No. 17-1009

IN THE

Supreme Court of the United States

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; BASIL SEGGOS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOHN FERGUSON, CHIEF PERMIT ADMINISTRATOR, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

PHILIP C. BOBBITT
Herbert Wechsler Professor of Federal Jurisprudence and Director for the Center for National Security
COLUMBIA LAW SCHOOL
Jerome Greene Hall, Room 720
435 West 116th Street
New York, NY 10027

ELIZABETH U. WITMER
SAUL EWING ARNSTEIN & LEHR LLP
1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087

JOHN F. STOVIAK
Counsel of Record
PATRICK F. NUGENT
SAUL EWING ARNSTEIN & LEHR LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102
(215) 972-1095
john.stoviak@saul.com

ANDREW T. BOCKIS
SAUL EWING ARNSTEIN & LEHR LLP
Two North Second Street, 7th Floor
Harrisburg, PA 17101

Counsel for Petitioner

April 9, 2018

279801

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 corporate disclosure statement that appears on pages iii and iv of the Petition for a Writ of Certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. The Second Circuit's decision below conflicts with this Court's decision in *Schneidewind*, the First Circuit's decision in *Weaver's Cove*, and the Second Circuit's own decision in *National Fuel*, all of which recognize FERC's exclusive authority over the siting of natural gas facilities. 4

II. This is precisely the right case to resolve the exceptionally important issue of cooperative federalism threatened by the Second Circuit's ruling below..... 7

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation, 868 F.3d 87 (2d Cir. 2017) . . . . . *passim*

Millennium Pipeline Co., L.L.C. v. Seggos, No. 117CV1197MADCFH, 2017 WL 6397742 (N.D.N.Y. Dec. 13, 2017) 5

Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n, 894 F.2d 571 (2d Cir. 1990) 4, 6, 7

Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation, 592 N.Y.S.2d 141 (N.Y. App. Div. 1993), *aff'd*, 624 N.E.2d 146 (N.Y. 1993), *cert. denied*, 511 U.S. 1141 (1994) 5

PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) 5, 6

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 4, 6

S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370 (2006) 5

Sekhar v. United States, 570 U.S. 729 (2013) 4

Page

Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council, 589 F.3d 458 (1st Cir. 2009). 4, 6, 7

STATUTES AND OTHER AUTHORITIES

15 U.S.C. § 717r(d)(1). 10

15 U.S.C. § 717r(d)(3). 10

33 U.S.C. § 1341(a)(1). 5

Gov. Andrew M. Cuomo, *New York State: Ever Upward*, 2017 STATE OF THE STATE (2017) 2

S. Rep. No. 109-78 (2005) 2

REPLY BRIEF FOR PETITIONER

This case presents a question of national and international importance: whether a state may use its narrowly circumscribed CWA[1] authority to determine the location of energy pipelines in order to bring the development of these projects to a standstill, despite the fact that the pipeline sitings at issue have already been approved by FERC.[2] The stakes for federal supremacy could hardly be greater, and the global consequences for U.S. national security are incalculable.

Congress and several U.S. presidents have recognized the importance of U.S. efforts to achieve energy independence. Moreover, some of the world's most hostile regimes are propped up by energy exports, whose pricing cannot be a matter of indifference to this country. The NGA, as amended by the Energy Policy Act of 2005, is

---

1. This Reply uses the same abbreviations as Constitution's Petition for a Writ of Certiorari and the following: Intervenors-Respondents Catskill Mountainkeeper, Inc., Riverkeeper, Inc., and Sierra Club (collectively, "Catskill"); Brief in Opposition for New York State Respondents ("NY Opp."); Brief in Opposition for Catskill ("Catskill Opp.").

