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

BRIEF *AMICUS CURIAE* OF COLUMBIA GAS TRANSMISSION, LLC IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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STATEMENT OF INTEREST

Columbia Gas Transmission, LLC, submits this brief as *amicus curiae* in support of Petitioner.[1]

The Columbia pipeline system serves millions of customers from New York State to the Gulf of Mexico. Columbia transports an average of three billion cubic feet of natural gas a day and covers hundreds of communities. Columbia's network of nearly 12,000 miles of pipeline ensures the heat stays on and businesses function, even when demand increases.

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner filed a notice of blanket consent with the Clerk. Respondents have consented to the filing of this brief.

The Nation's demand for natural gas continues to grow. But it is harder than ever for natural-gas infrastructure to be built. A "not in my backyard" mentality from certain States and state officials has created new obstacles for natural-gas projects that the Federal Energy Regulatory Commission has determined are "or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The eminent-domain power Congress conferred on pipeline companies in the Natural Gas Act, *id.* § 717f(h), was intended to overcome these obstacles by allowing pipeline companies to obtain rights-of-way in return for just compensation to affected landowners. But the decision below drastically undermines that purpose by allowing one kind of landowner—a State—to unilaterally veto a project, regardless of the public need or the compensation offered.

Columbia understands this reality better than most. Like PennEast here, Columbia has found its ability to complete a necessary, and FERC-certificated, natural-gas project stymied by a judicial decision holding that the Natural Gas Act's delegated eminent-domain power does not allow a pipeline to condemn state-owned land without the State's consent. *See Columbia Gas Transmission, LLC* v. *0.12 Acres of Land, More or Less, in Washington Cty., Md.*, No. 1:19-cv-01444-GLR (D. Md. Aug. 22, 2019), *appeal docketed*, No. 19-2040 (4th Cir. Sept. 25, 2019). Columbia therefore writes to emphasize that Congress intended States' pipeline concerns to be accommodated through the FERC certificate process—not through a largely ministerial eminent-domain action—and to highlight the hold-up problems that the decision below exacerbates, allowing States to delay or even defeat critical,

federally approved infrastructure improvements on pretextual bases.

SUMMARY OF ARGUMENT

I. The court of appeals' decision disrupts the Natural Gas Act's detailed system that funnels review of natural-gas infrastructure through the Commission. Under the Act and Commission regulations, States can voice their concerns about proposed natural-gas infrastructure by participating in inter-agency processes, intervening in Commission proceedings, and—if dissatisfied with the Commission's decisions—seeking judicial review in the circuit courts of appeals. The decision below allows a State to elect to not participate in the Commission process, yet still block a federally approved natural-gas project, not by persuading a neutral federal agency or court, but by simply refusing to voluntarily convey its property interests—including any land it might strategically acquire—at any price. The loophole that the court of appeals' decision creates in the Natural Gas Act's careful review scheme is contrary to the Act's structure and design.

II. Government officials historically have been a major impediment to natural-gas expansion. Before the Natural Gas Act, States imposed regulations that this Court held to be unconstitutional. After the Act, States refused to grant federally approved pipeline companies rights-of-way or the right of eminent domain, thus preventing pipeline expansion into their land. After Congress delegated the federal right of eminent domain to pipeline companies, state and local officials then looked to their own laws and ordinances, claiming pipeline companies must meet their own environmental or safety regulations. Those efforts were held to violate the Natural Gas Act's broad

preemptive scope. The state-led effort here is just another in the long line of government officials impeding natural-gas pipeline infrastructure projects at all costs. Just as it has in the past, this Court should recognize the state action here for what it is: an extralegal attempt to say, "Not in my backyard."

III. The court of appeals' decision also creates the hold-up problem that eminent domain was supposed to solve. Because only rights-of-way on the FERC approved route can be acquired, certificate holders—for regulatory and engineering reasons—must adhere to published routes that have limited flexibility. That makes it nearly impossible for FERC-regulated certificate holders to assemble rights-of-way in secret or to simply route around an obstinate landowner, which in turn allows a sufficiently opposed landowner to delay or block a project by refusing to sell. Eminent domain breaks the logjam by compelling a sale for constitutionally guaranteed just compensation.

The court of appeals' decision allows States to hold up projects on NIMBY, ideological, or pretextual grounds by refusing to sell their interests in land over which a pipeline must cross, even after their full participation in FERC proceedings or no participation at all. Indeed, the court of appeals' decision—by allowing *any* state-owned interest in a property to not be condemned without the State's consent—potentially allows private landowners to coordinate with States by conveying an easement to the State for the express purpose of blocking a natural-gas project.

