

Nos. 19-1039

IN THE
Supreme Court of the United States

PENNEAST PIPELINE COMPANY LLC,
Petitioner,

v.

STATE OF NEW JERSEY, ET AL.,
Respondents.

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

**BRIEF OF THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF
THE UNITED STATES AND CANADA, AFL-CIO;
INTERNATIONAL UNION OF OPERATING
ENGINEERS; INTERNATIONAL BROTHERHOOD
OF TEAMSTERS; LABORERS' DISTRICT
COUNCIL OF EASTERN PENNSYLVANIA; AND
NEW JERSEY STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

ELLEN O. BOARDMAN*
ANNA FRIEDLANDER
MICHAEL A. GILLMAN
O'DONOGHUE & O'DONOGHUE LLP
5301 Wisconsin Ave, NW
Suite 800
Washington, DC 20015
*Counsel of Record
Counsel for Amici Curiae

TABLE OF CONTENTS

| | Page |
|--|------|
| STATEMENT OF INTEREST | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 5 |
| I. THE DECISION BELOW CONFLICTS WITH THE ORDINARY MEANING OF THE NATURAL GAS ACT. | 5 |
| II. THE DECISION BELOW INTERFERES WITH THE NGA’S PURPOSE TO FACILITATE RELIABLE AND EFFICIENT NATURAL GAS SUPPLY NATIONWIDE..... | 9 |
| III. THE DECISION BELOW WOULD HAVE DETRIMENTAL EFFECTS FOR SKILLED CONSTRUCTION WORKERS AND LOCAL COMMUNITIES, WHICH OTHERWISE BENEFIT FROM NEW NATURAL GAS INFRASTRUCTURE..... | 14 |
| A. The Decision Below Threatens the Livelihoods of Thousands of Americans Engaged in Natural Gas Infrastructure Construction and Skilled Union Job Opportunities in the Industry. | 14 |
| B. The Decision Below Would Deprive Local Communities of Economic Benefits and Energy Savings. | 17 |
| CONCLUSION..... | 21 |

TABLE OF AUTHORITIES

| | Page |
|---|-------|
| <i>Advocate Health Care Network v. Stapleton</i> , 137 S.Ct. 1652 (2017)..... | 8 |
| <i>California v. Southland Royalty Co.</i> , 436 U.S. 519 (1978)..... | 10 |
| <i>Carcieri v. Salazar</i> , 555 U.S. 379 (2009)..... | 5 |
| <i>Director, Officer of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries</i> , 512 U.S. 267 (1994)..... | 5 |
| <i>Dolan v. U.S. Postal Service</i> , 546 U.S. 481 (2006)..... | 5 |
| <i>In re PennEast Pipeline Co. LLC</i> , 938 F.3d 96 (3d Cir. 2019)..... | 9, 12 |
| <i>Kohl v. United States</i> , 91 U.S. 367 (1875)..... | 6 |
| <i>NAACP v. Fed. Power Comm'n</i> , 425 U.S. 662 (1976)..... | 9 |
| <i>PennEast Pipeline Co., LLC</i> , 164 FERC ¶ 61,098 (2018)..... | 11 |
| <i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988)..... | 10 |
| <i>Thatcher v. Tennessee Gas Transmission Co.</i> , 180 F.2d 644 (5th Cir. 1950)..... | 11 |
| <i>U. S. ex rel. & for Use of Tennessee Valley Auth. v. Powelson</i> , 319 U.S. 266 (1943)..... | 6 |

TABLE OF AUTHORITIES—Continued

| | Page |
|--|---------------|
| Statutes & Regulations | |
| 15 U.S.C. § 717c | 10 |
| 15 U.S.C. § 717f..... | 10 |
| 15 U.S.C. § 717f(b) | 10 |
| 15 U.S.C. § 717f(e)..... | 10 |
| 15 U.S.C. § 717f(h)..... | <i>passim</i> |
| 15 U.S.C. § 717k..... | 10 |
| 16 U.S.C. § 814 | 8 |
| Pub. L. No. 102-486, 106 Stat. 2776 (1992) ... | 8 |
| 18 C.F.R. § 157.14(a)(15) | 10 |
| Other Authorities | |
| Brief of <i>Amici Curiae</i> Interstate Natural Gas Association of America, et al, <i>In re</i> <i>PennEast Pipeline Co.</i> , No. 19-1191 (3d Cir. May 15, 2019)..... | 12 |
| <i>Energy Market Savings: Report and Analysis</i> , Concentric Energy Advisors, Inc. (March 2015), https://penneastpipeline.com/ ConcentricEconomicStudy/concentric- economic-study.pdf | 18 |
| <i>Estimated Energy Market Savings from</i> <i>Additional Pipeline Infrastructure Serving</i> <i>Eastern Pennsylvania and New Jersey:</i> <i>Update for Winter 2017/2018</i> , Concentric Energy Advisors, Inc. (April 2018), https://penneastpipeline.com/wp-content/ uploads/2018/05/PennEast_Concentric_ Update_FINAL_4-24-2018.pdf | 19 |

