No. 19-1039

In the
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,

Petitioner,

v.

STATE OF NEW JERSEY, ET AL.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* ENERGY EQUIPMENT AND INFRASTRUCTURE ALLIANCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, delegates to FERC certificate holders the authority to exercise the federal government's eminent domain power to condemn land in which a State claims an interest.

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INTEREST OF *AMICUS CURIAE*[1]

The Energy Equipment and Infrastructure Alliance ("EEIA") represents the energy infrastructure supply chain, which includes contractors, equipment suppliers, and providers of materials and services for, among other things, building natural gas pipelines, upstream production complexes, and downstream storage, processing, power generation, and export facilities. EEIA's members include companies, trade associations, and labor unions encompassing thousands of businesses (mostly smaller local and regional firms), along with millions of workers in the construction trades and in technical and administrative support roles within construction companies and with equipment and materials manufacturers, distributors, and service companies.

The remarkable growth of American natural gas production and consumption over the past decade, spearheaded by technological developments permitting drilling along the Marcellus Shale in Pennsylvania, has created millions of jobs, brought new prosperity to communities, States, and regions throughout the Nation, propelled America toward energy independence, and resulted in America leading the world in lowering carbon dioxide emissions. The bulk of those new jobs have been created in the supply chain EEIA represents, generating prosperity in the communities where

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties received notice of *amicus curiae*'s intent to file, and all parties have consented to the filing of this brief.

EEIA members live and spend their careers building and operating energy infrastructure. EEIA is submitting this brief because this case raises issues of vital importance to EEIA's members and to every constituency involved in America's booming natural gas industry, including the millions of skilled laborers whose livelihoods depend on large scale and complex infrastructure projects like the PennEast pipeline.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari because this case raises issues of immediate and exceptional national significance. The U.S. natural gas industry has been experiencing an unprecedented economic boom. Spurred by new technology enabling production from shale, natural gas production and consumption are at all-time highs. Experts are forecasting more growth for decades to come. And now, more than ever, America's energy supply is dependent on a stable supply of affordable natural gas. The decision below threatens to halt that growth in its tracks.

Interstate pipelines are essential to the natural gas supply chain. Without them, it would be impossible to move the trillions of cubic feet of natural gas produced annually, in a small number of areas, to the widely diffused markets where natural gas is consumed. Given the abundant supply in shale formations, a major new network of pipelines is required to connect new producing areas to points of end use.

Those pipelines are built and supported by EEIA's members. Massive infrastructure projects

like interstate pipelines involve complex supply chains—thousands of businesses and millions of highly skilled workers spread around the country—that provide necessary materials, labor, equipment, and engineering support. Such projects create valuable, family-supporting jobs and stimulate commercial activity in dozens of economic sectors beyond the natural gas industry. And pipelines generate downstream growth in other important sectors—such as manufacturing and chemical production—that rely on natural gas.

Indeed, Congress centralized pipeline approval under the Federal Energy Regulatory Commission's ("FERC") control precisely because the interstate pipeline network is a matter of critical national importance. Recognizing that importance and the need for long-term planning associated with such massive and complex infrastructure projects—and in response to efforts by individual States to disrupt pipeline development—Congress established a process over 70 years ago through which FERC may delegate to private pipeline companies the federal eminent domain power. In making that change, Congress recognized that interstate pipelines and State veto power are incompatible. This regulatory scheme has worked exactly as Congress intended. Private companies have invested in extensive pipeline networks—paving the way for the U.S. to become the world's leading natural gas producer—on the assurance that one State cannot unilaterally block an interstate pipeline's construction.

The Third Circuit's decision resurrects the unworkable regime that Congress abolished 70 years ago. That decision essentially empowers a single State—no matter how slight its interest or how

significantly its interest conflicts with those of other States or the Nation as a whole—to veto an interstate pipeline project that FERC has found to be in the public interest. The Third Circuit candidly acknowledged that its holding "may disrupt how the natural gas industry . . . has used the [Natural Gas Act] to construct interstate pipelines over State-owned land for the past eighty years." Pet.App.30. That alone should be enough to convince this Court to grant review.