The logic of the court of appeals' decision is not limited to the Third Circuit. Columbia, too, has found its efforts to build additional pipeline stymied by a State—this time, Maryland—refusing to sell an

easement over a small tract of state-owned land and refusing to consent to condemnation. A Maryland district judge agreed with Maryland's sovereign-immunity argument, leaving Columbia currently unable to complete a project that FERC—nearly three years ago—found to be in the public convenience and necessity. The Court should put a stop to state obstructionism by making clear that the Natural Gas Act delegates *all* of the United States' eminent-domain powers to pipeline companies, including the United States' power to condemn state-owned land.

The Third Circuit's judgment should be reversed.

ARGUMENT

I. CONGRESS INTENDED STATES TO VET THEIR CONCERNS ABOUT INTERSTATE NATURAL-GAS PROJECTS THROUGH THE FERC PROCESS, NOT VETOING PIPELINE COMPANIES' EXERCISE OF EMINENT DOMAIN.

The decision below, by interpreting pipeline companies' Natural Gas Act-conferred eminent-domain power to not extend to state-owned land and interests in land, effectively allows States to veto FERC-approved projects that must cross land in which the State claims an interest. *See* Pet. App. 30a (court of appeals conceding that its decision "may disrupt how the natural gas industry, which has used the [Natural Gas Act] to construct interstate pipelines over State-owned land for the past eighty years, operates"). That result is contrary to Congress's design in the Natural Gas Act, which intended to channel States' objections to interstate natural-gas projects through FERC.

1. In the Natural Gas Act, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988). One way in which Congress occupied the field is through the Natural Gas Act's Section 7, which provides that no natural-gas company may engage in the transportation or sale of interstate natural gas—or build or expand interstate natural-gas infrastructure—without first obtaining a "certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." 15 U.S.C. § 717f(c)(1)(A). The Commission, in turn, will issue a certificate of public convenience and necessity only if it concludes that "the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder" and that "the proposed service * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." *Id.* § 717f(e). Otherwise, the "application shall be denied." *Id.*

The Commission's review process is extensive. The Natural Gas Act requires that FERC set an application for a certificate of public convenience and necessity "for hearing and * * * give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under" the Commission's rules and regulations. *Id.* § 717f(c)(1)(B). And the Commission takes its certificate-review process seriously. One study found that it took over a year-and-a-half for a major project to go from submission to certification. U.S. Gov't Accountability Office, GAO-13-221, *Pipeline Permitting: Interstate and Intrastate*

Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary 26 (Feb. 2013), https://tinyurl.com/rjh6fzo. And even minor projects took about seven-and-a-half months for FERC to complete its regulatory review. *Id.*

The FERC process for a major project begins with the "pre-filing" process. *See* 18 C.F.R. § 157.21. During the pre-filing process, the developer "notifies all stakeholders—including *state*, local, and other federal agencies, and potentially affected property owners—about a proposed project so that the developer and commission staff can provide a forum to hear stakeholder concerns." Paul W. Parfomak, Cong. Rsch. Serv., *Interstate Natural Gas Pipelines: Process and Timing of FERC Permit Application Review* 2 (Jan. 16, 2015) (*Process and Timing*) (emphasis added), https://fas.org/sgp/crs/misc/R43138.pdf. During the pre-filing period, the applicant also typically studies potential project sites and conducts pipeline-route and field studies to inform its formal application to FERC. And Commission staff "consults with interested stakeholders, *including government agencies*, and also holds public scoping meetings and site visits in the proposed project area." *Id.* (emphasis added). The pre-filing process allows the developer to "tak[e] into account stakeholder input"—including state input—before ever formally filing an application with FERC. *Id.*

The developer then submits a formal certificate application to the Commission. 18 C.F.R. § 157.6. A certificate application is comprehensive and includes notification to "all affected landowners and towns, communities, and local, *state* and federal governments and agencies involved in the project." *Id.* § 157.6(d)(1)

(emphasis added). An affected State, like any other affected entity, can intervene and protest the application by submitting comments on any matter relevant to the intervenor, including a pipeline's necessity, its environmental impact, or its route. *Id.* § 157.10(a) (permitting "any person" to intervene"); *id.* § 385.211(a)(1) (permitting "any person" to "file a protest"); *id.* § 385.102 (defining a "person" as including "a State"); *see also id.* § 380.10 (Commission regulations permitting public participation on environmental issues in certificate proceedings).

