

No. 19-1039

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IN THE  
**Supreme Court of the United States**

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PENNEAST PIPELINE COMPANY, LLC,  
*Petitioner,*

v.

STATE OF NEW JERSEY, *et al.*,  
*Respondents.*

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

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

—————  
CATHERINE E. STETSON  
*Counsel of Record*  
SEAN MAROTTA  
HOGAN LOVELLS US LLP  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5600  
cate.stetson@hoganlovells.com

*Counsel for Amicus Curiae*

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**BRIEF *AMICUS CURIAE* OF COLUMBIA GAS  
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**STATEMENT OF INTEREST**

Columbia Gas Transmission, LLC, submits this brief as *amicus curiae* in support of Petitioner.<sup>1</sup>

The Columbia pipeline system serves millions of customers from New York State to the Gulf of Mexico. Columbia transports an average of three billion cubic feet of natural gas a day and covers hundreds

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<sup>1</sup> No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amicus curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.



of communities. Columbia’s network of 12,000 miles of pipelines and 37 storage fields in four States ensures the heat stays on and businesses function, even when demand increases.

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

Columbia understands this reality better than most. Like PennEast here, Columbia has found its ability to complete a necessary natural-gas project stymied by a judicial decision holding that the Natural Gas Act’s delegated eminent-domain power does not allow a pipeline to condemn state-owned land without the State’s consent. *See Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, in Washington Cty., Md.*, No. 1:19-cv-01444-GLR (D. Md. Aug. 22, 2019), *appeal docketed*, No. 19-2040 (4th Cir. Sept. 25, 2019). Columbia therefore writes to emphasize that Congress intended States’

pipeline concerns to be accommodated through the FERC certificate process and to highlight the hold-up problems that the decision below exacerbates, allowing States to delay or even defeat critical, federally approved infrastructure on pretextual bases.

### **SUMMARY OF ARGUMENT**

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

II. The court of appeals also creates the hold-up problem that eminent domain was supposed to solve. Pipelines—for regulatory and engineering reasons—must adhere to published routes that have limited flexibility. That makes it nearly impossible for FERC-regulated pipelines to assemble rights of way in secret or to simply route around an obstinate landowner, which in turn allows a sufficiently opposed landowner to delay or block a project by refus-

ing to sell. Eminent domain breaks the logjam by compelling a sale for constitutionally guaranteed just compensation.

The court of appeals' decision allows States to hold up projects on NIMBY, ideological, or pretextual grounds by refusing to sell their interests in land over which a pipeline must cross, even after their full participation in FERC proceedings. Indeed, the court of appeals' decision—by allowing *any* state-owned interest in a property to not be condemned without the State's consent—potentially allows private landowners to coordinate with States by conveying an easement to the State for the express purpose of blocking a natural-gas project.

The logic of the court of appeals' decision is not limited to the Third Circuit. Columbia, too, has found its efforts to build additional pipeline stymied by a State—this time, Maryland—refusing to sell an easement over a small plot of state-owned land and refusing to consent to condemnation. A Maryland district judge agreed with Maryland's sovereign-immunity argument, leaving Columbia currently unable to complete a project that FERC has found in the public convenience and necessity. The Court should put a stop to state obstructionism by making clear that the Natural Gas Act delegates *all* of the United States' eminent-domain powers to pipelines, including the United States' power to condemn state-owned land.

The petition should be granted.

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

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

1. In the Natural Gas Act, “Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988). One way in which Congress occupied the field is through the Natural Gas Act's Section 7, which provides that no natural-gas company may engage in the transportation or sale of interstate natural gas—or build or expand interstate natural-gas infrastructure—without first obtaining a “certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.” 15 U.S.C. § 717f(c)(1)(A). The Commis-

sion, in turn, will issue a certificate of public convenience and necessity only if it concludes that “the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder” and that “the proposed service \* \* \* to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity.” *Id.* § 717f(e). Otherwise, the “application shall be denied.” *Id.*