The reality is that the decision below will cause massive disruption not only to the natural gas industry, but also to the complex web that provides the equipment, labor, and infrastructure support that makes pipelines possible. As a result, the consequences of the Third Circuit's decision will be devastating to a broad swath of ordinary Americans. Natural gas infrastructure spending totals tens of billions of dollars annually, supports millions of jobs, and contributes billions of dollars in tax revenues. In addition to eliminating high paying construction jobs, States vetoing new pipelines will send ripple effects across the economy. They will stunt investment and destroy thousands more jobs in the dozens of industries that supply equipment, materials, and services for the construction of pipelines, the upstream facilities producing natural gas, and the downstream facilities consuming it. They will deprive local communities of the economic revitalization generated by the influx of spending and taxes flowing from pipeline construction and maintenance. They will deprive consumers of energy cost savings. And they will destabilize the Nation's energy supply—which is heavily dependent on natural gas. The Third Circuit's decision is thus clearly a matter of significant national importance.

Indeed, FERC itself has sounded the alarm, warning that the decision will have "profoundly adverse impacts on the development of the nation's interstate natural gas transportation system."[2]

The Court should grant review now because the Third Circuit's decision will have an outsized impact given Pennsylvania's leading role in the natural gas industry. Pennsylvania is one of the largest and fastest growing producers of natural gas because of new technology enabling production from the abundant resources of the Marcellus Shale. Future pipeline development is heavily tied to this region of the country. Developing the required infrastructure in the Marcellus basin will have far-reaching benefits for businesses, workers, consumers, governments, and the national economy as a whole. The Third Circuit's decision, if not set aside, will reverse that progress.

Finally, by abandoning an interpretation of the Natural Gas Act that has been uniformly accepted as governing law by the industry, FERC, States, and Congress for over 70 years, the Third Circuit swept away the delicate balance Congress struck to facilitate necessary pipeline infrastructure projects and promote the overall public interest. That was particularly problematic because it was premised not on a holding that a constitutional barrier actually existed, but instead on a concern that some such problem *might* exist. The Court should grant review to resolve this critically important issue.

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[2] FERC Decl. Order, 170 FERC ¶ 61,064, Dkt. No. RP20-41-000, ¶56 (Jan. 20, 2020) (hereinafter, "FERC Order").

ARGUMENT

I. This Case Presents A Question Of Immediate And Exceptional National Importance That Endangers The Boom In Natural Gas Production.

The Petition should be granted because this case presents a question of national importance with far-reaching consequences. If allowed to stand, the Third Circuit's decision will send shock waves across the U.S. economy, with potential to destroy billions of dollars of annual contribution to the U.S. Gross Domestic Product ("GDP"), millions of high paying jobs for skilled workers across a wide-spectrum of industries, and billions of dollars of tax revenues. Adding to the financial fallout, the Third Circuit's decision will destabilize the natural gas markets at the heart of the Nation's energy supply. And by permitting a single State unilaterally to halt an interstate pipeline project, the decision below threatens to upend the complex commercial web that provides the equipment, labor, and infrastructure to make those pipelines possible.

A. The Natural Gas Industry Is Critical to the Nation's Economy and Energy Supply.

The U.S. natural gas industry is booming. According to U.S. Energy Information Administration data, natural gas production grew last year to the highest volume on record.[3] Horizontal drilling and hydraulic fracturing

[3] U.S. Energy Info. Admin. ("U.S. EIA"), *Today in Energy – U.S. Natural Gas Production Grew Again in 2019, Increasing by 10%* (Mar. 10, 2020), https://bit.ly/2WkV79H (hereinafter, "EIA *2019 Production Report*").

techniques that allow for production of natural gas from shale have fueled more than a decade of continuous growth,[4] making the United States the leading natural gas producer in the world.[5] The industry's value to the overall economy cannot be overstated. One study concluded that in 2015 alone, the natural gas and oil industry added over $1.3 *trillion* to U.S. GDP (7.6% of total GDP) and supported over 10 million jobs.[6] Government and private experts alike forecast that U.S. natural gas production will continue to grow for decades to come.[7] Much of this growth will depend on the Marcellus Shale in Pennsylvania. In fact, Pennsylvania had the second highest increase in natural gas production in the U.S. last year.[8]

Buoyed by robust supply conditions, U.S. natural gas consumption also reached a record level in 2019.[9]

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[4] *Id.*; *see also* U.S. EIA, *Natural Gas Explained, Where Our Natural Gas Comes From,* https://bit.ly/2TZtMrM (last accessed Mar. 23, 2020).

