Constitution never explicitly grants the power of eminent domain to the national government,” the “Fifth Amendment – which, at the time of its adoption applied only to the national government – requires that ‘just compensation’ be

paid for takings, making evident that such a power was assumed to be within the scope of enumerated powers.” Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 525 (2009) (footnotes omitted). *See also Tennessee Gas Pipeline Company, LLC, v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 242 (3d Cir. 2019) (“It is well-established that the federal government wields the authority to exercise eminent domain.”)

As the lower court acknowledged, “[t]he federal government can exercise that power to condemn State land in federal court.” *In Re: PennEast Pipeline Company, LLC*, 938 F.3d 96, 104 (3d Cir. 2019). In a separate case, decided less than two months after *PennEast Pipeline*, another panel of the lower court explained that “because ‘the power of eminent domain is merely the means to the end,’ the federal government also has the power to delegate its eminent domain power to private entities.” *Tennessee Gas Pipeline*, 931 F.3d at 242 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)). In Section 7(h) of the NGA, Congress delegated the federal government’s eminent domain power to the “holder of a certificate of public convenience and necessity” issued by FERC:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas...it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts....*Provided*, That the United

States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.00.

15 U.S.C. § 717f(h) (emphasis in original).

The lower court correctly recognized that, in Section 7(h), Congress delegated the federal government's eminent domain power to the holders of a FERC-issued certificate of public convenience. *PennEast Pipeline*, 938 F.3d at 100. Relying primarily on a solitary district court decision, however, *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange County Texas*, 327 F.R.D. 131 (E.D. Tex. 2017), the lower court then erred by concluding, first, that the federal government's eminent domain power is separate and distinct from its exemption from Eleventh Amendment immunity, and, second, that a delegation of the eminent domain power does not include the right to enforce the exercise of that power against State-owned property in federal court unless Congress – assuming that it can do so at all – also clearly and unmistakably delegates the Eleventh Amendment immunity exemption:

[I]t is essential at the outset to distinguish between the two powers at issue here: the federal government's eminent power and its exemption from Eleventh Amendment immunity. Eminent Domain is the power of a sovereign to condemn property for its own use. The federal government can exercise that power to condemn State land in federal court. But its ability to do so is not due simply to 'the supreme sovereign's right to condemn state land. Rather, it is because the federal government enjoys a special exemption from

the Eleventh Amendment.’ Thus, the federal government’s ability to condemn State land... is, in fact, the function of two separate powers: the government’s eminent domain power and its exemption from Eleventh Amendment immunity. A delegation of the former must not be confused for, or conflated with, a delegation of the latter. A private party is not endowed with all of the rights of the United States by virtue of a delegation of the government’s power of eminent domain.

PennEast Pipeline, 938 F.3d at 104 (citations omitted) (quoting *Sabine Pipe Line*, 327 F.R.D. at 140).

Although the lower court expressed its “deep doubt that the United States can delegate its exemption from state sovereign immunity to private parties,” rather than confront the constitutional question, the court instead held that, because the NGA contains no mention of the Eleventh Amendment nor any reference to “the federal government’s ability to sue the states,” the “NGA does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.” *PennEast Pipeline*, 938 F.3d at 111, 112-113.

The lower court wrongly bifurcated the federal government’s eminent domain power. The ability to exercise eminent domain power cannot be divorced from the ability to enforce that power in court, regardless of whether the property taken belongs to a State or a private individual or entity. This Court recognized in *Kohl* that the federal government’s eminent domain power flows from its sovereignty and that the right of eminent domain was “well known when the Constitution was adopted....” *Kohl*, 91 U.S. at 372. As the Court further observed in *Kohl*:

Such an authority is essential to [the federal government's] independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed....If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.

* * *

If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment.

Kohl, 91 U.S. at 368, 374.