The Commission’s review process is extensive. The Natural Gas Act requires that FERC set an application for a certificate of public convenience and necessity “for hearing and \* \* \* give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under” the Commission’s rules and regulations. *Id.* § 717f(c)(1)(B). And the Commission takes its certificate-review process seriously. One study found that it took over a year-and-a-half for a major project to go from submission to certification. U.S. Gov’t Accountability Office, GAO-13-221, *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary* 26 (Feb. 2013), <https://tinyurl.com/rjh6fzo>. And even minor projects took about seven-and-a-half months for FERC to complete its regulatory review. *Id.*

The FERC process for a major project begins with the “pre-filing” process. *See* 18 C.F.R. § 157.21. During the pre-filing process, the developer “notifies all stakeholders—including *state*, local, and other federal agencies, and potentially affected property

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

The developer then submits a formal certificate application to the Commission. 18 C.F.R. § 157.6. A certificate application is comprehensive and includes notification to “all affected landowners and towns, communities, and local, *state* and federal governments and agencies involved in the project.” *Id.* § 157.6(d)(1) (emphasis added). An affected State, like any other affected entity, can intervene and protest the application by submitting comments on any matter relevant to the intervenor, including a pipeline’s necessity, its environmental impact, or its route. *Id.* § 157.10(a) (permitting “any person” to intervene); *id.* § 385.211(a)(1) (permitting “any person” to “file a protest”); *id.* § 385.102 (defining a “person” as including “a State”); *see also id.* § 380.10 (Commission regulations permitting public participa-

tion on environmental issues in certificate proceedings).

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

2. The Commission proceedings in this case show FERC's solicitude towards States and their agencies in the certificate process. The Commission addressed comments from the New Jersey Department of Environmental Protection (NJDEP), adding environmental conditions to PennEast's certificate to protect New Jersey natural resources. *See, e.g., PennEast Pipeline Co.*, 162 FERC ¶ 61,053, at P 114 (Jan 19, 2018) (adding an environmental condition that "sufficiently addresses NJDEP's concerns" and that "appropriately mitigate[s]" any "adverse impacts on significant paleontological resources"); *id.* P 135

(adding an environmental condition “that PennEast file a final project-specific Wetland Restoration Plan developed in consultation with the \* \* \* applicable state agencies in Pennsylvania and New Jersey”). The Commission also stressed that PennEast would adhere to certain NJDEP requirements to mitigate the pipeline’s environmental impact—a success of the state consultative process. *See, e.g., id.* P 129 (noting that PennEast would complete and submit outstanding field surveys to NJDEP before beginning construction); *id.* P 138 (noting that “PennEast will adhere to the recommendations and requirements of NJDEP-Division of Fish and Wildlife in order to avoid or minimize impacts on” certain species, “including completing all necessary surveys for state species”); P 141 (noting, in response to NJDEP comments, that PennEast will set aside “permanent conservation of forest lands in key watersheds and reforest areas within the same municipality in which the impact occurs; or develop mitigation measures for restoring areas of temporary project impacts in New Jersey”).

To be sure, the Commission did not agree with all of New Jersey’s objections. But the Commission considered the State’s arguments and explained why it disagreed with them. The New Jersey Division of Rate Counsel, for instance, objected that the PennEast Pipeline was unnecessary because there was “little or no forecasted load growth in New Jersey.” *Id.* P 20. The Commission, in response, explained that under its Certificate Policy Statement and D.C. Circuit precedent, it did not have to look beyond the contractual commitment PennEast received for nearly all of the new pipeline’s capacity. *Id.* P 27. The Commission also rejected the Division of Rate



Counsel’s argument that PennEast was receiving too great a rate of return on its equity investments, explaining that PennEast’s 14-percent rate of return reflected the fact that pipelines “undertaken by a new entrant in the market face higher business risks than existing pipelines,” including “higher risks in securing financing.” *Id.* P 59. But even then, the Commission accepted the Division of Rate Counsel’s objection in part, requiring PennEast to modify its capital structure—again reflecting the importance of State participation in the certificate process. *Id.* P 58.