2. FERC conducted an exhaustive, multi-year environmental review of the Interstate Project and concluded that the anticipated impacts would be reduced to less-than-significant levels with implementation of required mitigation. *See* Certificate Order ¶ 3, JA1668. NYSDEC actively participated in FERC's review proceedings by submitting nine separate comment letters to FERC, and, by doing so, acknowledged (if only implicitly) that FERC has sole authority over routing determinations. *See* JA75-JA80, JA81-JA88, JA89-JA127, JA164-JA206, JA223-JA224, JA486-JA488, JA496-JA515, JA844-JA846, JA853-JA855.

expressly designed to "provide a *comprehensive national energy policy . . . to enhance the security of the United States* and decrease dependence on foreign sources of fuel." S. Rep. No. 109-78, at 1 (2005) (emphasis added). Respondents blithely dismiss the significance of this case for national security even though no issue so implicates federal supremacy as much as U.S. national security and foreign policy.

NYSDEC's position depends upon a deft sleight-of-hand: although the NGA, as amended by the Energy Policy Act of 2005, explicitly circumscribes the parameters a state may use in making a water quality judgment, and rejects the state's role in the approval process for pipelines beyond certifying that judgment, NYSDEC maintains that the routing of the pipeline can be brought within the state's discretion by the simple ruse of withholding water quality certifications on the grounds that a different location of the pipeline might improve water quality.

The Court need look no further than NYSDEC's recent trilogy of Section 401 certification denials to see the very real threat to the future of our nation's energy infrastructure posed by this ruse and others like it. It was no coincidence that NYSDEC's Denial was announced on Earth Day. New York's Governor has made clear that a blockade of federally-reviewed and approved interstate natural gas pipelines is central to New York's anti-fossil fuel agenda, an agenda which materially deviates from Congress' intent as set forth in the NGA and Energy Policy Act of 2005 and constrains the delivery of gas to New England. *See, e.g.*, Gov. Andrew M. Cuomo, *New York State: Ever Upward*, 2017 STATE OF THE STATE, 57-58 (2017), http://www.governor.ny.gov/2017StateoftheStateBook

("[T]he State must double down by investing in the fight against dirty fossil fuels and fracked gas from neighboring states . . . .").

Respondents have hit upon a novel way to try to insulate the Second Circuit's decision below from this Court's review. Rather than attempting to distinguish the decision below from decisions of this Court and of the First and Second Circuits, Respondents have attempted to reconfigure the Second Circuit's ruling, airbrushing away the crucial holding on which the opinion explicitly depends.

Thus, it is not surprising that Respondents' assertions that this case presents a poor vehicle for Supreme Court review are replete with mischaracterizations of the decision and record below. The Second Circuit did not reject all of Constitutions arguments—as claimed—and the reversible error of that court with respect to alternative pipeline routings occurred in the initial, prerequisite phase of its analysis on the merits.

Finally, NYSDEC's suggestion that this petition should be rejected because the state's "denial of the § 401 certification was effectively without prejudice," NY Opp. at 16, will be of little comfort to infrastructure applicants in the future whose plans have been approved by federal agencies. The whole point of NYSDEC's stratagem is to increase mounting costs and uncertainties that accompany endless and contrived delays. If the fact that infrastructure projects could always reapply for certification was a sufficient cloak to cover NYSDEC's actions, states could defend all manner of *ultra vires* acts on grounds that an applicant is free to acquiesce to the state's unlawful demands and reapply for an authorization.

That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013).

I. The Second Circuit's decision below conflicts with this Court's decision in *Schneidewind*, the First Circuit's decision in *Weaver's Cove*, and the Second Circuit's own decision in *National Fuel*, all of which recognize FERC's exclusive authority over the siting of natural gas facilities.