TABLE OF AUTHORITIES—Continued

| | Page |
|---|---------------|
| Exec. Order No. 13604, 77 Fed. Reg. 18887 (Mar. 22, 2012) | 13 |
| Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017) | 13 |
| Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 15, 2017) | 13 |
| Federal Energy Regulatory Commission Declaratory Order, 170 FERC ¶ 61,064, Docket No. RP20-41-000 (Jan. 30, 2020) | <i>passim</i> |
| H.R. Rep. No. 102-474, 99-100 (1992) | 8 |
| <i>PennEast Pipeline Project Economic Impact Analysis</i> , Econsult Solutions, Inc., Drexel University School of Economics (Feb. 2015) | 15, 17, 19 |
| Plaintiff’s Response in Support of its Motion for an Order of Condemnation and for Preliminary Injunction, <i>Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less</i> , No. 1:19-cv-01444-GLR (D.Md. July 8, 2019) | 12 |
| S. Rep. No. 80-429 (1947) | 7, 8 |
| U.S. Department of Energy, U.S. Energy Information Administration: <i>Electric Power Monthly with Data for December 2019</i> (Feb. 26, 2020), https://www.eia.gov/electricity/monthly/ current_month/epm.pdf | 18 |
| <i>One in Three U.S. Households Faces a Challenge in Meeting Energy Needs</i> (Sept. 19, 2018), https://www.eia.gov/ todayinenergy/detail.php?id=37072 | 18 |

TABLE OF AUTHORITIES—Continued

| | Page |
|---|-------|
| U.S. Department of Transportation, Pipeline & Hazardous Materials Safety Administration: | |
| <i>Pipeline Replacement Background</i> , https://www.phmsa.dot.gov/data-and- statistics/pipeline-replacement/pipeline- replacement-background | 19-20 |
| <i>Pipeline Replacement Updates</i> , https://opsweb.phmsa.dot.gov/pipeline_ replacement/by_decade_installation.asp . | 20 |

STATEMENT OF INTEREST

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“UA”), is an international labor organization representing over 350,000 plumbers, pipefitters, sprinkler fitters, service technicians, and welders. The UA’s membership includes 10,000–11,000 workers who perform pipefitting and welding on pipelines. UA pipeliners have worked on every major pipeline project in the United States.

The International Union of Operating Engineers (“IUOE”) is a diversified trade union that primarily represents operating engineers, who work as heavy equipment operators, mechanics, and surveyors in the construction and pipeline industries; as well as stationary engineers, who work in operations and maintenance in building and industrial complexes, and in the service and petrochemical industries. The IUOE has approximately 400,000 members and 110 local unions in the U.S. and Canada. Operating engineers operate, maintain, and repair all manner of heavy equipment on pipeline projects.

Founded in 1903, the International Brotherhood of Teamsters (“Teamsters”) represents more than 1.4 million hardworking men and women across the U.S., Canada, and Puerto Rico. Teamster members work in a wide variety of industries, including the construction industry. Approximately 3,000 Teamster members nationwide regularly work on pipeline projects, moving material and people to and from construction sites, as well as around construction sites.

The Laborers’ District Council of Eastern Pennsylvania is a council of local unions affiliated with the Laborers’ International Union of North America

(“LIUNA”) having territorial jurisdiction in 29 counties in Central and Northeastern Pennsylvania, including the counties through which the PennEast Pipeline would be constructed. Founded in 1903, LIUNA is a general workers union representing over half-a-million employees in the construction industry and in public service in the United States and Canada. As the union of record in both Canada and the United States holding undisputed jurisdiction over the craft of construction laborer, LIUNA represents the men and women throughout North America who are responsible for constructing the buildings, roads, bridges, highways, energy, and other critical infrastructure that makes life in the United States and Canada possible. On pipelines, LIUNA members perform a wide variety of tasks related to clearing the right of way, site preparation, pipe placement, and clean-up and restoration of the landscape after the pipeline is buried.