The Commission fully considers comments from States and other stakeholders, and issues an order granting or denying the certificate. *Process and Timing*, *supra* at 4-5. The Commission also takes a second look at any issues presented in a party's rehearing petition, a statutorily mandated step before judicial review. *See* 15 U.S.C. § 717r(a). The Administrative Procedure Act requires that FERC's orders "respond meaningfully to the arguments raised before it." *New England Power Generators Ass'n* v. *FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018) (internal quotation marks omitted). And a State aggrieved by FERC's decision can petition for review of the Commission's orders in the D.C. Circuit or in the regional circuit court of appeals where the developer is incorporated or headquartered. 15 U.S.C. § 717r(b). Many do. *See, e.g.*, *New York* v. *FERC*, 535 U.S. 1 (2002); *California* v. *FERC*, 495 U.S. 490 (1990); *North Carolina* v. *FERC*, 112 F.3d 1175 (D.C. Cir. 1997).

2. The Commission proceedings in this case show FERC's solicitude towards States and their agencies in the certificate process. The Commission addressed comments from the New Jersey Department of

Environmental Protection (NJDEP), adding environmental conditions to PennEast's certificate to protect New Jersey natural resources. *See, e.g.*, *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, at P 114 (Jan. 19, 2018) (adding an environmental condition that "sufficiently addresses NJDEP's concerns" and that "appropriately mitigate[s]" any "adverse impacts on significant paleontological resources"); *id.* P 135 (adding an environmental condition "that PennEast file a final project-specific Wetland Restoration Plan developed in consultation with the * * * applicable state agencies in Pennsylvania and New Jersey"). The Commission also stressed that PennEast would adhere to certain NJDEP requirements to mitigate the pipeline's environmental impact—a success of the state consultative process. *See, e.g.*, *id.* P 129 (noting that PennEast would complete and submit outstanding field surveys to NJDEP before beginning construction); *id.* P 138 (noting that "PennEast will adhere to the recommendations and requirements of NJDEP-Division of Fish and Wildlife in order to avoid or minimize impacts on" certain species, "including completing all necessary surveys for state species"); P 141 (noting, in response to NJDEP comments, that PennEast will set aside "permanent conservation of forest lands in key watersheds and reforest areas within the same municipality in which the impact occurs; or develop mitigation measures for restoring areas of temporary project impacts in New Jersey").

To be sure, the Commission did not agree with all of New Jersey's objections. But the Commission considered the State's arguments and explained why it disagreed with them. The New Jersey Division of Rate Counsel, for instance, objected that the PennEast Pipeline was unnecessary because there was "little or

no forecasted load growth in New Jersey." *Id.* P 20. The Commission, in response, explained that under its Certificate Policy Statement and D.C. Circuit precedent, it did not have to look beyond the contractual commitment PennEast received for nearly all of the new pipeline's capacity. *Id.* P 27. The Commission also rejected the Division of Rate Counsel's argument that PennEast was receiving too great a rate of return on its equity investments, explaining that PennEast's 14-percent rate of return reflected the fact that pipelines "undertaken by a new entrant in the market face higher business risks than existing pipelines," including "higher risks in securing financing." *Id.* P 59. But even then, the Commission accepted the Division of Rate Counsel's objection in part, requiring PennEast to modify its capital structure—again reflecting the importance of State participation in the certificate process. *Id.* P 58.

Despite the Commission's serious consideration of the State's objections, the New Jersey Department of Environmental Protection and Division of Rate Counsel both sought rehearing of the Commission's certificate order, as the Natural Gas Act allows. *See PennEast Pipeline Co.*, 164 FERC ¶ 61,098 (Aug. 10, 2018). The Commission again rejected the State's arguments, including the NJDEP's argument that PennEast should not be granted eminent-domain authority before it has completed all conditions precedent to construction. *Id.* PP 28-33 (NJDEP eminent-domain argument); *see also, e.g.*, *id.* PP 34-39 (Division of Rate Counsel rate arguments); *id.* PP 41-51 (NJDEP environmental-impact arguments).

Still dissatisfied, NJDEP and the Division of Rate Counsel petitioned the D.C. Circuit to review the

Commission's certificate and rehearing orders. *See New Jersey Dep't of Env't Prot.* v. *FERC*, No. 18-1144 (D.C. Cir.); *New Jersey Div. of Rate Counsel* v. *FERC*, No. 18-1233 (D.C. Cir.). And in their brief, NJDEP and the Division of Rate Counsel renewed their arguments that the PennEast Pipeline was unneeded and that the Commission's environmental analysis and rate-of-return analyses were deficient. *See* Joint Brief of Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of the Rate Counsel, at 15-39, *Delaware Riverkeeper Network* v. *FERC*, No. 18-1128 (D.C. Cir. Dec. 21, 2018). New Jersey, in short, has been diligently channeling its objections to the PennEast Pipeline through the Natural Gas Act's prescribed pathways that allow for consideration by impartial, federal adjudicators.

