No. 19-1039

In The
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC, PETITIONER,

v.

STATE OF NEW JERSEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A vital function of the Chamber is to represent the interests of its members in matters before this Court. The Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases implicating the development of pipelines and other critically needed infrastructure. *See*, *e.g.*, *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, Nos. 18-1584, 18-1587.

The Pennsylvania Chamber of Business and Industry is the largest broad-based business association in Pennsylvania. It has close to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private workforce. Its members range from small companies to mid-size and large business enterprises. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

Amici have a substantial interest in the issues presented here. The Third Circuit's decision in this case represented a significant departure from the previously settled understanding that Congress may—and, in the Natural Gas Act, did—authorize the taking of state-owned land to facilitate the construction of much-needed interstate pipelines. Acceptance of the court of appeals' erroneous reasoning would cause significant harm to many of amici's members, including members that construct pipelines and other infrastructure projects, and members that rely on that infrastructure to serve their energy and other needs.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 70 years, the nation's interstate natural gas pipelines have been built using 15 U.S.C. § 717f(h), a key provision of the Natural Gas Act (NGA). After the Federal Energy Regulatory Commission (FERC) has approved the construction of a natural gas pipeline along a specific route, Section 717f(h) enables pipeline companies to condemn any property necessary to the construction of the pipeline if the owner of that property refuses to sell. A classic exercise of the federal government's eminent-domain authority, Section 717f(h) addresses the hold-out problems that arise when critical infrastructure projects cross the properties of many different owners—all of which may have incentives to refuse to sell their property entirely, or to do so only at exorbitant prices.

But the Third Circuit's decision, if affirmed, would drain Section 717f(h) of much of its purpose. If Section 717f(h) does not apply to state-owned property, individual states' policy concerns and energy preferences would undermine FERC's authority to determine the number and location of pipelines necessary to serve the nation's energy needs. Contrary to Congress's clearly expressed intent, this reading of Section 717f(h) would leave the fate of all such pipeline projects to the whims of the various states through which the pipeline must pass. That is not the scheme Congress designed.

First, Section 717f(h) by its plain terms applies to *all* property necessary for pipeline construction, whoever or whatever its owner may be. The supposed constitutional concerns the Third Circuit raised cannot justify the court's deviation from this plain statutory text. Nor are those concerns valid in the first place. Contrary to the court's reasoning, states have no immunity from federal eminent-domain proceedings, which are an exercise of the authority vested in the federal government by the Constitution. While FERC's decision to authorize the taking of a state's property may offend that state's sovereign interests, it has long been settled that states consented to this abrogation of their sovereignty in the plan of the Constitutional Convention. States have no residual sovereign interest that might be implicated by the eminent-domain proceedings that are the necessary consequence of FERC's decision—proceedings intended to *compensate* property owners like the states, not to impose liability on them.

Second, a contrary reading of Section 717f(h) would upend the comprehensive scheme Congress created in the Natural Gas Act. Under the Third Circuit's interpretation, not only is property in which a state holds a possessory interest exempt from Section 717f(h)'s scope, but so too is property in which the state claims a conservation or similar easement—however recently acquired that nonpossessory interest may be. Any state thus may effectively exert a veto power over any proposed pipeline. While Congress created extensive procedures to allow states (and other

stakeholders) to express their views and concerns, Congress specifically declined to allow states the authority to unilaterally preclude pipeline construction altogether. The Third Circuit's understanding of Section 717f(h) would render these carefully crafted procedures superfluous, as states may simply exert the ultimate authority to reject a project—an authority that Congress sought to deny them.

Third, this Court's acceptance of that misreading of Section 717f(h) would have serious economic repercussions. The PennEast pipeline—which alone would generate an estimated 12,000 jobs, $740 million in wages, and as much as $900 million in annual energy savings—would be only the first casualty. Other natural gas pipelines also may soon meet their demise due to state objections. Even those pipelines that do go forward may do so only at greater cost given the added risks associated with investment in such projects—costs that would then be passed on to the millions of consumers and businesses that rely on natural gas. And these costs may soon spread to other sectors of the economy, as the Third Circuit's interpretation of Section 717f(h) would more broadly threaten Congress's ability to delegate its eminent-domain authority—a power Congress has used to facilitate construction of roads, railroads, and other infrastructure projects for more than two centuries.