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

Still dissatisfied, NJDEP and the Division of Rate Counsel petitioned the D.C. Circuit to review the Commission’s certificate and rehearing orders. *See New Jersey Dep’t of Env’tl. Prot. v. FERC*, No. 18-1144 (D.C. Cir.); *New Jersey Div. of Rate Counsel v. FERC*, No. 18-1233 (D.C. Cir.). And in their brief, NJDEP and the Division of Rate Counsel renewed

their arguments that the PennEast Pipeline was unneeded and that the Commission’s environmental and rate-of-return analyses were deficient. *See* Joint Brief of Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of the Rate Counsel, at 15-39, *Delaware Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. Dec. 21, 2018). New Jersey, in short, has been diligently channeling its objections to the PennEast Pipeline through the Natural Gas Act’s prescribed pathways that allow for consideration by impartial, federal adjudicators.

3. New Jersey—or any State—would not have to go through the trouble of pursuing its Natural Gas Act remedies—indeed, of participating at all in the FERC process—if all it had to do to block a natural-gas project is object to a sliver of its land being appropriated for just compensation. The decision below allows States to circumvent the Natural Gas Act’s reticulated process for considering opposition to natural-gas infrastructure. Rather than participating in the pre-filing process, intervening in the formal certificate proceeding, filing comments, seeking rehearing, and ultimately litigating if necessary, States can simply veto a project by refusing to sell or allow its property interests necessary to construct a pipeline to be condemned. That cannot be what Congress intended. This Court rejects interpretations of statutes that are “inconsistent with the statute’s design and structure,” *University of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013), and it beggars belief that Congress intended to let States frustrate the detailed federal system for resolving objections to natural-gas infrastructure through a loophole in the Natural Gas Act’s broad

delegation of eminent domain. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

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

## **II. THE DECISION BELOW CREATES A SIGNIFICANT HOLD-UP PROBLEM FOR PIPELINES WITH FERC-APPROVED ROUTES, AS COLUMBIA'S EXPERIENCE SHOWS.**

The court of appeals' decision undermines the entire purpose of eminent domain: Overcoming “not in my backyard” or other holdouts that oppose necessary natural-gas infrastructure. Opposition from certain States to natural-gas development has been increasing in recent years, and—as Columbia's experience shows—decisions like the court of appeals' below can delay or derail essential projects. Indeed, the decision below could give holdout *land-owners* new weapons in their rear-guard actions against Commission-approved projects, taking the risk beyond just States.

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

Natural-gas-pipeline developers face a particular problem in assembling the rights-of-way necessary for their projects. A developer must publicly file a detailed route map, and must notify landowners when the proposed route runs through or next to their properties. *See* 1 Office of Energy Projects, Fed. Energy Regulatory Comm’n, *Guidance Manual for Environmental Report Preparation: For Applications Filed Under the Natural Gas Act*, at 2-1 to 2-3 (Feb. 2017), <https://tinyurl.com/w3uec8r> (landowner-notification requirement); *id.* at 4-17 to 4-22 (route-map requirement). Once identified, pipelines’ ability to modify routes in response to landowner resistance is limited by local topography and project engineering specifications. *See* Fed. Energy Regulatory Comm’n, *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?* 8 (Aug. 2015), <https://tinyurl.com/y73qr6p3>.

This confluence of factors makes natural-gas projects ripe for hold-up by holdouts. A landowner that

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

The Natural Gas Act’s delegation of eminent-domain powers ensures a fair trade-off: Pipelines can obtain their necessary rights-of-way, and landowners are constitutionally guaranteed just compensation for their taken property. See *United States v. Reynolds*, 397 U.S. 14, 15-16 (1970) (explaining that the Fifth Amendment promises a landowner “the full monetary equivalent of the property taken” and that the landowner “be put in the same position monetarily as he would have occupied if his property had not been taken”). Eminent domain solves the holdout problem while protecting all parties’ rights.

2. Resistance to natural-gas infrastructure is not limited to private landowners. Government officials—either in response to constituent pressure or as a result of their own policy preferences—may also oppose interstate natural-gas infrastructure. Indeed, “the primary impediment to timely development of

natural gas infrastructure projects, historically, has been delay at the state level.” Joan M. Darby et al., *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005 — Consultation, Preemption, and Cooperative Federalism*, 6 Tex. J. Oil Gas & Energy L. 335, 384 (2011).