3. Under the decision below, New Jersey would not even have to go through the trouble of pursuing its Natural Gas Act remedies—indeed, of participating at all in the FERC process—because it need only object to a sliver of its land being appropriated for just compensation in order to block an entire natural-gas project. The decision below allows any State to circumvent the Natural Gas Act's reticulated process for considering opposition to natural-gas infrastructure. Rather than participating in the pre-filing process, intervening in the formal certificate proceeding, filing comments, seeking rehearing, and ultimately litigating if necessary, States can simply veto a project by refusing to sell or allow its property interests necessary to construct a pipeline to be condemned. That cannot be what Congress intended. This Court rejects interpretations of statutes that are "inconsistent with the statute's design and structure," *University of Texas Sw.*

Med. Ctr. v. *Nassar*, 570 U.S. 338, 339 (2013), and it beggars belief that Congress intended to let States frustrate the detailed federal system for resolving objections to natural-gas infrastructure through a loophole in the Natural Gas Act's broad delegation of eminent domain. *See Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The inconsistency of the court of appeals' holding is driven home in this case by how it has preempted the FERC-led review of the PennEast Pipeline. Following the court of appeals' decision, the D.C. Circuit placed its review of PennEast's FERC certificate order in abeyance—canceling oral argument—presumably because it saw the court of appeals' decision as potentially obviating the need to review the Commission's certificate order. Order Postponing Oral Argument, *Delaware Riverkeeper Network*, No. 18-1128 (Oct. 1, 2019). Condemnation should not be the tail that wags the Natural Gas Act dog, and the Court should reverse the judgment below to confirm that it is not.

II. STATE-LED NIMBYISM HISTORICALLY HAS BEEN A MAJOR IMPEDIMENT TO NATURAL-GAS PIPELINE EXPANSION.

1. State government officials—either in response to constituent pressure or as a result of their own policy preferences—have long opposed interstate natural-gas infrastructure. Indeed, "the primary impediment to timely development of natural gas infrastructure projects, historically, has been delay at the state level." Joan M. Darby et al., *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005 — Consultation, Preemption, and*

Cooperative Federalism, 6 Tex. J. Oil Gas & Energy L. 335, 384 (2011).

In the early twentieth century, States—both producing and consuming—regulated interstate pipelines directly: producing States "attempted to regulate sales by producers to pipelines and to limit the quantity of gas pipelines could transport out of the state," while consuming States "attempted to regulate the price at which those sales were made." *See* Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 25 Energy L.J. 57, 60 (2004); *see also* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 Iowa L. Rev. 947, 993 (2015). These regulations imposed inconsistent obligations on the pipeline companies—a State might require all suppliers in its State to meet the needs for all citizens and businesses in that State regardless of a supplier's obligations in other States—and began to jeopardize interstate transactions and drive up rates. *See* Pierce, *supra* at 60-61; *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923).

This Court thwarted some of these attempts, holding that some of the most-restrictive state laws violated the dormant Commerce Clause by benefitting citizens of the regulating State to the detriment of citizens of other States. *See Public Utils. Comm'n of Rhode Island* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927); *Missouri ex rel. Barrett* v. *Kansas Nat. Gas Co.*, 265 U.S. 298 (1924); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). But during the Depression, even as Texas, Kansas, Oklahoma, and Louisiana held natural-gas surpluses unconnected to the interstate grid, the eastern United States was suffering

"shortages and high gas prices, monopoly, and a reliance on manufactured gas." Klass & Meinhardt, *supra* at 994. States like Pennsylvania contributed to these shortages and monopolies by refusing to grant rights-of-way that would allow new pipelines access to the eastern United States. *See id.*

Even after the Natural Gas Act's enactment in 1938, States still obstructed the development of interstate pipelines. Some state laws expressly denied the right of eminent domain to out-of-state corporations or other federally approved interstate pipelines. *See* S. Rep. No. 80-429, at 2-3 (1947). Other States would not grant eminent-domain rights to pipelines that crossed but did not distribute natural gas in that State. *See id.* at 2; *see also Amendments to the Natural Gas Act: Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569, and H.R. 2956 Before the H. Comm. on Interstate and Foreign Com.*, 80th Cong. (1947). And even after the Natural Gas Act, state governments, along with the coal industry and railroad interests, blocked at least one pipeline company's expansion efforts to bring natural gas to markets in the East. *See* Christopher J. Castaneda, *Invisible Fuel: Manufactured and Natural Gas in America, 1800-2000*, at 138-139 (1999).

