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

STEVEN B. FEIRSON
STUART T. STEINBERG
RYAN M. MOORE
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

MICHAEL H. MCGINLEY
Counsel of Record
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
michael.mcginley@dechert.com
(202) 261-3300

Counsel for Amicus Curiae

MARCH 8, 2021

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 technical and administrative support roles within construction companies and 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 shale formations, 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 myriad benefits in the communities where EEIA members live, raise their families, and spend their careers building and operating energy infrastructure. EEIA is submitting

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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. All parties have consented to the filing of this brief.

this brief in support of Petitioner 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 U.S. natural gas industry is experiencing an unprecedented boom. Spurred by new technology enabling drilling along shale formations, natural gas production and consumption are at all-time highs. Experts are forecasting more growth for decades to come. More than ever before, America's energy supply is dependent on a stable source of affordable natural gas. If adopted as a nationwide rule, the decision below will halt that growth in its tracks.

Interstate pipelines are essential to the natural gas supply chain. Without them, it is 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 provide necessary materials, labor, equipment, and engineering support for these crucial projects. Pipeline projects like PennEast create valuable, family-supporting jobs, stimulate commercial activity in dozens of economic

sectors, and have far-reaching effects well beyond the natural gas industry, like downstream manufacturing and chemical producers that rely on abundant and inexpensive natural gas.

That Congress centralized pipeline approval under the Federal Energy Regulatory Commission's ("FERC") control is no surprise. The interstate pipeline network is a matter of critical national importance. Streamlining the processes through which complex and crucial pipeline infrastructure projects are planned, approved, and realized simply makes sense. And a key driver of this statutory design was historical interference by States seeking to disrupt pipeline development. Congress thus struck a delicate balance almost 80 years ago when it granted FERC the ability to delegate to private pipeline companies the full federal eminent domain power. Congress recognized that interstate pipelines and State veto power over where those pipelines would run are incompatible. And, for the better part of a century, this regulatory scheme has worked exactly as Congress intended: Private companies have invested dramatically in extensive pipeline networks on the assurance that, once approved, a State cannot unilaterally block an interstate pipeline's construction. This legislative scheme laid the foundation that has allowed the U.S. to grow into the world's leading natural gas producer.

The decision below resurrects the unworkable regime that Congress abolished almost 80 years ago. If affirmed, the panel's decision would establish a nationwide rule allowing a single State to veto an interstate pipeline project FERC has found to be in the public interest. Without reversal, the Third Circuit's candid acknowledgement 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," surely will come true. Pet.App.30. And FERC agrees. JA426.

Moreover, the lower court's view would 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. That disruption will be devastating to a broad swath of ordinary Americans, not just those working in the natural gas industry. 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.

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 almost 80 years, the decision below swept away the delicate balance Congress struck to facilitate necessary pipeline infrastructure projects and

promote the overall public interest. That decision did not rest on the existence of an unmistakable constitutional conflict, or even a clear barrier emanating from the penumbras of the Eleventh Amendment. The Third Circuit's error is one of basic statutory interpretation, which this Court can (and should) remedy with little consequence. The alternative is far worse. If affirmed and applied nationwide, the Third Circuit's decision would fracture a booming industry, slash desperately needed economic gains, and destroy lucrative, reliable jobs many American families depend on for survival. Rather than invite those drastic consequences, the Court should apply the statute as written and reverse.

ARGUMENT

I. If Applied Nationwide, The Decision Below Will Reverse The Recent Boom In Natural Gas Production.

This Court will significantly disrupt the U.S. economy should it affirm the decision below. If adopted as a nationwide rule, the Third Circuit's interpretation of the Natural Gas Act has the 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. Permitting a single State unilaterally to halt an interstate pipeline project will destabilize the natural gas markets at the heart of the Nation's energy supply and 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 in 2019 to the highest volume on record.[2] Horizontal drilling and hydraulic fracturing techniques that allow for production of natural gas from shale have fueled more than a decade of continuous growth,[3] making the U.S. the leading natural gas producer in the world.[4] 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

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[2] 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*"); *see also* U.S. EIA, *U.S. Natural Gas Production, Consumption, and Exports Set New Records in 2019* (Oct. 5, 2020), https://bit.ly/2OlRwpX. Although production fell 2% in 2020 from 2019 levels due to industry responses to the COVID-19 pandemic, production is expected to be on the rise again in 2022. U.S. EIA, *U.S. Oil and Natural Gas Production to Fall in 2021, then Rise in 2022* (Jan. 14, 2021), https://bit.ly/3dlXvFo.