Congress understood that. The Natural Gas Act therefore broadly preempts state and local regulations that stand in the way of needed natural-gas infrastructure, lest “agencies with only local constituencies \* \* \* delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need.” *National Fuel Gas Supply Corp. v. Public Serv. Comm’n of New York*, 894 F.2d 571, 579 (2d Cir. 1990).

The Natural Gas Act preempts any state or local regulation that would prevent a natural-gas developer from building FERC-approved infrastructure in the location or in the manner dictated by its Commission certificate. *See, e.g., id.* at 575-579 (state environmental-review statute preempted by FERC environmental review); *Millennium Pipeline Co. v. Seggos*, 288 F. Supp. 3d 530, 545 (N.D.N.Y. 2017) (state environmental-permit requirement preempted by FERC certificate); *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 578-579 (D. Md. 2013) (town zoning and land-use provisions preempted by FERC site-suitability determination). This overriding of local regulation reflects Congress’s decision to “place[] authority regarding the location of interstate pipelines \* \* \* in the FERC, a federal body that can make choices in the interests of energy consumers *nationally*.”

*National Fuel Gas Supply*, 894 F.2d at 579 (emphasis added).

But state resistance to natural-gas infrastructure remains strong. Some States have used their delegated authority under certain federal environmental statutes, such as the Clean Water Act, to block interstate natural-gas pipelines on pretextual grounds. See Craig Stevens, *Cuomo's War on Pipelines Means Pain for Little People*, N.Y. Post (Sept. 12, 2019), <https://tinyurl.com/yx2yp59j> (detailing New York's resistance to new natural-gas infrastructure); see also Jeff Brady, *Activists Have a New Strategy to Block Gas Pipelines: State's Rights*, NPR (Aug. 20, 2018), <https://tinyurl.com/vlybdgy> (detailing environmental activists' attempts to block pipeline projects through States' power to issue delegated federal permits). But pipelines have at least *some* remedy for States that twist federal law in an attempt to block natural-gas development on political grounds; the Natural Gas Act grants them expedited judicial review in the circuit court of appeals. See 15 U.S.C. § 717r(d)(1). That review keeps States from "kill[ing] a project with a death by a thousand cuts." *Islander E. Pipeline Co. v. Connecticut Dep't of Env'tl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (quoting *Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res.*, 109th Cong. 41 (2005) (statement of Mark Robinson, Director, Office of Energy Projects, FERC)).

3. The decision below, however, gives States a veto that no existing federal preemption or fast-track judicial review can overcome. Under it, a State can defeat a pipeline that must cross land in which the State claims a property interest simply by refusing to

sell the interest to the developer at any price. See Pet. App. 30a. In the face of a State veto, a developer must either hope that its FERC-approved route can be modified to avoid state-owned land—potentially with additional impacts on the environment and other land owners—or give up on the project. Moreover, avoiding state-owned land can be hard. For instance, New York—one of the most-vociferous objectors to new natural-gas infrastructure—claims an interest in nearly 4.9 million acres of land, including conservation easements. *State Land Acreage by Classification*, New York State Dep’t of Env’tl. Conservation (Sept. 2018), <https://tinyurl.com/rgmvpv6>. And a State can exercise its veto in its role as property owner no matter how many customers its decision may harm in its own or in other States. See Robert Bryce, Manhattan Inst., *Out of Gas: New York’s Blocked Pipelines Will Hurt Northeast Consumers* (June 25, 2019), <https://www.manhattan-institute.org/natural-gas-shortage-northeast> (explaining how New York’s opposition to new natural-gas infrastructure will harm not just New Yorkers, but customers in adjoining Massachusetts).