The explicit basis for the Second Circuit's holding—that "[a] state's consideration of *a possible alternative route* that would result in less substantial impact on its waterbodies is plainly within the state's authority," *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017), App. 29a (emphasis added)—unavoidably conflicts with this Court's decision in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), as well as the Second Circuit's decision in *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n,* 894 F.2d 571 (2d Cir. 1990) and the First Circuit's decision in *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458 (1st Cir. 2009), all of which recognize FERC's exclusive authority over the siting of natural gas facilities. The fact that New York has hit upon yet another device by which to frustrate FERC decision-making does not render these decisions irrelevant, as Respondents claim, but rather discloses their fundamental purpose, which is to insulate states' attempts to frustrate federal authority.

Catskill attempts to distinguish *Schneidewind*, *National Fuel*, and *Weaver's Cove* summarily on the basis that they "involve[d] instances where states attempted to assert control well beyond the powers reserved to

them under the NGA." Catskill Opp. at 11-12. Quite so. By holding that NYSDEC's denial of a water quality certification on the basis of the hypothetical relocation of a pipeline whose siting had already been approved by FERC, the Second Circuit upheld precisely the sort of state behavior deplored in those cases—behavior that goes "well beyond the powers reserved to [states] under the NGA," *id.* at 11, which, for purposes of CWA Section 401, are limited to reviewing projects for compliance with federally-approved water quality standards. *See* 33 U.S.C. § 1341(a)(1); *Constitution Pipeline*, 868 F.3d at 101, App. 27a-28a; *Millennium Pipeline Co., L.L.C. v. Seggos*, No. 117CV1197MADCFH, 2017 WL 6397742, at *2 (N.D.N.Y. Dec. 13, 2017); *see also Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation*, 624 N.E.2d 146, 148-49 (N.Y. 1993), *cert. denied*, 511 U.S. 1141 (1994); *Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation*, 592 N.Y.S.2d 141, 143 (N.Y. App. Div. 1993), *aff'd*, 624 N.E.2d 146 (N.Y. 1993).[3]

Citing *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006), NYSDEC claims that the states' scope of review under Section 401 includes "both state and federal water-quality standards." NY Opp. at 2. *S.D. Warren*, however, addressed whether a Section 401 Certification was required for the project, not the state's scope of review. *See* 547 U.S. at 373. Catskill also cites *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994), claiming that states may consider "a wide range of

3. Although "[e]xamining impacts on water quality necessarily requires the State to examine a project's location," NY Opp. at 12, that requires examination of the FERC-approved route only—not an examination of *alternative* routes.

factors" as part of their Section 401 review. Catskill Opp. at 10-11. In fact, this Court determined that the Section 401 certification in *PUD No. 1* was based on the use of EPA-approved standards, 511 U.S. at 712-13, a finding that hardly supports Catskill's expansive characterization of a state's authority under Section 401.

While Respondents' invocation of "the preservation of state rights," is to be expected, any attempt to reconcile the Second Circuit's assertion of these rights in the circumstances of this case with *Schneidewind* requires some ambitious question-begging. It would assume—with the decision below—that such rights simply include second-guessing the FERC determination as to the siting of an interstate pipeline, which is the exact question at issue here: did NYSDEC ***exceed*** its narrowly tailored authority under Section 401 in an attempt to regulate in an area reserved exclusively for FERC? In fact, the Court in *Schneidewind* held that the "facilities of natural gas companies" are one of "the things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308; *see also id.* at 300-01, 305.

Having seized on the tactic of assuming away the question at issue, NYSDEC applies this method to misconstrue the Second Circuit's decision in *National Fuel* and the First Circuit's decision in *Weaver's Cove.* NYSDEC claims the decision below does not conflict with *National Fuel* or *Weaver's Cove* because those cases involved states' impermissible regulation of natural gas facilities under state law, not the exercise of states' authority under CWA Section 401, *see* NY Opp. at 14-15, as if this might ratify a maneuver to use Section 401 as a means of overriding FERC decisions. In fact, whether

a state seeks to regulate under its own laws or under the auspices of federally-delegated authority, the point remains that "Congress placed authority regarding the location of interstate pipelines . . . in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions." *Nat'l Fuel*, 894 F.2d at 579; *see also Weaver's Cove*, 589 F.3d at 472.