[3] EIA *2019 Production Report*; *see also* U.S. EIA, *Natural Gas Explained, Where Our Natural Gas Comes From,* https://bit.ly/2TZtMrM (last accessed Mar. 8, 2020).

[4] 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.

over 10 million jobs.[5] Government and private experts alike forecast that U.S. natural gas production will continue to grow for decades to come.[6]

Buoyed by robust supply conditions, U.S. natural gas consumption also reached a record level in 2019.[7] 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).[8] Since 2016, natural gas has accounted for the largest share of domestic electricity generation.[9] The industrial sector, the next largest user, has

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[5] 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.

[6] *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").

[7] 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*"). Although mild weather and COVID-19 responses drove overall demand for U.S. natural gas downward in 2020, "[n]atural gas consumed to generate electric power in the United States reached a record high" in 2020. U.S. EIA, *In 2020, U.S. Natural Gas Prices Were the Lowest in Decades* (Jan. 7, 2012), https://bit.ly/3deClck.

[8] EIA *2019 Consumption Report*, *supra* note 7; *see also* U.S. EIA, *More than 100 Coal-Fired Plants have been Replaced or Converted to Natural Gas since 2011* (Aug, 5, 2020), https://bit.ly/3b1QlUa; 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").

[9] EIA *2019 Consumption Report*, *supra* note 7.

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.[10] 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.[11] 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 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 2019, the natural gas transportation network delivered over 28 trillion cubic feet of natural gas to almost 77 million customers.[12]

According to the latest numbers released by the federal government, there are approximately 302,249

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[10] 2016 IHS Report at 21.

[11] U.S. EIA, *Natural Gas Explained, Use of Natural Gas*, https://bit.ly/2wapNzH (last accessed Mar. 8, 2021).

[12] U.S. EIA, *Natural Gas Explained, Natural Gas Pipelines*, https://bit.ly/3b4fonZ (last accessed Mar. 8, 2021).

miles of transmission pipelines.[13] 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."[14] 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."[15] But the problem is not unique to the Keystone State. Experts have forecasted a need for 57 billion cubic feet per day of new gas pipeline capacity to support the levels of national production and market growth that are projected through 2035.[16] 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."[17] Indeed, the 5 billion cubic feet per day of new U.S. pipeline capacity that came online during the first half of 2020 should

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[13] U.S. Dep't of Transp., Bureau of Transp. Statistics, *U.S. Oil and Gas Pipeline Mileage*, https://bit.ly/3b4Sltc (last accessed Mar. 8, 2021).

[14] 2016 IHS Report at 18.

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

[16] INGAA Report at 37.

[17] 2016 IHS Report at 20.

drastically increase the industry's ability to link supply with increasing demand.[18]

C. If Applied Nationwide, the Third Circuit's Rule Will Devastate the Complex Commercial Web that Provides the Equipment, Labor, and Infrastructure to Build Pipelines.

The adverse economic effects of affirming the decision below would sweep far beyond the natural gas industry. Anything but reversal will have dire consequences on countless businesses throughout the Nation and ordinary Americans whose livelihoods are tied to the construction of interstate pipelines. 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.[19] 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 contributions of $190 billion to real gross domestic product" and "1.4 million additional jobs."[20]

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

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[18] U.S. EIA, *In the First Half of 2020, about 5 Bcf/d of Natural Gas Pipeline Capacity Entered Service* (Aug. 24, 2020), https://bit.ly/3al3qsI.

[19] 2016 IHS Report at 38-39.