[5] U.S. EIA, *Today in Energy – The U.S. Leads Global Petroleum and Natural Gas Production with Record Growth in 2018* (Aug. 20, 2019), https://bit.ly/33sVJvd.

[6] Am. Petroleum Inst., *Impacts of the Natural Gas & Oil Industry on the US Economy in 2015* E-1-E-2 (July 2017), *available at* https://bit.ly/2UdY8FS.

[7] *See, e.g.,* U.S. EIA, *EIA Expects Natural Gas Production and Exports to Continue Increasing in Most Scenarios* (Feb. 19, 2020), https://bit.ly/2x2lwyl; The INGAA Found., Inc., *North American Midstream Infrastructure through 2035, Significant Development Continues* 3 (Jun. 18, 2018), *available at* https://bit.ly/392bSsX (hereinafter, "INGAA Report").

[8] EIA *2019 Production Report*, *supra* note 3.

[9] U.S. EIA, *Today in Energy – U.S. Natural Gas Consumption Sets New Record in 2019* (Mar. 3, 2020), https://bit.ly/3b8295L (hereinafter, "EIA *2019 Consumption Report*").

The power generation sector—the largest user—has been transitioning toward natural gas and away from coal-powered plants due in part to lower gas prices (with the benefit of lowering carbon dioxide emissions).[10] Since 2016, natural gas has accounted for the largest share of domestic electricity generation.[11] The industrial sector, the next largest user, has likewise benefited from expanding gas production. One study, for example, projected that over $100 billion in new investment will occur between 2013 and 2025 in new chemical, plastics, and related manufacturing facilities to take advantage of lower natural gas prices.[12] The residential sector is also heavily dependent on the natural gas industry, with half of all American households using natural gas for heating their homes and water, cooking, and drying clothes.[13] The revitalized natural gas industry is thus not only a powerful engine of national economic growth and middle class job creation, but also a major and increasingly important source of the Nation's energy supply.

B. Interstate Pipelines Are Essential to the Natural Gas Supply Chain.

Interstate pipelines are indispensable to the natural gas supply chain. Natural gas can be produced only where it exists below the Earth's

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[10] *Id.*; *see also* IHS Economics, *The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector* 22 (May 2016), *available at* https://bit.ly/2U22rFm (hereinafter, "2016 IHS Report").

[11] EIA *2019 Consumption Report*, *supra* note 9.

[12] 2016 IHS Report at 21.

[13] U.S. EIA, *Natural Gas Explained, Use of Natural Gas*, https://bit.ly/2wapNzH (last accessed Mar. 23, 2020).

surface, but it is used by consumers across all 50 States. Pipelines address the mismatch between local supply and demand conditions by moving natural gas from underground formations to points of end use (*e.g.*, the power sector) or export (*e.g.*, major ports). In 2018, the natural gas transportation network delivered nearly 28 trillion cubic feet of natural gas to 75 million customers.[14]

According to the latest numbers released by the federal government, there are approximately 301,503 miles of transmission pipelines.[15] But the "rapid growth of low-cost production out of [major shale areas] has created a bottleneck, as drillers are unable to find pipeline capacity to move gas from the well to consumer markets."[16] This bottleneck is particularly acute in Pennsylvania, where the Governor's Pipeline Infrastructure Task Force has concluded that "[d]rilling for natural gas in Pennsylvania has far outpaced the development of the infrastructure needed to get that gas to markets."[17] Experts have forecasted a 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.[18] Nearly half of this additional pipeline capacity is tied to the Marcellus and Utica

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[14] U.S. EIA, *Natural Gas Explained, Natural Gas Pipelines*, https://bit.ly/3b4fonZ (last accessed Mar. 23, 2020).