The federal government's eminent domain power, the source of which pre-dates the Eleventh Amendment, is "complete in itself." *Id.*, at 374. It does not depend for its exercise against State-owned property upon the federal government's exemption from Eleventh Amendment immunity; the federal government does not need a State's consent to exercise its eminent domain power. And the federal government can delegate that power to a private party, like a holder of a

certificate of public convenience within the meaning of Section 7(h) of the NGA, to acquire the land necessary to build interstate pipelines to transport natural gas. The right to condemn absent the right to compel would reduce the eminent domain power, in the hands of Congress' delegee, to a bark without a bite.

The lower court erred by holding that the federal government's eminent domain power is not complete in itself, and that its right to condemn State-owned property depends upon its Eleventh Amendment immunity. "The consent of a State can never be a condition precedent to" the exercise of the federal power of eminent domain. *Kohl*, 91 U.S. at 374. The lower court's decision incorrectly enables a State to control how Congress elects to exercise the federal eminent domain power by blocking the exercise of that power by a private party to whom it has been delegated – even though the federal government, through FERC's issuance of a certificate of public convenience, has in effect selected the properties to be condemned by approving the pipeline's route. For this reason, the Court should grant the Petition for Certiorari and review the decision of the lower court.

II. THE DECISION BELOW THREATENS BOTH THE SECURITY AND THE ECONOMY OF THE UNITED STATES, BY CRIPPLING THE NATION'S ABILITY TO CONTINUE TO MAINTAIN AND EXPAND THE INFRASTRUCTURE REQUIRED TO MEET THE COUNTRY'S GROWING ENERGY NEEDS

The lower court candidly acknowledged that "our holding may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty

years, operates.” *PennEast Pipeline*, 938 F.3d at 113. In its Order on Petition for Declaratory Order (“Declaratory Order”) entered on January 30, 2020, FERC, the federal agency charged with administering the NGA and overseeing the development of the nation’s natural gas infrastructure, voiced its concern in starker terms:

If the Third Circuit’s opinion stands, we believe it would have profoundly adverse impacts on the development of the nation’s interstate natural gas transportation system, and will significantly undermine how the natural gas industry has operated for decades.

Declaratory Order, 170 FERC ¶ 61,064, ¶56, p. 42 (2020).

Some background facts will help put into relief the likely consequences of the lower court’s decision. According to the United States Department of Transportation’s Pipeline and Hazardous Safety Administration (“PHMSA”), “[n]atural gas supplies 25 percent of all the energy Americans consume.” *General Pipeline FAQs*, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs>, p. 1. A study prepared by ICF for the Interstate Natural Gas Association of America in June, 2018, projects that the demand for natural gas in the United States and Canada, including liquid natural gas exports and pipeline exports to Mexico, will increase from 91 billion cubic feet per day in 2017 to 130 billion cubic feet per day in 2035. ICF, *North American Midstream Infrastructure Through 2035: Significant Development Continues*, p. 34 (June 18, 2018), available at <https://www.ingaa.org/File.aspx?id=34703>, p. 34 (June 18, 2018). The ICF Study further “projects the need for 57 billion cubic feet per

day of new gas pipeline capacity to support the levels of production and market growth that are projected through 2035.” *Id.*, at p. 37.

The construction of this new capacity will require a “total investment of \$685 to \$898 billion,” which will add \$1.3 trillion to U.S. and Canadian GDP from 2018 through 2035.” *Id.*, at p. 68. Infrastructure development will support on average “725,000 jobs each year throughout the projection including 242,000 direct jobs.” *Id.* The study concludes that “[i]nfrastructure development will have wide-ranging benefits for millions of Americans. The midstream business is critical to the growth of the upstream and downstream portions of the oil and gas business.” *Id.*

According to PHMSA, “[p]ipelines enable the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life.” *General Pipeline FAQs*, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs>, p. 1. Pipelines “provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system,” by safely delivering “trillions of cubic feet of natural gas and hundreds of billions of ton/miles of liquid petroleum products each year.” *Id.*, at p. 2. In short, pipelines “are essential: the volumes of energy products they move are well beyond the capacity of other forms of transportation.” *Id.* Most importantly, according to PHMSA, “[p]ipeline systems are the safest means to move these products.” *Id.*