In response, Congress amended the Natural Gas Act in 1947 to permit pipeline companies to exercise the federal government's eminent-domain power. The Senate report for the amendment took particular note of the States that denied eminent-domain power to out-of-state pipeline companies. *See* S. Rep. No. 80-429, at 2-3 (1947). The report also explained that pipeline companies needed a federal eminent-domain power, because "[i]f a State may require such

interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified" by state law. *Id.* at 4.

2. Beyond eminent domain, Congress understood States' roles in blocking interstate natural-gas projects. Darby, *supra* at 384. The Natural Gas Act itself therefore broadly preempts state and local regulations that stand in the way of necessary natural-gas infrastructure, lest "agencies with only local constituencies * * * delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need." *National Fuel Gas Supply Corp.* v. *Public Serv. Comm'n of New York*, 894 F.2d 571, 579 (2d Cir. 1990).

But preemption has not stopped States from trying. Since the Act's passage, state and local governments continuously have attempted to impose their own regulations on interstate pipeline projects. In 1988, this Court held that the Natural Gas Act preempted a Michigan statute requiring natural-gas companies to obtain approval from the Michigan Public Service Commission before issuing long-term securities. *See Schneidewind*, 485 U.S. at 307. In New York, meanwhile, the State's Public Service Commission used a state regulatory scheme to conduct site-specific environmental review over interstate pipeline construction, despite never having done so for many years after enactment of the law. *National Fuel Gas Supply*, 894 F.2d at 575. The Second Circuit held that federal law preempted the state regulation because FERC also had authority to consider environmental issues. *See id.* at 579; *see also Millennium Pipeline Co.* v.

Seggos, 288 F. Supp. 3d 530, 545 (N.D.N.Y. 2017) (state environmental-permit requirement preempted by FERC certificate).

Local governments also obstruct natural-gas development. In 1990, officials in Clark County, Nevada attempted to force a natural-gas company to acquire local construction permits containing conditions that conflicted with federal requirements. *See Kern River Gas Transmission Co.* v. *Clark County*, 757 F. Supp. 1110, 1114 (D. Nev. 1990). A district court enjoined that attempt, explaining that the Natural Gas Act preempted the local requirements because "state and local governments * * * cannot require [interstate pipeline companies] to meet additional safety standards" beyond those required by the federal licensing scheme. *Id.* at 1115. In Rhode Island, an operator of a natural-gas facility applied to FERC for a certificate authorizing modifications to the existing facility. *See Algonquin LNG* v. *Loqa*, 79 F. Supp. 2d 49, 50 (D.R.I. 2000). After FERC approved the modifications, the City of Providence—despite not participating in the FERC proceedings—tried to hold up the modifications under the guise of enforcing its zoning and building code requirements. *See id.* A district court enjoined this attempt, too, explaining that the Natural Gas Act preempted the city's ordinances "insofar as they purport to apply to the FERC-approved modifications." *Id.* at 53; *see also Dominion Transmission, Inc.* v. *Town of Myersville Town Council*, 982 F. Supp. 2d 570, 578-579 (D. Md. 2013) (town zoning and land-use provisions preempted by FERC site-suitability determination).

These experiences and others like them show that despite Congress's decision to "place[ ] authority

regarding the location of interstate pipelines * * * in the FERC, a federal body that can make choices in the interests of energy consumers nationally," *National Fuel Gas Supply*, 894 F.2d at 579, States and localities still use their regulatory powers to hold up projects. And even when pipeline projects ultimately move forward, they often can do so only after significant cost and delay.

3. In an attempt to address that concern, Congress again amended the Natural Gas Act through the Energy Policy Act of 2005. In a nod to States' roles in cooperative federal environmental schemes, the Act preserves States' delegated federal roles under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. *See* Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 Vand. L. Rev. 1801, 1861 n.334 (2012); *see also* 15 U.S.C. § 717b(d).