[15] U.S. Dep't of Transp., Bureau of Transp. Statistics, *U.S. Oil and Gas Pipeline Mileage*, https://bit.ly/3b4Sltc (last accessed Mar. 23, 2020).

[16] 2016 IHS Report at 18.

[17] Governor's Pipeline Infrastructure Task Force (PIFT) Report 20 (Feb. 2016), *available at* https://bit.ly/3a0V4E3.

[18] INGAA Report at 37.

production basins in the Northeast.[19] Simply put, "[n]ew pipeline and processing infrastructure expansion will be a key to connecting new supply sources with new and growing sources of demand."[20]

C. The Third Circuit's Decision Will Have Severe National Economic Consequences on the Complex Commercial Web that Provides the Equipment, Labor, and Infrastructure Necessary to Build Interstate Pipelines.

The adverse economic effects of the decision below would sweep far beyond the natural gas industry. The Third Circuit's decision, if not reversed, will have dire consequences on countless businesses throughout the Nation and ordinary Americans whose livelihoods are tied to the construction of interstate pipelines like PennEast. Natural gas infrastructure projects are engines of economic growth. One industry study shows, for example, that the nearly $26 billion spent constructing natural gas transmission pipelines in 2015 stimulated 348,789 jobs and contributed nearly $34 billion dollars to U.S. GDP.[21] The same study concluded, more broadly, that "economic benefits [in 2015] from increased domestic shale gas production and the accompanying lower [natural gas] prices include $190 billion to real gross domestic product . . . [and] 1.4 million additional jobs."[22]

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[19] *Id.* at 37*; see also* 2016 IHS Report at 18 (projecting new infrastructure development to support 19.3 billion cubic feet per day of productive capacity growth from the Marcellus Shale).

[20] 2016 IHS Report at 20.

[21] *Id.* at 38-39.

[22] *Id.* at 4.

Similar economic and employment gains were quantified in another recent study based on longer-term projections for the period 2018 through 2035. Those projections show total capital expenditures for new oil and natural gas infrastructure development of approximately $791 billion, including approximately $154 to $190 billion to construct 26,000 miles of additional natural gas pipelines.[23] This total investment is projected to support 658,000 U.S. jobs annually and contribute more than $1.1 *trillion* to U.S. GDP.[24] These projections focus solely on infrastructure development and do not take account of additional job creation arising from operating the infrastructure or across the upstream or downstream segments of the industry.[25]

The economic benefits of natural gas infrastructure development are spread across every State, even those with no natural gas production.[26] This is due in large part to what economists refer to as "backward linkages," *i.e.*, economic activity from sectors that supply intermediate inputs required to construct pipelines. Building a pipeline requires an extensive supply chain, including materials (*e.g.,* steel pipe, concrete pipe supports, coatings), supplies (*e.g.* sand, gravel), equipment (*e.g.*, earthmoving, grading, drilling, pipe handling), and services (*e.g.*, surveying, transportation). These inputs are commonly sourced from businesses around the country. In addition, many inputs have their own backward linkages. For example, a $2 million piece

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[23] INGAA Report at 2, 48.

[24] *Id.* at 2, 63-64.

[25] *Id.* at 61.

[26] *Id.* at 63-65.

of earth-moving equipment, intended for work on a project in New Jersey, may be built in Illinois, and many of its components may be supplied to the equipment manufacturer by factories in other States, further contributing to the economic multiplier effect. Simply put, "[u]nconventional oil and gas development in the United States is a wide-ranging economic juggernaut that impacts dozens of industries beyond the oil and gas sector."[27]

If single States are permitted to veto interstate pipeline projects, they will destroy high paying construction jobs for welders, pipefitters, construction crews, engineers, and countless other Americans whose livelihoods depend on pipeline projects. Many of those workers travel across the country from job-to-job because of the highly technical skills required on pipeline construction sites. On this project alone, PennEast was expected to spend more than $700 million on construction labor.[28]

But the losses will not end there. Additional economic losses and workforce cuts will reverberate up and down the natural gas infrastructure supply chain. The jobs lost will not be easily replaced, particularly in the fragile and highly uncertain economic environment we currently face. Indeed, the average unconventional supply chain worker earns $79,000 a year, far outpacing the average $68,000

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[27] IHS Economics, *Supplying the Unconventional Revolution: Sizing the Unconventional Oil and Gas Supply Chain* 1 (Sept. 2014), *available at* https://bit.ly/33tA3PA (hereinafter, "2014 IHS Report").