This Court should confirm that Section 717f(h) must be read according to its plain terms, restore the balanced scheme embodied in the Natural Gas Act,

and ensure the continued development of critical infrastructure projects.

ARGUMENT

I. THE NATURAL GAS ACT AUTHORIZES CONDEMNATION OF STATE PROPERTY INTERESTS

A. Congress Can And Did Authorize The Taking Of State-Owned Property

The terms of the statute are clear. Section 717f(h) provides that whenever FERC has granted a company a "certificate of public convenience and necessity" for "a pipe line or pipe lines for the transportation of natural gas," that company may "acquire" any property interests necessary to complete the federally approved project along the approved route "by the exercise of the right of eminent domain" if it cannot secure those interests by contract. 15 U.S.C. § 717f(h). This express delegation of the power of eminent domain does not depend on the nature of the property or the identity of its owner.

In this respect, Section 717f(h) is unlike certain other delegations in similar federal statutes. The Federal Power Act, for example, prohibits the exercise of eminent domain over property that, before 1992, was "owned by a State or political subdivision thereof and [was] part of or included within any public park, recreation area or wildlife refuge." 16 U.S.C. § 814. The Natural Gas Act contains no such exception. Instead, Section 717f(h) applies to *any* property comprising "the necessary right-of-way to construct, operate, and

maintain a pipe line," along with "the necessary land or other property" for the location of "stations or equipment necessary to the proper operation of such pipe line." 15 U.S.C. § 717f(h). Whether that "necessary" property is owned by a state, municipality, private party, or some other entity makes no difference—it is subject to the federal eminent-domain power.

Congress's authority to enact Section 717f(h) is equally clear. This Court has long held that "[t]he fact that land is owned by a state is no barrier to its condemnation by the United States." *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). Simply put, the federal government's right of eminent domain "can neither be enlarged nor diminished by a State," no state can "prescribe the manner in which it must be exercised," and "[t]he consent of a State can never be a condition precedent to its enjoyment." *Kohl v. United States*, 91 U.S. 367, 374 (1875).

It also has long held that Congress may delegate the federal government's eminent-domain power to private parties. *E.g.*, *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 533-34 (1894). Indeed, for more than two hundred years, it has been Congress's practice to grant the condemnation authority needed to construct important infrastructure projects to the private companies equipped to build those projects. *E.g.*, Act of Mar. 3, 1809, ch. 31, 2 Stat. 539 (authorizing taking for construction of road).

Given the plain text of Section 717f(h) and Congress's well-established power to enact such a

provision, it should come as no surprise that parties have regularly exercised this federal eminent-domain authority to seize the property necessary for pipeline construction along FERC-approved routes, even when that property is state-owned. For the first 70 years following Congress's enactment of Section 717f(h), no court questioned its application to state-owned property. *See* Pet. App. 16-17. And both FERC and the Federal Power Commission had repeatedly affirmed that "the eminent domain grant to persons holding * * * certificates applies equally to private and state lands." *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, ¶¶ 65,203-04 (1977); *accord Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at ¶¶ 120-126 (2003); *Recommendation to the President Alaska Nat. Gas Transp. Sys*, 58 F.P.C. 810, 1454 (1977). FERC reiterated that same view last year, explaining that Section 717f(h) "does not limit a certificate holder's right to exercise eminent domain authority over state-owned land." *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 25 (2020).

B. The Third Circuit's Contrary Reading Is Wrong

The Third Circuit's decision upended this settled understanding. Invoking the Eleventh Amendment, the Third Circuit expressed its "deep doubt" that the federal government could delegate its power to bring condemnation actions against states. Pet. App. 26-27. In light of these supposed constitutional concerns, the Third Circuit read into Section 717f(h) an exception that appears nowhere in its text: "unless that land is state-owned." *See* Pet. App. 27-30.