Only by assuming away the question at issue in this case can NYSDEC avoid the conclusion that the decision below conflicts with *National Fuel* and *Weaver's Cove* because it allows the state to intrude upon FERC's exclusive authority over the routing of interstate natural gas pipelines.

It is worth emphasizing that New York is not relying on its police powers, but can only be relying on its authority under federal law to apply federally-approved standards to a water quality certification. However ingenious, transmuting this very limited authority into the power to assess alternative routes shows just how far the Second Circuit has strayed from the actual source of New York's defined role in the matter.

II. This is precisely the right case to resolve the exceptionally important issue of cooperative federalism threatened by the Second Circuit's ruling below.

There is a widespread movement by New York to use its limited authority to frustrate the deployment of new energy infrastructure. A decision adverse to federal authority in this case—such as letting the Second Circuit

rationale remain unchallenged—would invite a deluge of similar state intrigues and farragoes of delay. The facts of this case, and the holding below, invite a clear judicial rule that the federal statute cannot be perverted to serve such stratagems.

NYSDEC, however, is anxious to assert that "this case does not squarely present the question of whether failure to provide information on alternative routes can justify denying a water-quality certification," claiming that "this Court's resolution of the issue proposed by Constitution would be an academic exercise." NY Opp. at 13; *see* Catskill Opp. at 9. These assertions are inconsistent with the Second Circuit's ruling that:

> We need not address all of [Constitution's] contentions. ***A state's consideration of a possible alternative route*** that would result in less substantial impact on its waterbodies ***is plainly within the state's authority***. . . . And where an agency decision is sufficiently supported by even as little as a single cognizable rationale, ***that rationale, by itself, warrants our denial of [a] petition for review*** under the arbitrary-and-capricious standard of review.

Constitution Pipeline, 868 F.3d at 101–02, App. 29a (internal citations and quotations omitted) (emphases added).

To further muddy the waters, NYSDEC claims that "[t]he Second Circuit unanimously rejected all of Constitution's arguments," NY Opp. at 8, and that "[t]he Second Circuit did not hold that the 'single cognizable rationale' for the denial was 'the issue of alternative

routes,'" *id.* at 10-11. In fact, the Second Circuit ***explicitly declined*** to consider all of Constitution's arguments, *see Constitution Pipeline*, 868 F.3d at 101, App. 29a ("We need not address all of [Constitution's] contentions"), and focused entirely on the issue of alternative routes, which underscores the singularly appropriate nature of this case for Supreme Court review. That is why the Second Circuit's opinion is at pains to emphasize that it will deny a petition for review under the arbitrary and capricious standard "where an agency decision is sufficiently supported by even as little as a single cognizable rationale," *id.*

The opinion's plain language also contradicts NYSDEC's bald assertion that the Second Circuit purportedly found "it 'need not address' Constitution's contention that the State relied on improper factors because the State's decision was independently sustainable on ***other grounds***," *see* NY Opp. at 11 (quoting *Constitution Pipeline*, 868 F.3d at 101, App. 29a) (emphasis added). Indeed, the ***only grounds*** identified by the Second Circuit in concluding that it "need not address all of [Constitution's] contentions" was the issue of alternative routes. *See Constitution Pipeline*, 868 F.3d at 101, App. 29a. Though inconvenient for Respondents' position, this element of the opinion below underscores once more the aptness of this case for further review. Rarely are constitutional and statutory questions so neatly isolated in an appellate opinion.

NYSDEC and Catskill would have the Court believe that this case is an inappropriate vehicle for review because, they claim, the outcome below would not change even if the Second Circuit erred in its ruling on alternative routes. To see why this is not so illuminates the simplicity of the question being presented for review.