The New Jersey State Building and Construction Trades Council (“NJ B&CTC”) coordinates activity and provides resources to 15 affiliated trade unions in the construction industry. It represents 13 Local Building Trades Councils, more than 100 local unions and over 150,000 rank and file members within New Jersey—including many who are members of the UA, IUOE, LIUNA, and Teamsters who regularly perform work on pipeline projects in New Jersey and the surrounding area. Created in 1903, the NJ B&CTC has helped its affiliated building trades unions to make job sites safer, deliver apprenticeship and journey-level training, organize new workers, support legislation that affects working families, and assist in securing improved wages, hours, and working conditions through collective bargaining and project labor agreements.

Amici (collectively referred to herein as the “Pipeline Crafts”) represent the thousands of union work-

ers who would perform all aspects of pipeline construction on the PennEast Pipeline (the “Project” or the “Pipeline”). PennEast has committed to constructing the Pipeline under the terms of the National Pipeline Agreement (“NPLA”), a collective-bargaining agreement that would require contractors hired to construct the Pipeline to utilize members of the Pipeline Crafts to perform the work. The NPLA requires contractors to pay wages that allow workers to earn a high standard of living, health benefits for themselves and their families, and pension contributions for all hours worked. Under the NPLA, employers also make hourly contributions to training funds jointly run by the Pipeline Crafts and signatory contractors, which ensure that workers are up-to-date on the skills necessary to build the safest pipelines and allow new members to enter the trade and develop those skills.

The Petitioner and Respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Section 7(h) of the Natural Gas Act (“NGA”) grants “the right of eminent to domain” to “any holder of a certificate of public convenience and necessity” issued by the Federal Energy Regulatory Commission (“FERC”) in order to secure “the necessary land or other property” to build, operate, and maintain natural gas infrastructure. 15 U.S.C. § 717f(h). For decades, this transfer of “the right of eminent domain” to private companies was understood by all involved to include the right to use eminent domain over private and State-owned land alike. The text, statutory history, and context of Section 7(h), as well as related precedent, confirm that this interpretation was correct. The full grant of eminent domain to natural gas

companies is an extension of federal power and was added to the NGA in recognition of private companies' necessary role in developing U.S. natural gas infrastructure.

Nevertheless, the Third Circuit, in its decision below, incorrectly held that a State's 11th Amendment sovereign immunity prevents a private company from initiating a condemnation proceeding concerning State land despite the NGA's grant of the federal government's power of eminent domain to such companies. The decision below thus allows any State, on its own initiative, to block construction of a project permitted under the NGA for any reason or for no reason at all, as long as the State has an ownership interest in any of the land needed for the project. It thus seriously dilutes the NGA's grant of the federal eminent domain authority to private companies seeking to construct necessary natural gas infrastructure and renders it useless as to lands in which a State has a property interest. It effectively allows States to reject the reasoned, statutorily-guided judgment of FERC in favor of their own evaluation of a project, which need not be based on anything other than politics.

This result directly conflicts with federal policy favoring efficiency in the pipeline approval process. It will have serious and long-lasting negative consequences not only for natural gas companies, but also for the socioeconomic welfare of thousands of American workers and consumers, and the overall condition of U.S. energy infrastructure in the immediate and long-term future. *Amici* urge the Court to grant certiorari on the petition in order to restore the correct interpretation and application of the NGA so that approval and construction of natural gas infrastructure remains accessible and efficient going forward.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE ORDINARY MEANING OF THE NATURAL GAS ACT.

Statutory words and phrases must be interpreted according to their “ordinary meaning . . . as understood when the [statute] was enacted.” *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009). *See also Director, Officer of Workers’ Comp. Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (“This Court presumes that Congress intended [a statutory] phrase to have the meaning generally accepted in the legal community at the time of enactment.”). Any such interpretation “depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006).

In this case, Section 7(h) of the Natural Gas Act establishes a procedure under which “any holder of a certificate of public convenience and necessity” that is unable to agree on compensation for “the necessary right-of-way” and “the necessary land or other property” to fulfill the certificate, “may acquire the same by the exercise of the right of eminent domain.” 15 U.S.C. § 717f(h) (emphasis added). This grant of the power of eminent domain is unqualified, providing no special rule applicable to State-owned lands.