Amici curiae represent manufacturers and other businesses in Pennsylvania and New Jersey. “The Marcellus Shale, the largest U.S. natural gas field,” underlies about three-fifths of the Commonwealth of Pennsylvania. U.S. Energy Information Admin-

istration, *Pennsylvania State Energy Profile*, <https://www.eia.gov/state/?sid=PA>, p. 6 (last visited March 19, 2020) (footnotes omitted). Pennsylvania is the nation's second largest producer of natural gas, after Texas, and "the second largest net supplier of energy to other states, after Wyoming. *Id.*, at p.p. 1, 6 (footnotes omitted). "Pennsylvania's marketed natural gas production reached 6.2 trillion cubic feet in 2018, almost 11 times larger than in 2010," and "was equal to about one-fifth of total U.S. gas production." *Id.*, at p. 7 (footnotes omitted). Pennsylvania serves as an important source of natural gas for New Jersey, and other surrounding states, since "[m]ost of the natural gas shipped by pipeline from Pennsylvania goes to New Jersey, New York, Maryland, Ohio and West Virginia." *Id.* Still, "[e]ven with booming production, Pennsylvania's role as a gas giant continues to be constrained by a lack of pipelines that ship gas out of the state." Jude Clemente, *Pennsylvania as the New Natural Gas Giant*, (March 21, 2019, 07:41pm EDT) <https://www.forbes.com/sites/judeclemente/2019/03/21/pennsylvania-as-the-new-natural-gas-giant#37853384636c>.

Against this background, it can be fairly seen that the lower court's decision will detrimentally impact the nation's security and economy in at least the following ways. First and foremost, the lower court's holding hands to individual States the ability to block construction of any interstate pipeline which crosses over land which the State either owns, or in which the State owns some interest, such as a restrictive easement. Moreover, through the simple expedient of conveying a portion of their property, or an interest in their property, to the State, private landowners who oppose the building of a pipeline can effectively prevent the pipeline's construction. For this reason

alone, the lower court's holding threatens to subvert the continued maintenance (some pipelines have rights-of-way which need to be renewed periodically) and development of the nation's natural gas infrastructure. As FERC summarized in its Declaratory Order:

We note that the court's interpretation would permit states to block construction both on land a state owns (e.g., along or across all state roads and the bottoms of navigable water bodies), and on land over which the state asserts some lesser property interests (e.g., conservation easements). If state-owned lands are treated as impassable barriers for purposes of condemnation, the circumvention of those barriers, if possible at all, would require the condemnation of more private land at significantly greater cost and with correspondingly greater environmental impact. If lands over which a state has asserted any property interest also become barriers for purposes of condemnation, a state could unilaterally prevent interstate transportation of an essential energy commodity through its borders, thus eviscerating the purpose of NGA section 7(h).

Declaratory Order, 170 FERC ¶ 61,064 at ¶ 58, n. 221, p.p. 43-44.

Second, affording to individual States the ability to block construction of interstate gas pipelines threatens to rob the nation of its energy independence, and businesses and residential consumers of a steady, market-priced supply of energy, by effectively stranding large quantities of natural gas. Pennsylvania, the second largest producer of natural gas in the country,

whose marketed natural gas in 2018 amounted to about one-fifth of total gas production in the United States, relies on interstate pipelines to get its gas to consumers in New Jersey, New York and elsewhere. Without an adequate interstate pipeline infrastructure, this gas will remain in Pennsylvania, and will not be available to meet an ever-expanding nationwide demand. States like New Jersey, that do not produce substantial amounts of natural gas, depend on interstate pipelines to deliver the energy needed by their residents and businesses. As FERC noted in its Declaratory Order, “New Jersey Natural Gas states that if interstate pipeline companies such as PennEast are frustrated in their attempts to provide this needed additional capacity ‘a significant outage event is a realistic threat.’” *Declaratory Order*, 170 FERC ¶ 61,064 at ¶ 63, p. 47.