The Third Circuit's rationale cannot withstand scrutiny. Nothing in the Natural Gas Act's plain language provides any license for courts to rewrite Section 717f(h) to apply only to property in which states have no interest. By its terms, the provision applies to any and all "necessary land or other property"—full stop. 15 U.S.C. § 717f(h).

Nor can the purported constitutional concerns the court of appeals invoked justify its atextual reading. The Third Circuit's premise was that, for Section 717f(h) to provide for condemnation actions against a state, Congress would have had to delegate not only its eminent-domain power (which the Third Circuit acknowledged Congress may do), but also its separate power to bring suit against the states. Pet. App. 13-14. Yet the two powers are indivisible: the exercise of the eminent-domain power requires a condemnation proceeding in which the property owner is divested of title and awarded with compensation. *See* Restatement (First) Property, § 53 (1936). Without condemnation proceedings, there is no eminent domain, only a request to sell property voluntarily. Because states have no immunity from the federal eminent-domain power (*Atkinson*, 313 U.S. at 534), they have no immunity from the judicial proceedings that this power necessarily entails.

That remains the case even when this federal power is delegated to a private party, because that party exercises the *government's* power as a *government* actor. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974) (exercise of delegated power "which

is traditionally associated with sovereignty, such as eminent domain," is state action). The states thus have no immunity from this exercise of federal authority.

That is all the more true given the nature and purpose of these particular Natural Gas Act proceedings, which impose no liability on the state. To be sure, the state may be a nominal defendant in the Section 717f(h) action, which is part of the process by which the state is deprived of a property right. But an eminent-domain proceeding is *in rem*, not *in personam*, meaning the effect of any judgment "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner." *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). And the decision to divest the state of its property interest is made by the federal government when FERC issues the requisite "certificate of public convenience and necessity" that encompasses the state's property interest—not in the Section 717f(h) action. 15 U.S.C. § 717f(h).

The Section 717f(h) action itself is intended merely to compensate the state for this taking (assuming the state and the holder of the FERC-issued certificate cannot privately agree on a fair measure of what the state is owed). *See ibid.* In initiating such an action, the certificate holder "does not seek monetary damages or any affirmative relief from a State." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004). Nor does it otherwise subject the state to "a coercive judicial process." *Ibid.* Rather, the certificate holder seeks a judicial assessment of *its* liability

to the state. Thus, much like similar *in rem* proceedings under bankruptcy and admiralty law, Section 717f(h) actions pose no "threat[] to state sovereignty," and the exercise of federal jurisdiction does not "offend the sovereignty of the State." *Id.* at 451 & n.5.

C. The Third Circuit's Decision Undermines Congress's Carefully Designed Scheme

Not only is the Third Circuit's reading of the Natural Gas Act inconsistent with the Act's text, it would also drain the statute of much of its purpose. The Natural Gas Act "long has been recognized as a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (quotation marks omitted). Section 717f(h)'s delegation of eminent-domain authority, and its application to state-owned property, is no minor or esoteric provision of this comprehensive scheme—it is a critical element of Congress's efforts to ensure adequate infrastructure to meet the nation's energy needs. As FERC found, the Third Circuit's interpretation subverts those efforts and would consequently "have profoundly adverse impacts on the development of the nation's interstate natural gas transportation system." *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 56.