Furthermore, it is clear that Congress understood “the right of eminent domain” to include the right to file a condemnation suit against a State. By the time Congress added Section 7(h) to the NGA, it was well established that “[t]he right of the United States to exercise the power of eminent domain is ‘complete in

itself and ‘can neither be enlarged nor diminished by a State.’” *U. S. ex rel. & for Use of Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 279 (1943) (quoting *Kohl v. United States*, 91 U.S. 367, 374 (1875)). See also *Kohl*, 91 U.S. at 374 (holding that no State may “prescribe the manner in which [eminent domain] must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.”). Therefore, when Congress gave private parties “the . . . right of eminent domain” in Section 7(h) of the NGA, the ordinary meaning of that grant included the limitation on States’ ability to resist it.

In addition, the context and purpose of Section 7(h) clearly show that Congress intended for it to authorize private certificate holders to utilize eminent domain against States and private entities alike, on the same basis as the federal government. The legislative history is replete with evidence that Congress intended for Section 7(h) to give private companies that right specifically because States, at the time, were interfering with private pipeline companies’ attempts to construct natural gas pipelines that had received certificates of public convenience and necessity from FERC and for the purpose of preventing States from doing so. See Petition for Writ of Cert. at 6-11; FERC Declaratory Order, 170 FERC ¶ 61,064, Dkt. No. RP20-41-000, ¶¶ 40-41 (Jan. 30, 2020) (hereinafter, “FERC Decl. Order”).

One need look no further for this context and purpose than the Senate Committee on Interstate and Foreign Commerce’s report recommending passage of Section 7(h). The Committee’s report presents, as the sole justification for its recommendation, the problem

of States denying certificate holders the right to construct natural gas pipelines. See S. Rep. No. 80-429 (1947). Thus, the Committee recommended that Congress, “in carrying out its constitutional authority to regulate interstate commerce should correct . . . the [NGA] by passage of . . . the right of eminent domain [for] those natural gas companies which have qualified under the [NGA] to carry out and perform the terms of any certificate of public convenience and necessity.” *Id.* at 3. The Committee’s report concludes that it would “defeat[] the very objectives of the [NGA],” and FERC’s “exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce,” if States could “nullif[y]” FERC’s certificates by withholding or requiring additional conditions before granting certificate holders the right of eminent domain. *Id.* at 3-4. And yet, 73 years later, this is the exact outcome the Third Circuit’s decision yields.

Until the Third Circuit’s decision below, parties involved in eminent domain under the NGA have generally accepted private companies’ ability to utilize it to obtain all property rights needed—whether from a private party or the State. When the question arose before FERC, the Commission has always held that “the eminent domain grant to persons holding . . . certificates [under the NGA] applies equally to private and State lands.” FERC Decl. Order at 27-30 (quoting *Teneco Atlantic Pipeline Co.*, 1 FERC ¶ 63,203-04 (1977)).

Finally, Congress’s intent and purpose to give certificate holders the full power of eminent domain under Section 7(h) is apparent from other statutory grants of eminent domain that specifically limit the use of eminent domain by private parties over State lands. The Federal Power Act (“FPA”) is the most re-

vealing example of this limiting language. Section 7(h) of the NGA was modeled after Section 21 of the FPA, 16 U.S.C. § 814, which allows a private licensee of a Commission-approved hydroelectric project to utilize eminent domain for lands necessary to construct, maintain, or operate the facility. *See* S. Rep. No. 80-429 at 1. In 1992, Congress passed the Energy Policy Act of 1992, which, in part, amended Section 21 of the FPA to carve out “any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law” from the lands over which a hydropower licensee may exert eminent domain. Pub. L. No. 102-486, 106 Stat. 2776 (1992).¹ If Congress understood the 11th Amendment to prohibit certificate holders under the NGA and similar laws from bringing condemnation proceedings against States, the 1992 amendment to the FPA would be unnecessary and confusing.² *See Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652, 1659 (2017) (explaining that “the presumption [is] that each word Congress uses is there for a reason” and correct statutory interpretation seeks to “give effect, if possible to every clause and word of a statute”). Regardless, Congress did not then nor has it since added a similar limitation to the NGA.

¹ The hydropower licensee, may, however, still exert eminent domain over such lands after a public hearing in the affected community and a finding by FERC that “the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.” Pub. L. 102-486, 106 Stat. 2776 (1992).

² *See also* H.R. Rep. No. 102-474, 99-100 (1992) (explaining that the original text of Section 21 of the FPA “granted a Federal power of eminent domain . . . includ[ing] the power to condemn lands owned by States”).