[28] PennEast Pipeline, *Economic Impact Report & Analysis* 10 (Feb. 9, 2015), *available at* https://bit.ly/33xvAvl (hereinafter, "PennEast *Econ. Impact Report*").

annual U.S. salary.[29] Here too, this particular project is illustrative: PennEast's design and construction expenditures of $1.2 billion were expected to generate a total economic impact of more than $1.6 billion and more than 12,000 jobs *in Pennsylvania and New Jersey alone*.[30] In addition to job losses, the Third Circuit's decision will stifle long-term investment, as suppliers will be reluctant to acquire equipment or train employees in the face of uncertainty over whether a FERC-approved pipeline project will nevertheless be vetoed by a State intent on blocking it.

Giving States veto power over interstate pipelines will also deprive governments of much needed tax revenues. Pennsylvania, for example, was expected to collect more than $11 million in state personal income taxes from the construction of the PennEast pipeline before New Jersey blocked the project.[31] On a macro level, oil and gas infrastructure investment is projected to boost federal taxes by $238 billion and state and local taxes by $204 billion, respectively, from 2018 to 2035.[32] Those tax revenues are a critical source of funding for essential services and further underscore the dangers of allowing one State to wield a veto over projects with larger, more complex implications. The loss of tax revenue will be particularly devastating to the many small towns along pipeline routes that have been revitalized by the influx of workers constructing, operating, and maintaining pipelines.

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[29] 2014 IHS Report at 1, 7.

[30] PennEast *Econ. Impact Report* at 10-11.

[31] *Id.* at 12.

[32] INGAA Report at 62.

These workers not only generate new taxes; they also stimulate local and state economies by spending money at hotels, restaurants, grocery stores, and across the retail landscape. Those "induced" economic impacts and the jobs and prosperity they create will be imperiled if individual States can dictate whether interstate pipelines get built. That is precisely the kind of economic balkanization that Congress intended to prevent by putting interstate pipeline approval under federal control.

Finally, natural gas customers across the nation will be harmed by States unilaterally vetoing pipeline construction. Increased production, largely from the shale regions, has led to "low and stable" natural gas prices and "electricity prices that are significantly lower than they otherwise would have been."[33] Added pipeline capacity helps to reduce volatility in constrained natural gas markets, particularly during periods of peak usage. Consumers in Eastern Pennsylvania and New Jersey, for example, could have saved an additional $1.325 *billion* in the winters of 2013/14 and 2017/18 had the additional capacity of the PennEast pipeline been available.[34] Lower energy costs from natural gas are a major driver of economic development in other industries. For example, since 2010, the domestic chemical manufacturing industry has announced 334 projects (*e.g.*, new factories and capacity expansions) cumulatively valued at $204 *billion* to take advantage of new domestic supplies of

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[33] 2016 IHS Report at 34.

[34] PennEast Pipeline, *Estimated Energy Market Savings from Additional Pipeline Infrastructure Serving Eastern Pennsylvania and New Jersey: Update for Winter 2017/2018* 3-4 (April 2018), *available at* https://bit.ly/2QrGQUZ.

more affordable natural gas.[35] From 2010 to 2025, increased chemical industry output made possible by shale gas is projected to generate 785,784 additional permanent jobs and $292 *billion* of additional output.[36] The regime endorsed by the Third Circuit thus risks not only the future of the natural gas industry, but many other sectors of the economy that are dependent on the robust and affordable supply of natural gas.

II. The Third Circuit's Flawed Analysis Will Have An Outsized Impact On The Rapidly Growing Natural Gas Industry In A Critical Region.