1. The Third Circuit's interpretation of the Natural Gas Act grants states a veto power over pipelines

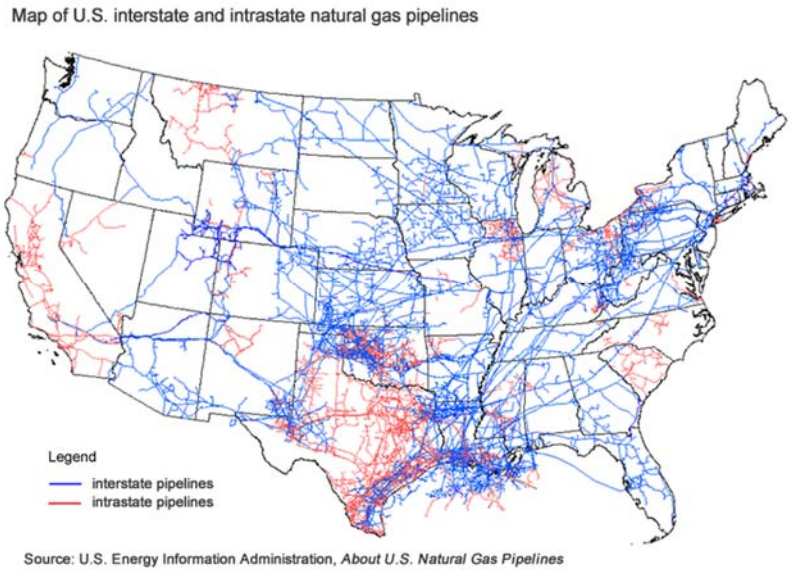
Section 717f(h) is designed to preclude precisely what the Third Circuit read it to enable. The provision

addresses the prototypical problem that calls for the exercise of eminent-domain power. Ideally, the government, like any private party, would acquire property with the current owner's consent. But when the government seeks to construct a road, pipeline, or similar infrastructure that must cross through many individual parcels of land, market dynamics often will impede such negotiations. Although the value of any one of these property interests may be limited, the value of the public good the government seeks to construct by combining these individual interests can be considerable. Recognizing as much, each individual owner has the incentive to hold out, refusing to sell unless the government provides compensation or other concessions that may far exceed the worth of the underlying property interest. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75-76 (1986). Eminent domain solves this problem by allowing the sovereign to seize the necessary property interests at a judicially determined fair price. *Ibid.* It likewise solves the problem of individual landowners refusing to sell at any price, whether due to personal opposition to a project, animosity toward the people or institutions involved, or some other reason.

This hold-out problem—and the corresponding need for the exercise of eminent domain—does not evaporate simply because a state rather than a private party owns the relevant property interest. States likewise may hold out by refusing to sell, and they may do so to secure economic rents or to pursue any number of policy or other goals.

Congress expressly recognized this concern in enacting Section 717f(h). As the Senate Report declared, allowing states to "require a natural-gas pipe-line company entering the State to serve the people of that State as a condition to obtaining the right of eminent domain" would "defeat[] the very objectives of the Natural Gas Act." S. Rep. No. 80-429, 3 (1947). That is because, the report explained, it is the *federal* government, through the Federal Power Commission (and now FERC), that "is given exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce." *Ibid.* If state consent were required for acquisition of the property interests necessary to construct and operate a pipeline, "then it is obvious that the orders of the Federal Power Commission may be nullified." *Id.* at 4.

Under the Third Circuit's reading of the Natural Gas Act, states would reacquire the very veto power that Congress sought to deny them. All states have significant real property holdings. In particular, under the equal footing doctrine, each state owns the land underlying all navigable waters within its borders. *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926). As this map of natural gas pipelines shows, few if any pipeline projects can completely evade all such state-owned property:



U.S. Energy Information Administration, *Natural gas explained* (Dec. 3, 2020).[2] Those pipelines that could avoid state-owned property would be able to do so only at substantial cost. There are thus few if any projects that could escape the control of every state through which they pass. *See PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 58 n.221 ("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.").

The Third Circuit's interpretation of the Natural Gas Act is all the more problematic because it exempts

[2] https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php.

from Section 717f(h) even the far more intangible property interests that a state might claim. Here, for example, New Jersey holds possessory interests in only two of the relevant properties. Pet. App. 5. In 40 others, it holds certain nonpossessory interests, generally "easements requiring that the land be preserved for recreational, conservation, or agricultural use." Pet. App. 5. If such interests are immune from condemnation, then any state that seeks to block or alter a pipeline has an easy means of doing so: it may simply secure a conservation easement or similar property interest somewhere in a pipeline's path and withhold consent until its demands are met. *See PennEast Pipeline Company*, 170 FERC ¶ 61,064, at ¶ 58 n.221 ("If lands over which a state has asserted any property interest also become impassable 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) [15 U.S.C. § 717f(h)].").