In the decision below, the Third Circuit found that “nothing in the text of the NGA suggests” that Congress intended the NGA to give private companies the right to bring condemnation suits against States. *In re PennEast Pipeline Co. LLC*, 938 F.3d 96, 100 (3d Cir. 2019). This statement misinterprets the ordinary language of the NGA and ignores the normal rules of statutory interpretation that take into account the context and purpose of the statute and relevant, related precedent. This Court should grant review to correct the Third Circuit’s errors of interpretation and restore the eminent domain rights Congress intended to give certificate holders under the NGA.

II. THE DECISION BELOW INTERFERES WITH THE NGA’S PURPOSE TO FACILITATE RELIABLE AND EFFICIENT NATURAL GAS SUPPLY NATIONWIDE.

In the words of FERC, the Third Circuit’s decision would “allow States to nullify the effect of Commission orders affecting State land—and, apparently, private land in which the State has an interest—through the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate.” FERC Decl. Order at 43. Not only does this result go against the text, purpose, and context of the NGA, *see* Section I *supra*, but it also threatens the public interest—at the heart of the NGA—in ensuring reliable and affordable access to natural gas across the nation.

The NGA’s principal purpose is to serve the “public interest” by “promot[ing] the orderly production of plentiful supplies of . . . natural gas at just and reasonable rates.” *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 670 (1976). To serve this goal, the NGA requires any company proposing to build new or expand

existing interstate natural gas infrastructure to obtain a certificate of public convenience and necessity from FERC before doing so. 15 U.S.C. § 717f. The procedure to obtain a FERC certificate is long and detailed. It requires FERC to find that the proposed action “is or will be required by the present or future public convenience and necessity” and empowers FERC to “attach to the . . . certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e).

FERC’s authority over the certificate continues indefinitely and controls virtually all aspects of the certificate holder’s operations. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) (“The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale.”). For example, FERC controls the rates that may apply to natural gas transportation. 15 U.S.C. § 717c. It also has the authority to ensure that a project is financed in accordance with the public interest and requires companies to file statements of their financing plans and any proposed issuance of securities. 18 C.F.R. § 157.14(a)(15). Officers and directors of natural gas companies are prohibited from profiting from the company’s issuance of securities. 15 U.S.C. § 717k. Certificate holders must also continue the flow of gas indefinitely and cannot abandon any service or facility without FERC finding that either the available gas supply is depleted or “the present or future public convenience or necessity permit such abandonment.” 15 U.S.C. § 717f(b). In the words of this Court, “the flow of gas [is] a service obligation imposed by the [NGA].” *California v. Southland Royalty*, 436 U.S. 519, 525 (1978) (explaining that a natural gas company may not terminate the flow of natural

gas even after its private contract to supply the natural gas terminates without FERC approval).

Congress's delegation of plenary control over the flow of natural gas and the infrastructure that transports it to FERC through the NGA reinforces its intention that private certificate holders are meant to constitute an arm of FERC with eminent domain authority equivalent to the federal government. Indeed, neither FERC nor any other arm of the federal government exercises the federal eminent domain power to build interstate natural gas infrastructure because Section 7(h) only authorizes "any holder of a certificate of public convenience and necessity" to do so. *See* FERC Decl. Order at 38-39. Section 7(h)'s grant of eminent domain to natural gas companies is thus necessary to fulfill the NGA's purpose of ensuring an adequate and affordable supply of natural gas nationwide. *See PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 at 29 (2018). *See also Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950) ("There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility . . .").

In the decision below, the Third Circuit ignores this carefully arranged relationship between FERC and private companies under the NGA. By allowing States to avoid condemnation proceedings for any reason or for no reason at all, the Third Circuit's decision threatens to create large areas of the United States where natural gas infrastructure cannot be built without going to extreme lengths to avoid land in which a State has any interest. The Third Circuit's holding on this

point is especially broad and alarming in that it allowed New Jersey to resist condemnation of all its “property interests” subject to the certificate, including only two parcels in which New Jersey held a “possessory interest” and 40 in which New Jersey held “non-possessory interests—most often, easements requiring that the land be preserved for recreational, conservation, or agricultural use.” *PennEast Pipeline Co.*, 938 F.3d at 100-101.³ The Third Circuit, itself, acknowledged that its holding “may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.” *Id.* at 113.