Third, the lower court’s decision, by slowing and potentially halting the needed expansion of the country’s pipeline infrastructure, will deprive the nation of significant anticipated economic growth. As noted in the IFC study, over the next 15 to 20 years, investments in the development of pipeline infrastructure could add as much as \$1.3 trillion to the Gross Domestic Product of the United States and Canada, and support as many as 725,000 jobs each year. These figures “do not consider employment in the upstream and downstream portions of the oil and gas business.” *ICF Report*, <https://www.ingaa.org/File.aspx?id=34703>, p. 68.

For example, Pennsylvania recently lost out on the expansion of a polypropylene manufacturing facility in Marcus Hook that, according to an analysis performed by *amicus curiae* PMA, would have supported more than one billion dollars of expanded economic activity

in Southeastern Pennsylvania over the course of five years. David N. Taylor and Carl A. Marrera, *Economic Model Analysis: Polypropylene Manufacturing Plant Expansion in Delaware County, PA*, (January 15, 2019), available at https://www.pamanufacturers.org/sites/default/files/PMA_Econ_Model_PolyProp_19.pdf “The reason why was clear: Pennsylvania lacked sufficient pipeline networks to provide natural gas liquids (NGL) feedstock to the proposed plant site.” *Id.*, p. 2. The manufacturers of everything from military aircraft to medical equipment rely on natural gas to power their plants, and the pharmaceutical industry employs natural gas liquids in the production of needed medicines. These businesses and many others count on pipelines to meet their energy demands.

Fourth, by introducing uncertainty into the approval and development process, and by undermining the value and effectiveness of a certificate of public convenience issued by FERC, the lower court’s decision will render it difficult to finance new pipeline projects and make building those projects more expensive. Institutional investors and lenders will be less likely to commit to finance a pipeline that may never be built due to an inability to obtain the needed right-of-way. Similarly, if a State or private individual can delay indefinitely, or even prevent, the construction of a pipeline, it will be very difficult for the developer to estimate accurately the pipeline’s construction cost, given the variances in wages and the cost of employee benefits and materials that can occur over time. The uncertainty flowing from the lower court’s decision will in and of itself hamper the expansion of the nation’s energy infrastructure, and in turn slow the economic growth fostered by a steady supply of affordable energy.

Finally, the lower court suggests that a “work-around” exists for its decision, i.e. an “accountable federal official” can “file the necessary condemnation actions and then transfer the property to the natural gas company.” *PennEast*, 938 F.3d at 113. FERC disagrees, stating in its Declaratory Order that “NGA section 7(h) confers authority to exercise eminent domain to certificate holders [pipeline developers] alone. And because neither NGA section 7(h) nor any other provision of the NGA authorizes the Commission to exercise eminent domain, the Commission lacks statutory authority to do so.” *Declaratory Order*, 170 FERC ¶ 61,064, ¶ 50, p. 39. Additionally, FERC noted that the NGA contains no provisions concerning “how the Commission would pay just compensation in the absence of an appropriation to do so, and the process of transferring the property from the Commission to the pipeline.” *Id.*, at ¶ 51, p. 40.

In summary, FERC stated in its Declaratory Order that, in the NGA:

“Congress established a carefully crafted comprehensive scheme in which the Commission was charged with vindicating the public interest inherent in the transportation and sale of natural gas in interstate and foreign commerce, in significant part through the issuance of certificates of public convenience and necessity for interstate gas pipelines. A key aspect of this scheme was the remit to natural gas companies of the ability to exercise, where necessary, the power of eminent domain to acquire lands needed for projects authorized by the Commission. We here confirm our strong belief that NGA section 7(h) empowers natural gas companies, and

not the Commission, to exercise eminent domain and that this authority applies to lands in which states hold interest.

Declaratory Order, 170 FERC ¶ 61,064, ¶ 66, p. 49.

The lower court's incorrect application of Eleventh Amendment immunity will upset the regulatory scheme set forth in the NGA which has worked for 80 years, and has allowed this nation finally to achieve energy independence. In the end, American businesses and consumers who rely on a secure supply of market-priced energy will pay the price.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request the Court to grant PennEast Pipeline's Petition for Certiorari and to review the decision of the lower court.

Respectfully submitted,

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March 23, 2020