[20] *Id.* at 4.

approximately $791 billion, including approximately $154 to $190 billion to construct 26,000 miles of additional natural gas pipelines.[21] This total investment is projected to support 658,000 U.S. jobs annually and contribute more than $1.1 *trillion* to U.S. GDP.[22] 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.[23]

The economic benefits of natural gas infrastructure development are spread across every State, even those with no natural gas production.[24] This is due in large part to what economists refer to as "backward linkages"—that is, 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 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

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[21] INGAA Report at 2, 48.

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

[23] *Id.* at 61.

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

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."[25]

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.[26]

But the losses will not end there. Additional economic losses and workforce cuts will reverberate up and down the natural gas infrastructure supply chain. 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.[27] These figures are not outliers. The abandoned Atlantic Coast Pipeline project was expected to generate $2.7 billion in economic activity across the mid-Atlantic region and generate 17,000 new jobs.[28] And the

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

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

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

[28] Atlantic Coast Pipeline, *Benefits* (last accessed Mar. 8, 2021), https://bit.ly/3dkaY0t.

abrupt revocation of the a key federal permit for the Keystone XL pipeline project put 42,000 overall American jobs and an $8 billion investment in the North American economy at risk.[29] The jobs lost when pipeline projects are cancelled or abandoned will not be easily replaced, particularly in the highly uncertain economic environment we currently face. The average unconventional supply chain worker earns $79,000 a year, far outpacing the average $68,000 annual U.S. salary.[30] In addition to job losses, the rule adopted below would stifle long-term investment, as suppliers will be reluctant to acquire equipment, train employees, or begin construction in the face of uncertainty over whether a FERC-approved pipeline project will nevertheless be vetoed by a State intent on blocking it. *See, e.g.*, J. Bowker, *The Issue of Condemning State-Owned Property Pursuant to the Natural Gas Act:* In re PennEast, 41 Energy L.J. 403, 418 (2020) (decision below will cause natural gas companies to "reevaluate" their plans "which may in turn lead to longer, costlier pipeline project proposals"); Z. Wright, *Siting Natural Gas Pipelines Post*-PennEast*: The New Power of State-Held Conservation Easements*, 105 Minn. L. Rev. 1053, 1079 (2020) (decision below "opened the door for a state to stop any interstate natural gas pipeline project").

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

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[29] Keystone XL, *About Keystone XL – Project Overview* (last accessed Mar. 8, 2021), https://bit.ly/3pwmb0l.

[30] 2014 IHS Report at 1, 7.

before New Jersey blocked the project.[31] The Atlantic Coast Pipeline would have generated $28 million in annual property tax revenue for local governments and communities along its route.[32] 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 from 2018 to 2035.[33] 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. These workers not only generate new taxes, they 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

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[31] PennEast *Econ. Impact Report* at 12.

[32] Atlantic Coast Pipeline, *Benefits* (last accessed Mar. 8, 2021), https://bit.ly/3dkaY0t.

[33] INGAA Report at 62.

lower than they otherwise would have been."[34] Added pipeline capacity helps to reduce volatility in constrained natural gas markets, particularly during periods of peak usage. The Atlantic Coast Pipeline would have saved consumers millions of dollars each year in energy costs.[35] And consumers in Eastern Pennsylvania and New Jersey could have saved $1.325 *billion* in the winters of 2013-14 and 2017-18 had the additional capacity of the PennEast pipeline been available.[36]

Worse, without the much-needed increased capacity interstate pipeline projects provide, consumers may face obstacles simply in procuring inexpensive energy from natural-gas-based resources. Just such consequences arose from the abandonment of the Northeast Supply Enhancement pipeline. After the project was cancelled for failure to obtain necessary permits from New York and New Jersey, one New-York-based utility operator stopped processing applications for new and expanded natural gas service and another imposed a moratorium on some new natural gas customers entirely.[37]

Given that lower energy costs from natural gas are a major driver of economic development in other industries, these effects compounded on a nationwide

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[34] 2016 IHS Report at 34.

[35] Atlantic Coast Pipeline, *Benefits* (last accessed Mar. 8, 2021), https://bit.ly/3dkaY0t.

[36] 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.