As such, the Third Circuit’s decision stands in direct opposition to the bipartisan policy goal of timely and reliable authorization and construction of natural

³ Land directly owned by the State includes all State roads and bottoms of navigable water bodies and so would be difficult for a company to avoid in planning natural gas infrastructure, and especially in the context of a pipeline. FERC Decl. Order at 43-44 n.221. Land in which the State has a non-possessory interest would be even more difficult to avoid. See Br. of Amici Curiae Interstate Natural Gas Assoc. of Am., et al, at 31-32, *In re PennEast Pipeline Co.*, No. 19-1191, Doc. 3113239304 (3d Cir. May 15, 2019) (observing that New Jersey has acquired interests in over 850,000 acres of land (the equivalent of 1,300 square miles) through its Green Acres Program and the State Agricultural Development Committee’s activities related to farmland and that selling or donating a property interest through the Green Acres Program is as simple as filling out a two-page form, which is available online). See also Plaintiff’s Response in Support of its Motion for an Order of Condemnation and for Preliminary Injunction at 6, *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less*, No. 1:19-cv-01444-GLR (D.Md. July 8, 2019) (stating that “every single one” of Columbia Gas Transmission’s FERC-regulated interstate pipeline projects in North America, which together transport gas through nearly 10,000 miles of pipeline in ten States, crosses and/or collocates with State-owned property or property interests).

gas infrastructure. In 2012, President Obama issued Executive Order 13604, which recognized the need to “make pipeline infrastructure a priority, ensuring the health, safety, and security of communities and the environment while supporting projects that can contribute to economic growth and a secure energy future.” 77 Fed. Reg. 18887 (Mar. 22, 2012). Executive Order 13604 encouraged federal agencies to “execute Federal permitting and review processes with maximum efficiency and effectiveness...[to] provide a transparent, consistent, and predictable path for both project sponsors and affected communities.” *Id.* In 2017, President Trump issued Executive Order 13766, which reinforced the federal policy of “expedit[ing], in a manner consistent with law . . . approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as . . . pipelines.” 82 Fed. Reg. 8657 (Jan. 24, 2017). Later in 2017, President Trump issued Executive Order 13807, which calls for “coordinated, consistent, predictable, and timely” authorization processes “in order to give public and private investors the confidence necessary to make funding decisions for new infrastructure projects.” 82 Fed. Reg. 40463 (Aug. 15, 2017).

The decision below represents a significant retreat from these policy goals. By effectively giving States the power to halt federally-approved natural gas infrastructure projects, the Third Circuit’s interpretation inserts uncertainty and unreliability into a process meant to be streamlined and efficient. Under these circumstances, it is to be expected that development of U.S. natural gas infrastructure would suffer, as companies would be discouraged from going through the lengthy and costly FERC approval process to obtain a certificate of public convenience and necessity that can be nullified by a State for any reason.

III. THE DECISION BELOW WOULD HAVE DETRIMENTAL EFFECTS FOR SKILLED CONSTRUCTION WORKERS AND LOCAL COMMUNITIES, WHICH OTHERWISE BENEFIT FROM NEW NATURAL GAS INFRASTRUCTURE.

Natural gas infrastructure produces numerous tangible benefits in affected communities. As recognized by Congress in passing the NGA, consumers rely on sound and efficient natural gas infrastructure to keep supply steady and affordable. At the same time, the natural gas industry relies upon predictability in the approval process to remain viable. But it is not only corporate bottom lines that are affected when natural gas infrastructure projects are blocked or subjected to extreme uncertainty. *Amici* represent the union workers who construct these vital infrastructure projects and rely on their availability to earn necessary wages and benefits. The economic activity created by construction also ripples through local communities in the form of local spending, tax revenue, and business development.

A. The Decision Below Threatens the Livelihoods of Thousands of Americans Engaged in Natural Gas Infrastructure Construction and Skilled Union Job Opportunities in the Industry.

As discussed above, the Third Circuit's decision effectively allows States to veto natural gas infrastructure projects at the final stage, after projects have received all approvals required under federal and State law. If these projects are stopped, the jobs they would normally create—including for the Pipeline Crafts' members—also do not materialize, causing immense and widespread harm for American households.

Design and construction of the 115-mile long PennEast Pipeline alone is anticipated to create more than 12,160 total jobs, including 2,500 direct planning and construction jobs, with a total of \$740 million in wages. *PennEast Pipeline Project Economic Impact Analysis 3*, Econsult Solutions, Inc., Drexel Univ. School of Economics (Feb. 2015) (hereinafter “Econsult Report”).⁴ PennEast has committed to fill these construction jobs with skilled union workers from the Pipeline Crafts.