As explained above and in the Petition, certiorari is warranted in light of the massive disruption and economic dislocation that the Third Circuit's decision is likely to cause to the natural gas industry, which is strategically important to the Nation's energy supply, and the economy at large. Review in *this particular case* is especially warranted because the Third Circuit covers the geographic region that is driving the rapid expansion of natural gas production and pipeline construction in the United States. The Appalachian Region generally and Pennsylvania's Marcellus Shale deposits in particular are fueling the exponential growth of the natural gas industry. And, as the facts demonstrate here, the natural gas being extracted from Pennsylvania's rolling hills is frequently transported by pipeline to neighboring states, including New Jersey and Delaware (both within the Third Circuit), for end use or export from

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[35] Am. Chemistry Council, *U.S. Chemical Investment Linked to Shale Gas: $204 Billion and Counting* (May 2019).

[36] *Id.*

one of the many ports within those jurisdictions. Rather than allow the Third Circuit's decision to constrict economic activity within a critically important region to the natural gas industry, the Court should grant review now to decide the issue and ensure uniform application of the Natural Gas Act.

In recent years, Pennsylvania and the surrounding region has become one of the epicenters for natural gas production and transport. According to recent data from the U.S. Energy Information Administration, "[t]he Appalachian region remains the largest natural gas producing region in the United States."[37] "Within the Appalachian region, Pennsylvania had the largest increase in gross withdrawals of natural gas" in 2019.[38] And "[n]ationally, Pennsylvania's increase was second to that of Texas."[39]

That production shows no signs of slowing down: A 2016 report from the National Association of Manufacturers predicted that "[c]ombined with the Utica, the other major Appalachian play, the Marcellus is expected to account for almost 75% of the total growth . . . in the U.S. Lower-48 productive capacity between 2015 and 2025."[40] Yet, as production capacity in the region has skyrocketed, the "rapid growth of low-cost production out of these areas has created a bottleneck, as drillers are unable to find pipeline capacity to move gas from the well to

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[37] EIA *2019 Production Report*, *supra* note 3.

[38] *Id.*

[39] *Id.*

[40] 2016 IHS Report at 17.

consumer markets."[41] It is thus inevitable that "the supply growth in Appalachia will require the construction of brand-new pipeline capacity."[42] That sort of pipeline infrastructure support is precisely what the PennEast pipeline was designed to provide. Many other similar interstate projects are currently in the works as well.[43]

As explained above, PennEast and other pipeline projects not only drive the economic growth directly associated with the increasing production and transportation of natural gas in the region. They also fuel a complex and diverse web of interconnected economic activities, spanning from increases in the labor force, to equipment purchasing, to construction support, to surges in the economic activity of local businesses along the pipeline's construction path. In a region that has historically suffered from economic depression and dislocation associated with decreases in overall U.S. manufacturing, and Pennsylvania lumber and coal production in particular, that complex economic web has provided a much-needed stimulus.[44]

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[41] *Id.* at 18.

[42] *Id.* at 19.

[43] U.S. EIA, *U.S. Natural Gas Pipeline Projects* (Mar. 5, 2020), *available at* https://bit.ly/2IT22ig (reporting over 550 miles of new Pennsylvania-based natural gas pipeline either under construction or planned to come on line by 2023).

[44] Kris Maher, *Gas Rush Reshapes Town: Tiny Towanda Cashes In on Drilling, But Some Worry About the Changes*, The Wall Street Journal (Dec. 14, 2010), *available at* https://on.wsj.com/3aYI0ir; Candy Woodall, *'Energy Capital of the East': Marcellus Shale Drilling Brings Economic Boost*, PennLive.com (Oct. 22, 2015), https://bit.ly/3able6M.