[37] Reuters, *National Grid Says No New NYC Natgas Customers Without Williams Pipeline* (May 17, 2019), https://reut.rs/2NyCfkY.

level would be disastrous. Since 2010, the domestic chemical manufacturing industry alone has announced 334 projects (*e.g.*, new factories and capacity expansions) cumulatively valued at $204 billion to take advantage of new domestic supplies of more affordable natural gas.[38] 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.[39] The decision below, if affirmed, risks not only the future of the natural gas industry but countless other sectors of the economy reliant upon a robust and affordable supply of natural gas.

II. The Decision Below Ignores The Relevant Historical Landscape And Would Cause The Very Effects Congress Sought To Avoid.

The drastic economic harm that the lower court's decision would unleash is precisely what Congress sought to avoid when it amended the Natural Gas Act to include §717f(h). Those amendments were intended specifically to prevent States from frustrating the purpose of the Act, as New Jersey seeks to do here. Rather than countenance New Jersey's obstruction, the Court should restore the sensible balance that Congress struck.

A. The Decision Below Ignores the Relevant Historical Context.

In granting FERC certificate holders the full breadth of the federal eminent domain power, Congress was not legislating on a blank slate.

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

[39] *Id.*

Congress was well aware that, because "practically all" American natural gas reserves are "located in a certain section of the country," natural-gas pipelines "must cross over many States" "to reach their distant markets." *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 House Comm. on Interstate and Foreign Commerce*, 80th Cong. 544 (1947) (hereinafter "*Amendments to the Natural Gas Act House Hearings*") (statement of Mr. Searls). Interstate natural gas pipelines began appearing as early as the 1920s. A. Klass & D. Meinhardt, *Transporting Oil & Gas: U.S. Infrastructure Challenges*, 100 Iowa L. Rev. 947, 993 (2015). Not shortly after, this Court held that any state-based regulation of interstate pipelines was unconstitutional, *see, e.g.*, *State of Missouri ex rel. Barnett v. Kansas Nat'l Gas Co.*, 265 U.S. 298, 307–08 (1924); *Pennsylvania v. West Virginia*, 262 U.S. 553, 595–600 (1923), because the Commerce Clause grants that power exclusively to Congress.

Wartime demands for energy in the 1940s sparked an explosion of interstate pipeline construction, most commonly linking natural gas reserves in the Gulf Coast states to the northeastern war industry. Klass & Meinhardt, *supra*, at 996. After the War, problems arose where private companies purchased the rights to government-built pipelines and sought to expand those projects. For example, after purchasing government-owned crude pipelines it intended to convert for natural gas transportation, the Texas Eastern Transmission Corporation faced blowback from the coal industry, railroad interests, and state governments, all of which objected to its plans to expand the pipeline into

Pennsylvania. *Id.* at 996-97. Those practical barriers set the field for congressional action.

In amending the Natural Gas Act to confer upon FERC certificate holders the full scope of the federal government's eminent domain power, Congress sought to address the need to avoid pipeline projects being "readily and flippantly thwarted at the caprice of a recalcitrant or selfish private concern," particularly after the project had been determined by FERC "to be for the convenience and necessity of thousands of the people of the United States." *Amendments to the Natural Gas Act: Hearing on S.1028 Before the Sen. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947) (statement of Sen. Moore).

At the time, two general obstacles stood in the way of necessary interstate pipeline development. *First*, without the federal eminent domain power, FERC certificate holders were reliant upon the eminent domain power of the States. But protectionist state laws and constitutions permitted the use of eminent domain only on the condition that property be taken for the "public use" of the State in which the property was located. S. Rep. No. 80-429, 2 (1947) (identifying Missouri, Illinois, Indiana, and West Virginia as having such laws); *see also, e.g.*, *Carnegie Nat'l Gas Co. v. Swiger*, 79 S.E. 3, 9 (W.Va. 1913); *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43, 59 (Wyo. 1913). Focusing on whether the property was taken for the "public use" of *each* State proved problematic, given that each State could (and often would) interpret its eminent domain law to permit takings only where the interstate pipeline was providing gas to consumers *in their State* and to deny takings where the pipeline