Despite Congress's amendments, state resistance to federal natural-gas infrastructure remains strong. Using the 2005 Act's modest carveouts as a roadmap, and undoubtedly as an unintended consequence of the amendments, States have used their delegated authority under these three statutes to continue to hold up federally authorized natural-gas infrastructure projects. For instance, New York regulators recently used the Clean Water Act to block a pipeline project in the State. *See* Chad Arnold, *Cuomo on Constitution Pipeline: 'Any Way That We Can Challenge It, We Will'*, Press & Sun-Bulletin (Sept. 6, 2019, 1:55 PM ET), https://tinyurl.com/5by82nje; *see also* Jeff Brady, *Activists Have a New Strategy to Block Gas Pipelines: State's Rights*, NPR (Aug. 20, 2018, 3:51 PM ET),

https://tinyurl.com/vlybdgy. Though claiming to protect water quality, the State's Governor made his true intent clear: "Any way that we can challenge [the pipeline], we will." Arnold, *supra*.

In Massachusetts, meanwhile, a natural-gas company unveiled plans in 2015 for a new compressor station (a relatively small upgrade) to aid expansion of its pipelines from New Jersey to Canada. State officials used all three carve-out statutes to hold up the project for years. *See* Lane Lambert & Neal Simpson, *Baker's Review of Weymouth Compressor Station Applauded*, Patriot Ledger (July 18, 2017, 1:21 AM), https://tinyurl.com/y5y2wtyx. State officials first held up the compressor station for two years before finally issuing a water permit. *See id.* But the station then hit another snag, with the governor ordering further state environmental review before the project received its necessary air-quality and coastal zone management permits. *See id.* The station finally made it through the permitting process and was put into service, but it took five years. *See* Miriam Wasser, *The Controversial Natural Gas Compressor in Weymouth, Explained*, WBUR (Oct. 13, 2020), https://tinyurl.com/mrxm3es.

Against these new delay tactics, pipeline companies have some remedy. The Energy Policy Act of 2005 granted pipeline companies expedited judicial review in the circuit court of appeals of state-agency denials of federal-law permits needed to build a FERC-regulated project, *see* 15 U.S.C. § 717r(d)(1), and allows the D.C. Circuit to order state agencies to act by a date certain when they unreasonably refuse to act on a federal-law permit, *id.* § 717r(d)(2). This unusual federal judicial review statute keeps States from

"kill[ing] a project with a death by a thousand cuts." *Islander E. Pipeline Co.* v. *Connecticut Dep't of Env't Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (quoting *Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Nat. Res.*, 109th Cong. 41 (Jan. 24, 2005) (statement of Mark Robinson, Director, Office of Energy Projects, FERC)).

States have therefore moved onto a new strategy that they believe cannot be countered by the courts: refusing to accede to pipeline companies' condemnation actions. *See infra* pp. 22-26. And that is just what New Jersey's Eleventh Amendment objection is: A strategy to block infrastructure development, not a solemn assertion of the State's sovereign prerogatives. After all, everyone agrees that the United States and its agencies can condemn New Jersey's property interests directly. *See Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) ("The fact that land is owned by a state is no barrier to its condemnation by the United States."). And the United States, through FERC, and with New Jersey's participation in the process, has determined that PennEast's acquisition of a right of way over the land in which New Jersey claims an interest is required by the public convenience and necessity. *See PennEast Pipeline Co.*, 164 FERC ¶ 61,098, at PP 6-10. The Court should reject this latest method to obstruct needed interstate natural-gas infrastructure, just as it has in the past.

III. THE DECISION BELOW CREATES A SIGNIFICANT HOLD-UP PROBLEM FOR PIPELINE COMPANIES WITH FERC-APPROVED ROUTES, AS COLUMBIA'S EXPERIENCE SHOWS.

The court of appeals' decision undermines the entire purpose of eminent domain. As Columbia's experience shows, decisions like the court of appeals' below can delay or defeat essential projects. Indeed, the decision below could give holdout *landowners* new weapons in their rear-guard actions against Commission-approved projects, taking the risk beyond just States.

1. "Given the choice, almost no one would want natural gas infrastructure built on their block." *Minisink Residents for Env't Pres.* v. *FERC*, 762 F.3d 97, 100 (D.C. Cir. 2014). Interstate natural-gas projects serve interstate markets, not necessarily local ones. Local communities thus may not experience the scope of the national-network benefits that come from locating natural-gas pipelines in their backyard. Localities may therefore "understandabl[y]" want developers to build projects " 'elsewhere.' " *Id.* "But given our nation's increasing demand for natural gas * * * , it is an inescapable fact that such facilities must be built somewhere." *Id.*

Natural-gas-pipeline developers face a particular problem in assembling the rights-of-way necessary for their projects. A developer must publicly file a detailed route map, and must notify landowners when the proposed route runs through or next to their properties. *See* 1 Office of Energy Projects, Fed. Energy Regul. Comm'n, *Guidance Manual for Environmental Report Preparation: For Applications Filed Under the Natural Gas Act*, at 2-1 to 2-3 (Feb. 2017),

https://tinyurl.com/2b2a8nx8 (landowner-notification requirement); *id.* at 4-17 to 4-22 (route-map requirement). Once identified, a pipeline company's ability to modify routes in response to landowner resistance is limited by local topography and project engineering specifications. *See* Federal Energy Regul. Comm'n, *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?* 8 (Aug. 2015), https://tinyurl.com/y73qr6p3.