Under the NGA, judicial review of a state administrative agency's decision to deny an approval required by federal law proceeds in two phases. First, the court "review[s] the agency's interpretation of federal law *de novo*; if the agency correctly interpreted federal law," then the court goes on to "review [the agency's] factual determinations under the arbitrary-and-capricious standard." *Constitution Pipeline*, 868 F.3d at 100, App. 26a. The Second Circuit's critical legal error—which forms the basis for the question presented in Constitution's petition—occurs in the first phase of its analysis (under the appropriate subheading "*Federal Law*"), where the court held that "[a] state's consideration of a possible alternative route that would result in less substantial impact on its waterbodies" is plainly within the authority granted by the federal statute, *id.* at 101, App. 29a.

By considering and basing its Denial (in part) on alternative routes, NYSDEC's decision was "inconsistent with the Federal law" governing Section 401 Certifications. *See* 15 U.S.C. §§ 717r(d)(1), (3). Indeed, Constitution explained in its briefing below how numerous aspects of the Denial exceeded the bounds of NYSDEC's limited authority under Section 401, although the Second Circuit chose to base its holding on one of these aspects alone. Because the Second Circuit committed reversible error in the first, prerequisite phase of its analysis, this Court need not (and doubtless should not) reach the second phase of the Second Circuit's analysis.

It is true that the Second Circuit misapprehended critical parts of the record when it erroneously found that "[n]owhere does Constitution claim to have provided" various information referenced in the Denial, *Constitution*

Pipeline, 868 F.3d at 102, App. 32a. Indeed, the court simply ignored the information included among the tens of thousands of pages of material Constitution submitted to NYSDEC in response to NYSDEC's inquiries (information that Constitution had identified in its briefs as relevant to those categories identified by the Second Circuit as lacking sufficient information).[4] *See* Constitution's Opening Brief at 16, 18-19, 21, 46, 49, 51, 54, 57-58, 60-61, 64; Constitution's Reply Brief at 16-18, 23.

It is also true that the Second Circuit's finding that NYSDEC "repeatedly requested" trenchless feasibility information for all stream crossings is incorrect. *See Constitution Pipeline*, 868 F.3d at 102, App. 31a. Nowhere in the record is there a request from NYSDEC to Constitution stating that "*all* 251 stream crossings must be evaluated for . . . trenchless technology," *id.* at 96, App. 16a (emphasis in original).

But it is easy to see how these factual errors may have crept into the Second Circuit analysis. Both NYSDEC and Catskill claim that NYSDEC lacked sufficient information to issue the water quality certification. In fact, the Court need look no further than the detailed draft water quality certification NYSDEC prepared and circulated to the U.S. Army Corps of Engineers on July 20, 2015, seeking its prompt review and comment in light of the apparent imminence for issuance of the Section 401 Certification, to see how misleading these post-hoc claims are. *See* JA2219-JA2241.

---

4. NYSDEC's mischaracterizations of the record presented a distorted account of the agency proceedings upon which the Second Circuit incorrectly relied.

We should not belabor our criticisms of the portrait of the facts of this case, however. The critically important aspect of this case is the simple, straightforward issue of how to apply a crucial federal statute when a state agency makes that application seem far from straightforward as part of a strategy to frustrate federal energy policy.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

PHILIP C. BOBBITT
Herbert Wechsler Professor of Federal Jurisprudence and Director for the Center for National Security
COLUMBIA LAW SCHOOL
Jerome Greene Hall, Room 720
435 West 116th Street
New York, NY 10027

ELIZABETH U. WITMER
SAUL EWING ARNSTEIN & LEHR LLP
1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087

JOHN F. STOVIAK
Counsel of Record
PATRICK F. NUGENT
SAUL EWING ARNSTEIN & LEHR LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102
(215) 972-1095
john.stoviak@saul.com

ANDREW T. BOCKIS
SAUL EWING ARNSTEIN & LEHR LLP
Two North Second Street, 7th Floor
Harrisburg, PA 17101

Counsel for Petitioner

April 9, 2018