merely passed through their State to service consumers at another endpoint. S. Rep. No. 80-429, 2; *Washington Water Power Co. v. Waters*, 115 P. 682, 686 (Idaho 1911) ("Condemnation could evidently not be had in this state for the purpose alone of serving a public use in another state . . . ."); *see also, e.g.*, *Grover Irrigation & Land Co.*, 131 P. at 59. The Supreme Court of Indiana even opined that an alternate reading of the State's eminent domain power would raise constitutional concerns. *Shedd v. N. Ind. Pub. Serv. Co.*, 188 N.E. 322, 325 (Ind. 1934) ("Indiana has no power of eminent domain for uses constituting interstate commerce over which the United States alone has the sovereign right of control and regulation.").

Second, in some other States, the right of eminent domain was granted exclusively to domestic corporations. S. Rep. No. 80-429, 2-3. Those limitations were antithetical to interstate pipeline projects, where pipelines are often constructed over hundreds of miles of territory and cross multiple state lines. Requiring pipeline construction companies to establish separate or subsidiary corporate entities in each State through which the pipeline traveled created a costly and overly bureaucratic redundancy. Thus, Congress knew that delegation of the federal eminent domain power to FERC certificate holders was necessary to provide assurance that, once a right-of-way was approved, pipeline projects would be constructed and operated as planned. *See Amendments to the Natural Gas Act House Hearings*, *supra*, at 540-45 (statement of Mr. Searls).

Without objection and for almost 80 years, the natural gas industry, States, and Congress relied on the fact that the Natural Gas Act, as written, protects

a certificate-holder's use of the §717(h) eminent domain power against obstruction by hold-out States. Petr.Br.29-30. Normally, years of "consensus" regarding a statutory interpretation and "congressional silence" are "enough to rule out any serious claim of ambiguity" in that statute. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 592, 593-94 (2004). Moreover, the model for §717(h)—the then-in-effect §814 of the Federal Power Act ("FPA"), *see* Petr.Br.27—had long been applied and interpreted as granting license-holders eminent domain authority to condemn State-owned lands. 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 charged with implementing the statute, has made its views clear: It agrees that "section [717(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." JA391 (footnotes omitted).

That the current version of the Federal Power Act (a different statute) limits the use of eminent domain against certain state-owned land interests does not compel a different conclusion with respect to *this* statute. *See* 16 U.S.C. §§814, 824p(e)(1). Private entities' use of the FPA's eminent domain power typically involves construction of large scale hydroelectric projects, which can necessitate the

taking of property in fee simple. *See, e.g.*, *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 467 (7th Cir. 2008) (FPA eminent domain complaint asked for "[f]ull and clear fee simple title to the Premises"); *Rivers Elec. Co. v. 4.6 Acres of Land Located in Town of Catskill, Cty. of Greene*, 731 F. Supp. 83, 85 (N.D.N.Y. Nov. 25, 1991) ("In order to comply with the terms of the license, the plaintiff is required to acquire a fee simple interest in or the right to use in perpetuity the lands needed to build, maintain, and operate the project."). The Natural Gas Act's eminent domain power, in contrast, is far less invasive. Typically, certificate holders operating under the Natural Gas Act utilize their eminent domain power to procure merely a right-of-way through a parcel over which the pipeline will run. Pet.App.34. That Congress would draw a distinction between the delegation of federal eminent domain power in the two statutes, thus, makes good sense. Certificate holders operating under the Natural Gas Act are far less intrusive than those operating under the FPA. The statutes reflect that fact, and prohibit private entities operating under the FPA from taking certain state-owned land interests in fee simple. But Congress continues to recognize that large scale pipeline projects are dependent upon a certificate holders' ability to secure right-of-ways over hold-out parcels via eminent domain, regardless of the parcel's title holder. If that were not the case, something as mundane as a state-owned land interest in a riverbed along an objecting State's border could resurrect the unworkable situation that Congress sought to remedy by amending the Natural Gas Act in the first instance. Thus, Congress' decision to refrain from amending the

Natural Gas Act as it has the FPA is both deliberate and logical.