This confluence of factors makes natural-gas projects ripe for hold-up by holdouts. A landowner that is sufficiently opposed to a project can refuse to sell an easement to the developer at any price, delaying or even potentially defeating the project. *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 18-19 (2006) (describing the "holdout problem" in land development). To keep the right to construct necessary natural-gas infrastructure from being "made a barren right by the unwillingness of property-holders to sell," *Kohl* v. *United States*, 91 U.S. 367, 371 (1875), Congress, through the Natural Gas Act, delegated to FERC certificate holders who were unable to "acquire by contract" needed easements the power to "acquire the same by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h).

The Natural Gas Act's delegation of eminent-domain powers ensures a fair trade-off: Pipeline companies can obtain their necessary rights-of-way, and landowners are constitutionally guaranteed just compensation for their taken property. *See United States* v. *Reynolds*, 397 U.S. 14, 15-16 (1970) (explaining that the Fifth Amendment promises a landowner "the full

monetary equivalent of the property taken" and that the landowner "be put in the same position monetarily as he would have occupied if his property had not been taken"). Eminent domain solves the holdout problem while protecting all parties' rights.

2. The decision below, however, gives States a veto that no eminent-domain delegation, existing federal preemption, or fast-track judicial review can overcome. Under it, a State can defeat a pipeline project that must cross land in which the State claims a property interest simply by refusing to sell the interest to the certificated pipeline company at any price. *See* Pet. App. 30a. In the face of a State veto, a developer must either hope that its FERC-approved route can be modified to avoid state-owned land—potentially with additional impacts on the environment and other land owners—or give up on the project entirely. And avoiding state-owned land can be hard, if not impossible. For instance, New York—one of the most-vociferous objectors to new natural-gas infrastructure—claims an interest in nearly 4.9 *million* acres of land, including conservation easements. *State Land Acreage by Classification*, New York State Dep't of Env't Conservation (Sept. 2018), https://tinyurl.com/rgmvpv6. And a State can exercise its veto in its role as property owner no matter how many customers its decision may harm in its own or in other States. *See* Robert Bryce, Manhattan Inst., *Out of Gas: New York's Blocked Pipelines Will Hurt Northeast Consumers* (June 25, 2019), https://tinyurl.com/2mcvdm4z (explaining how New York's opposition to new natural-gas infrastructure will harm not just New Yorkers, but customers in adjoining Massachusetts).

The threat from the decision below is amplified because it allows a State to exercise a veto over FERC-approved pipelines not just when the State has a possessory interest in the property, but when the State owns *any interest* in the property. Attempting to avoid state-implicated land may simply be impossible as a result. In the decision below, for instance, New Jersey's interest in most of the properties was nothing more than a "conservation * * * easement," where the property owner conveys a promise to maintain the property for "recreational, conservation, or agricultural use." Pet. App. at 4a n.4 & 5a; *Estate of Gibbs* v. *United States*, 161 F.3d 242, 243 n.1 (3d Cir. 1998) (explaining New Jersey's use of conservation easements).

In the hands of a sufficiently motivated private landowner and a like-minded State or state agency, such conveyances can allow private landowners to exercise a veto over FERC-approved pipelines. All the landowner needs to do is convey a conservation easement over the pipeline's proposed right-of-way to the State, and the easement will become an impenetrable barrier to the pipeline's development. As PennEast's chairman has explained, under the decision below, "[i]t's very, very easy to put up a conservation easement on a private property that would essentially create a blocking effect" and that "[n]o matter where you turn, you would run into another wall." Niina H. Farah, *Pipeline Eminent Domain Battle Lands at Supreme Court*, E&E News (Jan. 22, 2021), https://tinyurl.com/2bz37s67. And landowners do not even need to be tied to long-term conservation easements to create such barriers. Suppose, for instance, a State and a landowner were to agree that the State had a conditional easement over a pipeline's planned right-of-way only so long as the pipeline continues to pursue

development. That could allow a State and landowner to stop an unwanted pipeline without the landowner actually giving up anything of value. The State thus can create a property interest for the sole purpose of frustrating a certificate holder's exercise of the federal eminent-domain power. That is precisely the kind of private-party hold-up that the Natural Gas Act and its delegation of eminent domain were enacted to prevent.