Congress has recognized that states might take such action to block prospective projects. Thus, in the Federal Power Act, Congress allowed for the exercise of eminent domain over state-owned property interests acquired *after* the passage of the statute, even while exempting those acquired before. 16 U.S.C. § 814. The Natural Gas Act's condemnation provision is, of course, even broader. *See* 15 U.S.C. § 717f(h); *supra* pp. 6-7. But the Third Circuit's reading of it allows for no limitations on state immunity from the federal eminent-domain power: *no* state property interests may be

condemned under the Natural Gas Act, no matter when or how the state acquired them. Pet. App. 30. By the Third Circuit's logic, the Constitution would *preclude* any further limitations. Indeed, even the Federal Power Act's allowance for condemnation of a state's recently acquired property interests would be unconstitutional. Pet. App. 26-27; *see infra* pp. 22-23.

2. Granting states veto power frustrates Congress's scheme

Congress was not blind to the interests of the states when it enacted the Natural Gas Act. Rather, as discussed further below, Congress provided detailed mechanisms for states to express their concerns and for FERC to address them. But if, as the Third Circuit concluded, states are exempt from Section 717f(h)'s scope, they will have the ultimate trump card: the ability to block any pipeline project passing through their territory. States may exercise this veto power for policy or other reasons inconsistent with the federal interests the Natural Gas Act is intended to advance.

That is just what happened here. After the Third Circuit issued its opinion denying PennEast the ability to condemn state-owned property, a New Jersey agency determined the pipeline project must therefore be terminated. Adam Hermann, *New Jersey turns down permits for proposed 120-mile natural gas pipeline*, PHILLY VOICE (Oct. 12, 2019).[3] New Jersey governor Phil Murray declared: "My Administration fought and

[3] https://www.phillyvoice.com/new-jersey-proposed-natural-gas-pipeline-120-miles-trenton-pennsylvania-penneast/.

won in court to stop the proposed 116-mile Penn East natural gas pipeline." *Ibid.* He continued: "We are committed to transitioning New Jersey to 100% clean energy by 2050." *Ibid.*

Whether New Jersey's asserted policy preferences are valid is beside the point: Congress did not intend for any one state to be able to unilaterally impose such preferences. To the contrary, although Congress established intricate mechanisms to allow all stakeholders a say in whether and how a pipeline will be constructed, it granted *FERC* the ultimate authority to weigh these interests and make a final determination by issuing a "certificate of public convenience and necessity." 15 U.S.C. § 717f(h). FERC may issue such a certificate only if it finds that pipeline construction is "required" by present or future public needs, and it may make that determination only after having provided a hearing to "all interested persons" on issues including the specific route the pipeline should take. 15 U.S.C. §§ 717f(c)(1)(B), (e). But it is FERC that makes this decision for interstate pipelines, and not the individual states. *Ibid.*

The procedural requirements that precede any such FERC determination allow a full airing of the sorts of concerns that states like New Jersey might raise. Here, FERC first published PennEast's application to construct the pipeline in 2015. Pet. App. 38. Before that, FERC had published a notice that it intended to prepare an Environmental Impact Statement (EIS) for the contemplated project, which it "sent to more than 4,300 interested entities, including

representatives of federal, state, and local agencies." Pet. App. 42. FERC received more than 6,000 written comments, along with numerous additional verbal comments at open public meetings. Pet. App. 42-43. FERC then issued a draft EIS, which was again both published and sent to more than 4,000 interested parties. Pet. App. 43. After receiving and accounting for many additional comments—some of which prompted changes to the proposed route of the pipeline—FERC in 2017 issued a final EIS that addressed "all substantive comments received." Pet. App. 43. Finally, in 2018, following a proceeding in which "New Jersey State representatives" among others were permitted to intervene (Pet. App. 38), FERC issued a final order reaffirming the agency's conclusions and addressing "for over 40 pages" the "major environmental issues raised." Pet. App. 47. Only after this elaborate process did FERC approve the proposed pipeline. Pet. App. 48.

Should any stakeholders that participated in these proceedings object to FERC's determination, still further process is available to them: they may petition for review of the FERC order in the D.C. Circuit. *See* 15 U.S.C. § 717r(b). New Jersey took advantage of this avenue for review here. *See* Order, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. Oct. 1, 2019) (holding case in abeyance pending final resolution of Third Circuit proceedings).