The Third Circuit's novel interpretation of the Natural Gas Act threatens to grind the enormous economic activity detailed above to a screeching halt. Without objection and for over 70 years, the natural gas industry, States, and Congress relied on the fact that pursuant to the Natural Gas Act, as written, there was no constraint on a certificate-holder's use of the §717f(h) eminent domain power, let alone one against State-owned property. *See* Pet.9. Normally, years of "consensus" regarding a statutory interpretation and "congressional silence" are "enough to rule out any ambiguity" in that statute. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 592, 593-94 (2004). Moreover, the model for §717f(h)—the then-in-effect §814 of the Federal Power Act, *see* Pet.9 (citing 16 U.S.C. §814; S. Rep. No. 80-429 (1947))—had long been applied and interpreted as granting license-holders eminent domain authority to condemn State-owned lands.[45] And this Court has long held that when statutory terms are "obviously transplanted" from another statute, they bring "the old soil" with them. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (quoting *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018)); *see also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Column. L. Rev. 527, 537 (1947). For its part, FERC, which is

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[45] *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 323-33, 338-39 (1958) (citing and discussing *State of Wash. Dep't of Game v. Fed. Power Comm'n*, 207 F.2d 391 (9th Cir. 1953)); *see also First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 164 (1946) (noting State "veto power" over Commission-authorized projects "could destroy the effectiveness of the federal act," and "subordinate to the control of the State the comprehensive planning which the Act provides shall depend upon the judgment of the Federal Power Commission" (internal quotation marks omitted)).

charged with implementing the statute, has made its views clear: It agrees that "section [717f(h)] contains no limiting language concerning state land; the legislative history . . . describes a specific intent to prevent states from conditioning or blocking the use of eminent domain . . . and caselaw—including both federal precedent shortly after the statute's enactment and [FERC's] earliest hearing orders—supports this view."[46]

Rather than adhere to the commonsense interpretation of the Natural Gas Act that governed for three-quarters of a century, the Third Circuit posited a constitutional concern and then effectively nullified the statute to avoid that non-existent problem—without actually deciding the constitutional issue. Pet.App.26-27. In doing so, the decision upsets the federal balance between state and national interests established by Congress long ago. Not only does it grant States the sort of veto power over pipeline construction that amendments to the Natural Gas Act were intended to prevent, but it permits one State to put its interests, no matter how slight, ahead of the interests of other States, no matter how significant. Here, the Third Circuit's decision effectively (and unfairly) prioritizes New Jersey's interest in two State-owned properties and certain non-possessory interests over Pennsylvania's interest in assuring its invaluable natural resources can be transported to downstream market users, and over the public interests that FERC recognized when it granted the certificate. In doing so, it allowed New Jersey to disadvantage the diverse array of individuals and businesses that build and benefit

[46] FERC Order ¶25.

from natural gas pipelines—ranging from skilled laborers from Texas, to pump manufacturers in Ohio, machinists in Illinois, and steel workers in Arkansas.

Worse, the decision injects significant confusion into Eleventh Amendment doctrine. That confusion would be problematic in any context, but it is especially harmful in the context of a rapidly growing and critically important sector of the energy industry—and even more destructive in the region that is driving that growth. Under the Third Circuit's ruling, doctrinal clarity would require Congress to pass new legislation that even more explicitly grants certificate-holders authority to condemn State-owned lands. Pet.App.26-30. But even that legislative solution might not be enough. *Id.* The Third Circuit's reasoning thus makes it all the more critical for this Court to grant review and address its flawed reading of the statute.

This is thus the right case and the right time to decide these important issues. The natural gas production out of Pennsylvania's Marcellus Shale is a key driver of the Nation's incredible growth in natural gas production—which has led to cleaner energy solutions, record exports, and significant economic benefits to the equipment, infrastructure, and labor industries that support pipeline production. Without additional interstate pipeline construction, like that planned by PennEast, the benefits of that potential economic growth will be squandered. Indeed, the Third Circuit panel candidly acknowledged that its decision "may disrupt how the natural gas industry" operates in this critically important region. Pet.App.30. Especially as the Nation faces a global pandemic that has constrained international trade and is crushing local

commerce, the need for energy independence and domestic economic growth is paramount. Because the Third Circuit's decision poses a threat to those interests, based on a novel interpretation of the Natural Gas Act with nationwide implications, the Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Energy Equipment and Infrastructure Alliance urge the Court to grant certiorari and reverse.

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