Without reversal, the decision below will upset the federal balance between state and national interests established by Congress long ago in response to concerns and interference from state actors. If the decision below is affirmed, not only would States be granted the sort of veto power over pipeline construction that Congress sought to prevent, this Court would be effectively permitting one State to put its interests, no matter how slight, ahead of the interests of other States, no matter how significant. This weighing of interests over a delicate and drastically important issue of interstate commerce is a practice best left to Congress, which has clearly and unmistakably spoken on the issue through the plain text and decades-long understanding of the Natural Gas Act.

B. The Drastic Consequences of the Decision Below Highlight the Wisdom Behind the Congressional Scheme.

Congress' wisdom, and the need to restore the traditional interpretation of the Natural Gas Act, is all the more evident from the damage the decision below will cause with respect to this pipeline alone. 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 interstate pipeline to neighboring states, including New Jersey and

Delaware, for end use or export from one of the many ports within those jurisdictions. The decision below thus constricts economic activity within a critically important region to the natural gas industry, a consequence Congress specifically sought to avoid through amending 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."[40] "Within the Appalachian region, Pennsylvania had the largest increase in gross withdrawals of natural gas" in 2019.[41] And "[n]ationally, Pennsylvania's increase was second to that of Texas."[42]

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."[43] 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 consumer markets."[44] It is thus inevitable that "the

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[40] EIA *2019 Production Report*, *supra* note 2.

[41] *Id.*

[42] *Id.*

[43] 2016 IHS Report at 17.

[44] *Id.* at 18.

supply growth in Appalachia will require the construction of brand-new pipeline capacity."[45] 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.[46]

As explained above, PennEast and other pipeline projects do not drive only 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.[47]

If affirmed, the Third Circuit's novel interpretation of the Natural Gas Act would grind the enormous economic activity detailed above to a

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[45] *Id.* at 19.

[46] U.S. EIA, *U.S. Natural Gas Pipeline Projects* (last updated Jan. 28, 2021), *available at* https://bit.ly/2IT22ig (reporting over 400 miles of new Pennsylvania-based natural gas pipeline either under construction or planned to come on line by 2023).

[47] 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.

screeching halt. Worse, it 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 the other public interests FERC recognized when it granted PennEast's certificate. Without reversal, New Jersey will disadvantage the diverse array of individuals and businesses that build and benefit from natural gas pipelines—ranging from skilled laborers from Texas, to pump manufacturers in Ohio, machinists in Illinois, and steel workers in Arkansas.

These consequences were exactly what Congress was seeking to avoid by amending the Natural Gas Act. 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. As a result of the decision below, Pennsylvania and the overall northeast region could face natural gas shortages, stalls or failures in major sectors of upstream and downstream industry, and massive job loss—all concerns that motivated Congress' amendments to the Natural Gas Act almost 80 years ago. *See Amendments to the Natural Gas Act House Hearings*, *supra*, at 46-48 (statements of Gov. Willis and Gov. Meadows); *id.* at 183-84 (statement of

Mr. Siggins); *id.* at 188 (statement of Mr. Dougherty); *id.* at 620 (statement of Mr. Haley).

The Third Circuit panel candidly acknowledged that its decision "may disrupt how the natural gas industry" operates. Pet.App.30. If affirmed, the disruptions already felt in the Third Circuit will spread throughout the Nation, devastate decades of progress toward American energy independence, and crush domestic economic growth in the midst of a global pandemic and a changing climate, both of which require affordable, adequate, and available energy resources for proper mitigation and response. The novel interpretation of the Natural Gas Act by the decision below could not be further from what Congress actually intended in establishing the legislative and regulatory scheme. This Court should reverse and restore the almost 80-year *status quo ante*.

CONCLUSION

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

Respectfully submitted,

STEVEN B. FEIRSON
STUART T. STEINBERG
RYAN M. MOORE
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA
19104
(215) 994-4000

MICHAEL H. MCGINLEY
Counsel of Record
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
michael.mcginley@dechert.com
(202) 261-3300

Counsel for Amicus Curiae

MARCH 8, 2021