Under the Third Circuit's reading of the Natural Gas Act, however, all of this process is for naught. A state need not convince FERC of the state's view that pipeline construction is unnecessary or unwarranted.

Nor need it convince the D.C. Circuit that FERC's decision must be set aside. Instead, stymied on these fronts, a state can simply assert immunity from any condemnation proceeding and stop the project in its tracks.

That is precisely the "nulli[fication]" of FERC orders Congress designed Section 717f(h) to prevent. S. Rep. No. 80-429, at 4. Congress recognized that states are an important voice in the process for siting and approving pipelines. But it intended that they be just one voice of many, and never the determinative one. The Third Circuit's interpretation subverts that carefully calibrated approach.

The Third Circuit's suggested "work-around" fails to resolve this fundamental problem. *Contra* Pet. App. 31. The court of appeals suggested that, rather than have PennEast or a similar private entity condemn state-owned land, "an accountable federal official" could "file the necessary condemnation actions and then transfer the property to the natural gas company." Pet. App. 30. But as FERC itself explained, the Natural Gas Act grants relevant federal officials no such authority. *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶¶ 51-52. Perhaps Congress could amend the statute to permit FERC itself to condemn state-owned property. Pet. App. 31; *but see PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 52 (highlighting "practical considerations" that might undermine this approach). Presumably, the Third Circuit would require Congress to make FERC more than just a nominal party to such proceedings, as otherwise this legislative fix would be

a pointless formality. But if so, requiring FERC to litigate the value of hundreds of individual parcels of land would be a serious drain on the federal government's resources. That is why Congress delegated its eminent-domain authority to private parties in Section 717f(h) and other similar condemnation provisions, appointing them as agents of the federal government to exercise its sovereign power. *See supra*, pp. 6-11. Contrary to the Third Circuit's decision, nothing required Congress to make a different, more costly, choice.

II. DEPARTING FROM THE PREVAILING UNDERSTANDING OF THE NATURAL GAS ACT WOULD HAVE SIGNIFICANT REPERCUSSIONS

The consequences of the Third Circuit's interpretation of the Natural Gas Act further confirm the court of appeals' error. Parties had long accepted the straightforward proposition that the statute authorizes condemnation of any property FERC determines to be necessary for the nation's natural gas infrastructure, including state-owned property. Accepting the Third Circuit's recalibration of Congress's carefully crafted scheme would have significant practical implications.

Indeed, just the single pipeline directly at issue in this case is a matter of economic importance. Nearly 75 percent of New Jersey households rely on natural gas, the vast majority of which must be transported into the state via pipeline. Comment of New Jersey

Natural Gas, at 3-4, *PennEast Pipeline Co.*, FERC Docket No. RP20-41 (Oct. 18, 2019). Recent independent reviews have determined that existing New Jersey natural gas pipelines are fully subscribed—which can cause supply outages and other reliability concerns on high-demand days (*e.g.*, during cold weather, when people are attempting to heat their homes). *Id.* at 4-5. The PennEast pipeline would address these concerns by delivering roughly a billion cubic feet of natural gas every day, serving the energy needs of 4.7 million households. PennEast Pipeline, *Overview* 1 (Sept. 21, 2016).[4] According to PennEast's estimates, this added supply could save consumers nearly $900 million in some years. *Ibid.* And the construction of the pipeline alone would itself generate 12,000 jobs and $740 million in wages. *Id.* at 4. If the Third Circuit's decision is left standing, none of these benefits will materialize.

The threat to future pipeline projects is no less real. Already, Maryland has asserted its supposed Eleventh Amendment immunity to attempt to prevent construction of a FERC-approved pipeline linking Pennsylvania to West Virginia. Comment of TC Energy Corp., at 19, *PennEast Pipeline Company, LLC*, FERC Docket No. RP20-41 (Oct. 18, 2019). Were this Court to affirm the decision below, other states would undoubtedly invoke this newfound veto power.