The Pipeline Crafts anticipate that its members would work over 2.45 million hours cumulatively in constructing the PennEast Pipeline and associated facilities, including necessary metering and compressor stations. The Pipeline Crafts expect that construction of the PennEast Pipeline would generate a total of more than \$172 million in wages and fringe benefit contributions for pipeline workers and their families. Included in this amount is approximately \$120 million in wages, \$25.7 million in payments to provide medical and accident benefits for pipeline workers and their families, \$25 million in payments to provide retirement, survivor and disability benefits, and \$1.5 million in payments to provide training, education, and safety programs, including for new entrants to the industry.

These are the exact type of jobs—blue collar, skilled jobs that provide good wages, health coverage, and fund their own training—that are so badly needed in today’s economy. Unfortunately, since delays and obstruction of pipeline permitting have become increasingly common nationwide over the last several years, members of the Pipeline Crafts have seen a corresponding decline in available jobs. With major main-

⁴ After construction, the pipeline would continue to support a number of jobs with an annual \$8.3 million in wages and a total annual economic impact of \$23 million. Econsult Report at 3.

line pipeline projects on indefinite hold due to these delays, the Pipeline Crafts experienced a combined 37.6% decline in hours worked under the National Pipeline Agreement in 2019 compared to 2018.

This type of decline in hours is especially harmful for specialized pipeline workers, who are impacted severely and immediately by downturns in the industry. Although pipeline construction jobs are often described as “temporary,” their temporary nature is exactly what makes them so important. Every opportunity for work that is denied is devastating because pipeline construction workers rely on a steady supply of projects to provide complete incomes and retirement savings for themselves and their families over the course of their careers. When there is not enough work available, pipeline construction workers also often lose eligibility for health insurance through jointly-sponsored union and employer health plans, which often require a minimum number of hours worked during set time periods, *e.g.*, monthly or annually, to establish and maintain coverage. Similarly, retirement benefits are computed based on length of time and/or hours worked and so workers who experience lapses in employment risk not accumulating sufficient pension benefits to make ends meet during retirement.

Workers affected by the unavailability of pipeline jobs may try to get jobs outside of the industry, but these jobs—especially if they are not covered by a collective bargaining agreement—often do not compare in terms of wages and benefits to the skilled pipeline construction jobs for which they have trained. Thus, to the extent an unemployed pipeline worker is able to find a replacement job, that job may well provide inferior wages and benefits.

Roadblocks to pipeline construction and a corresponding decline in available jobs also make the Pipe-

line Crafts less able to accept new members and advance the ones they have. When there is a shortage of jobs or uncertain timelines for permitting, unions cannot accept as many entry-level members as they would otherwise, preventing those workers from receiving the training and other benefits available in the unionized pipeline construction industry.

B. The Decision Below Would Deprive Local Communities of Economic Benefits and Energy Savings.

Roadblocks to pipeline construction also negatively impact local communities that would otherwise prosper from the economic surge accompanying construction and energy savings from the increased availability of natural gas. For example, the PennEast Pipeline would generate an estimated total of \$1.62 billion in economic activity. Econsult Report at 3. It would also create tax revenue gains in Pennsylvania and New Jersey. During design and construction, it is anticipated that the Project would be responsible for a total of \$17.5 million in personal income tax in Pennsylvania and New Jersey. *Id.* at 12. Part of this economic activity and tax revenue would come from the workers on the pipeline, who would spend their earnings largely locally, including on lodging and all the necessities of every day life.⁵

Local consumers also suffer when natural gas infrastructure projects are stopped. Relevant to this case, Pennsylvania and New Jersey residents both

⁵ These economic benefits would not be restricted to the construction period. Operation of the PennEast Pipeline in Pennsylvania and New Jersey would result in a total economic impact of approximately \$23 million on spending on labor, equipment maintenance, and supplies and nearly \$200,000 in income tax revenue to State Governments per year. Econsult Report at 14-15.

pay more for electricity than the nationwide average—20% more than the national average in the case of New Jersey residents. See *Electric Power Monthly with Data for December 2019* Table 5.6.A, U.S. E.I.A (Feb. 26, 2020).⁶ Unaffordable electricity costs are a serious problem that can have severe consequences for American households. For example, the U.S. Energy Information Administration found that nearly one in three U.S. households had faced such difficulty affording the cost of residential energy in 2015 that they had either received a disconnection notice or been forced to reduce expenditures by keeping their homes at unhealthy or unsafe temperatures or by foregoing other basic necessities in order to afford energy costs. *One in Three U.S. Households Faces a Challenge in Meeting Energy Needs*, U.S. E.I.A. (Sept. 19, 2018).⁷