3. The rationale of the decision below is spreading, threatening more projects than just PennEast. Columbia is the sponsor of the Eastern Panhandle Expansion Project, which will provide up to 47,500 dekatherms per day of incremental firm transportation[2] service to markets in West Virginia. *Columbia Gas Transmission*, 164 FERC ¶ 61,036, at P 4 (July 19, 2018). The Eastern Panhandle Expansion Project will consist of a little more than three miles of pipeline stretching from Fulton County, Pennsylvania, through Washington County, Maryland, and end in Morgan County, West Virginia, and will cost $24.97 million. *Id.* PP 4, 6. The Project is fully subscribed by a local distribution system, Mountaineer Gas Company, for a 20-year term. *Id.* P 5.

The Commission's environmental-assessment process included consultation with the Maryland State Historic Preservation Office, which concluded that the Project will not have an effect on historic properties.

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[2] A dekatherm is about equal to 1,000 cubic feet of natural gas. *Market Assessments: Glossary*, Fed. Energy Regul. Comm'n (Aug. 31, 2020), https://tinyurl.com/yvs3sp4v (definition of "MMBtu"). In FERC parlance, "firm" service is guaranteed, as opposed to "interruptible" service, which is not. *Georgia Indus. Grp.* v. *FERC*, 137 F.3d 1358, 1360 n.6 (D.C. Cir. 1998).

Id. P 71. The Commission also directed Columbia "to adhere to state conditions for permits," including those conditions imposed by Maryland law, except to the extent they would frustrate Columbia's project. *Id.* P 74. After considering all the comments submitted, the Commission concluded that "[b]ased on the benefits the project will provide and the lack of effects on," among others, "landowners and surrounding communities," the "public convenience and necessity requires approval of" the Project. *Id.* P 16.

Columbia was able to negotiate the voluntary acquisition of easements for all of the privately owned property impacted by the Project. Declaration of Jacob Haney, P.E., ¶ 19, *Columbia Gas*, No. 1:19-cv-01444-GLR (May 16, 2019), Dkt. No. 2-1. Columbia was not, however, able to negotiate an easement over 0.12 acres of land owned by the Maryland Department of Natural Resources, a Maryland state agency. *Id.* ¶ 13. After extensive negotiations, Columbia offered Maryland $5,000 for its required easement, well in excess of the easement's appraised value. *Id.* ¶ 15. But Maryland's Board of Public Works refused to approve the Department of Natural Resources' conveyance of the easement to Columbia. *Id.* ¶ 17.

Columbia therefore began a condemnation action against the parcel in the District of Maryland. Complaint in Condemnation, *Columbia Gas*, No. 1:19-cv-01444-GLR (May 16, 2019), Dkt. No. 1. But Maryland, like New Jersey here, moved to dismiss the complaint on the ground that the State's Eleventh Amendment immunity forbids Columbia from condemning state-owned land without Maryland's consent. Motion to Dismiss, *Columbia Gas*, No. 1:19-cv-01444-GLR (June 17, 2019), Dkt. No. 29.

The district court agreed and dismissed Columbia's complaint in condemnation. *See* 8/21/19 Hearing Transcript at 12-18, *Columbia Gas*, No. 1:19-cv-01444-GLR (Sept. 17, 2019), Dkt. 47. The district court concluded that "Congress did not delegate the federal government's exemption to state sovereign immunity" to natural-gas companies in the Natural Gas Act—the same reasoning offered by the court of appeals below. *Id.* at 12. And like the court of appeals below, the district court believed that the sovereign-immunity problem could be obviated if a federal agency were to file the condemnation action in Columbia's place. *Id.* at 19. *But see PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at PP 26, 49-53 (Jan. 30, 2020) (explaining that FERC cannot, under its current authority, bring a condemnation action on a pipeline's behalf). Yet the district court confessed that the question presented "is not particularly clear in this circumstance." 8/21/19 Hearing Transcript, *supra* at 18.

Columbia's case demonstrates that the court of appeals' reasoning is not limited to the Third Circuit. If it stands, it can significantly impair the development of needed infrastructure. This Court should now clarify that the Natural Gas Act delegates to certificated pipeline companies *all* of the United States' eminent-domain powers, including the power to condemn state-owned land in federal court. Decisions like this one and the one below limit the development of federally approved, necessary projects critical to fulfilling the Nation's economic growth and its demand for natural gas.

CONCLUSION

For the foregoing reasons and those in PennEast's brief, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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