The threat from the decision below is amplified because it allows States to exercise vetoes over FERC-approved pipelines not just when the State has a possessory interest in the property, but when the State owns *any interest* in the property. In the decision below, for instance, New Jersey’s interest in most of the properties was a “conservation \* \* \* easement,” where the property owner conveys a promise to maintain the property for “recreational, conservation, or agricultural use.” Pet. App. at 4a n.4 & 5a; *Estate of Gibbs v. United States*, 161 F.3d



242, 243 n.1 (3d Cir. 1998) (explaining New Jersey’s use of conservation easements).

In the hands of a sufficiently motivated private landowner and a like-minded State or state agency, such conveyances can allow private landowners to exercise a veto over FERC-approved pipelines. All the landowner needs to do is convey a conservation easement over the pipeline’s proposed right-of-way to the State, and the easement will become an impenetrable barrier to the pipeline’s development. And landowners need not necessarily be limited to long-term conservation easements. Suppose, for instance, a State and landowners were to agree that the State had a conditional easement over a pipeline’s planned right-of-way only so long as the pipeline continues to pursue development. That could allow a State and landowner to stop an unwanted pipeline without the landowner giving up anything of value to him. The State thus can create a property interest for the sole purpose of frustrating pipelines’ eminent-domain rights. That is precisely the kind of private-party hold-up that the Natural Gas Act and its delegation of eminent domain were enacted to prevent.

4. The rationale of the decision below is spreading, threatening more than just PennEast. Columbia is the sponsor of the Eastern Panhandle Expansion Project, which will provide up to 47,500 dekatherms per day of incremental firm transportation<sup>2</sup> service to

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<sup>2</sup> A dekatherm is about equal to 1,000 cubic feet of natural gas. *Guide to Market Assessments: Glossary*, Fed. Energy Regulatory Comm’n, <https://tinyurl.com/vacdm33> (definition of “MMBtu”). In FERC parlance, “firm” service is guaranteed, as opposed to

markets in West Virginia. *Columbia Gas Transmission*, 164 FERC ¶ 61,036, at P 4 (July 19, 2018). The Eastern Panhandle Expansion Project will consist of a little more than three miles of pipeline stretching from Fulton County, Pennsylvania, through Washington County, Maryland, and end in Morgan County, West Virginia, and will cost \$24.97 million. *Id.* PP 4, 6. The Project is fully subscribed by a local distribution system, Mountaineer Gas Company, for a 20-year term. *Id.* P 5.

The Commission’s environmental-assessment process included consultation with the Maryland State Historic Preservation Office, which concluded that the Project will not have an effect on historic properties. *Id.* P 71. The Commission also directed Columbia “to adhere to state conditions for permits,” including those conditions imposed by Maryland law, except to the extent they would frustrate Columbia’s project. *Id.* P 74. After considering all the comments submitted, the Commission concluded that “[b]ased on the benefits the project will provide and the lack of effects on,” among others, “landowners and surrounding communities,” the “public convenience and necessity requires approval of” the Project. *Id.* P 16.

Columbia was able to negotiate the voluntary acquisition of easements for all of the privately owned property impacted by the Project. Declaration of Jacob Haney, P.E., ¶ 19, *Columbia Gas*, No. 1:19-cv-01444-GLR (May 16, 2019), Dkt. No. 2-1. Columbia was not, however, able to negotiate an easement over

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“interruptible” service, which is not. *Georgia Indus. Grp. v. FERC*, 137 F.3d 1358, 1360 n.6 (D.C. Cir. 1998).

0.12 acres of land owned by the Maryland Department of Natural Resources, a Maryland state agency. *Id.* ¶ 13. After extensive negotiations, Columbia offered Maryland \$5,000 for its required easement, well in excess of the easement’s appraised value. *Id.* ¶ 15. But Maryland’s Board of Public Works refused to approve the Department of Natural Resources’ conveyance of the easement to Columbia. *Id.* ¶ 17.

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

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

on a pipeline's behalf). Yet the district court confessed that the question presented "is not particularly clear in this circumstance." 8/21/19 Hearing Transcript, *supra*, at 18.

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

### CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

CATHERINE E. STETSON

*Counsel of Record*

SEAN MAROTTA

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

cate.stetson@hoganlovells.com

*Counsel for Amicus Curiae*

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