It is into this environment of energy insecurity that the PennEast Pipeline would deliver staggering savings to energy consumers. One economic study of the Project's expected impact—prepared at the time it was proposed and the approval process began—shows that, had the pipeline been part of the local energy infrastructure during the winter of 2013-2014, when conditions were especially cold for a prolonged period of time, consumers in Eastern Pennsylvania and New Jersey would have saved an estimated \$890 million in energy costs. See *Energy Market Savings: Report and Analysis* at 3, Concentric Energy Advisors, Inc. (March 2015).⁸ Several years later, while tied up in a long

⁶ https://www.eia.gov/electricity/monthly/current_month/epm.pdf.

⁷ <https://www.eia.gov/todayinenergy/detail.php?id=37072>.

⁸ <https://penneastpipeline.com/ConcentricEconomicStudy/concentric-economic-study.pdf>.

regulatory process, an updated study showed that the Project would have continued saving consumers money—to the tune of an additional \$435 million in savings in the winter of 2017-2018, when demand was high and natural gas and electric prices were volatile. *Estimated Energy Market Savings from Additional Pipeline Infrastructure Serving Eastern Pennsylvania and New Jersey: Update for Winter 2017/2018* at 3, Concentric Energy Advisors, Inc. (April 2018).⁹ These energy savings, in turn, produce economic benefits in the form of increased economic activity by the affected consumers. In the case of the PennEast Pipeline, a different economic study found that every additional \$10 million in disposable income derived from energy savings could be expected to generate an estimated \$13.5 million of total economic impact and supports 90 jobs. Econsult Report at 16.

Finally, it is worth noting that, to the extent the Third Circuit’s decision allows States to effectively foreclose construction of natural gas pipelines and other infrastructure, it undercuts important federal policy aimed at developing a modern pipeline infrastructure with the most up-to-date safety and efficiency features. In 2011, the U.S. Department of Transportation’s (“U.S. DOT”) Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued a “call to action” to accelerate the repair, rehabilitation, and replacement of the highest-risk, aging pipeline infrastructure. *See Pipeline Replacement Background*, U.S. DOT PHMSA (last visited March 16, 2020).¹⁰ Since that time, the number of pipelines installed be-

⁹ https://penneastpipeline.com/wp-content/uploads/2018/05/PennEast_Concentric_Update_FINAL_4-24-2018.pdf.

¹⁰ <https://www.phmsa.dot.gov/data-and-statistics/pipeline-replacement/pipeline-replacement-background>.

fore 1970 that remain in operation has declined, but still comprises approximately 33% and 45% of gas distribution mainline and hazardous liquid miles of pipeline, respectively. See *Pipeline Replacement Updates*, U.S. DOT PHMSA (last visited March 16, 2020).¹¹ These vintage pipelines are more prone to failure and inefficiency due to inferior and outdated materials, welding techniques, and quality control. *Id.*

In contrast, modern pipelines feature improved pipe coating to protect against corrosion, welding techniques, seam inspection, pressure testing of pipe before it leaves the mill, and in-place hydrostatic pressure testing and inspection. Modern pipelines also utilize cutting edge machinery that passes through the pipe checking for defects like corrosion, cracking, gouges, dents, and weaknesses in welds, among other safety risks. Faced with an inability to build new pipelines under the Third Circuit's holding, pipeline operators will have little choice but to keep using aging, less reliable pipelines that lack modern safety features just to do their best to meet regional energy needs, to the detriment of consumers and local communities.

Given all of these economic and other benefits of new natural gas infrastructure and the jobs and opportunities it creates both directly and indirectly, it is not surprising that federal policy aims to provide efficient and reliable authorization procedures. American workers and communities count on having such procedures in place. By allowing States to stymie this clear policy goal, the Third Circuit has done a grave disservice to American workers and communities.

¹¹ https://opsweb.phmsa.dot.gov/pipeline_replacement/by_decade_installation.asp.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to grant the petition and review the decision below.

Respectfully submitted,

ELLEN O. BOARDMAN*
ANNA FRIEDLANDER
MICHAEL A. GILLMAN
O'DONOGHUE & O'DONOGHUE LLP
5301 Wisconsin Avenue, NW
Suite 800
Washington, DC 20015
(202) 362-0041
*Counsel of Record

Counsel for Amici Curiae