The uncertainties created by these potential state vetoes would have widespread ramifications. Pipelines

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[4] https://penneastpipeline.com/wp-content/uploads/2016/10/PennEast_Overview_9-21-16_9pm.pdf.

require significant capital investment, and the costs of raising such capital depend on the associated risks. Any reading of the Natural Gas Act that allows states to exempt themselves from the statute's eminent-domain provision would multiply that risk for all natural gas pipelines. No longer could investors be confident that FERC approval of a project will be the final word. Instead, they would be required to account for the possibility that one or more states might subsequently step in and prohibit a pipeline's construction. To address that risk, investors would either increase the interest rate at which they lend funds or refuse to provide financing at all. "This," as FERC recognized, "would result in either increased costs for natural gas consumers or greater supply constraints as a result of pipeline[s]' inability to secure capital for construction." *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 62.

Any increase in the costs of capital for natural gas pipelines would, in turn, have broad effects on the national economy. Indeed, nearly a third of the country's energy needs are currently met by natural gas. U.S. Energy Information Administration, *U.S. energy facts explained* (May 7, 2020).[5]

Nor would the effects of adhering to the Third Circuit's interpretation of the Natural Gas Act be limited to this particular segment of the energy market. As noted above (*supra* pp. 15-16), if sovereign immunity concerns require departing from the Natural Gas Act's plain text, they also call into question the

[5] https://www.eia.gov/energyexplained/us-energy-facts.

constitutionality of the Federal Power Act's eminent-domain provision, 16 U.S.C. § 814. Nearly 75 years ago, this Court recognized that the Federal Power Act generally preempts state laws imposing permitting requirements that would otherwise effectively grant states "a veto power over the federal project." *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 164 (1946). Having a "dual final authority * * * would be unworkable." *Id.* at 168.

Under the Third Circuit's reasoning, however, states would acquire that same "final authority" through other means. The Federal Power Act authorizes FERC-approved licensees to condemn the property necessary to construct hydro-electric power projects. 16 U.S.C. § 814. Although *some* state-owned property is exempt from this condemnation provision, other state-owned property—including, most significantly, property interests a state acquired after 1992—is not. *Ibid.* Yet if Congress's delegation of power to acquire state-owned lands in the Natural Gas Act would violate the Eleventh Amendment, so too would the Federal Power Act's parallel delegation of power. Pet. App. 26-27. States could use this newly recognized immunity from condemnation to block the construction of key hydro-electric power projects. Again, as with the Natural Gas Act, that would subvert Congress's clearly expressed intent and increase the costs of energy.

More generally, adopting the Third Circuit's rationale would threaten to remove a critical tool from Congress's toolkit. For most of this nation's history, Congress has delegated its eminent-domain power to

private corporations to protect and promote interstate commerce. *See Luxton*, 153 U.S. at 533-34. Congress has used this authority to construct roads,[6] canals,[7] aqueducts,[8] railroads and telegraph lines,[9] and innumerable other public goods. Without this authority, the key infrastructure projects that knit the nation together and constitute the foundation of our economy might never have been built with such speed and scope.

The Third Circuit's understanding of eminent domain proceedings would impose a novel limit on this well-established authority: it may be exercised only if each state consents to having these infrastructure networks pass through its boundaries. This Court's acceptance of that proposition would severely hamper

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[6] Act of Mar. 3, 1809, ch. 31, 2 Stat. 539 (authorizing company to take land for construction of turnpike).

[7] *Chesapeake & Ohio Canal Co. v. Union Bank of Georgetown*, 5 F. Cas. 570, 572 (C.C.D.D.C. 1830) (discussing condemnation proceedings for property taken to construct canal).

[8] Act of Apr. 8, 1858, ch. 14, 11 Stat. 263 (authorizing takings by government's approved agents for construction of aqueduct).

[9] *California v. Cent. Pac. R. Co.*, 127 U.S. 1, 38-39 (1888) (discussing 1862 Act authorizing Central Pacific Railroad Company of California to construct railroad and telegraph lines connecting San Francisco, California, to the Missouri River, and observing that "[t]he power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce").

Congress's ability to spur the development of infrastructure needed to sustain and promote economic growth.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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