

No. 19-1039

In The
Supreme Court of the United States

—◆—
PENNEAST PIPELINE COMPANY, LLC,

Petitioner,

v.

STATE OF NEW JERSEY; et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

—◆—
**BRIEF OF THE INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA, AMERICAN GAS
ASSOCIATION AND AMERICAN PETROLEUM
INSTITUTE AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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CORPORATE DISCLOSURE STATEMENT

The Interstate Natural Gas Association of America (“INGAA”) is an incorporated, not-for-profit trade association that represents virtually all of the interstate natural gas transmission pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

The American Gas Association (“AGA”) is an incorporated, not-for-profit trade association that represents local energy companies that deliver natural gas in the United States. AGA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Some AGA member companies are corporations with publicly traded stock.

The American Petroleum Institute (“API”) is an incorporated, not-for-profit trade association that represents all aspects of America’s oil and gas industry. API has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Some API member companies are corporations with publicly traded stock.

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INTEREST OF THE *AMICI CURIAE*¹

These *amici curiae* (“Industry *Amici*”) represent critical infrastructure: the interstate natural gas pipeline industry and companies dependent on pipelines to deliver natural gas across the country.

The Interstate Natural Gas Association of America (“INGAA”) represents virtually all interstate natural gas pipeline companies in the United States. INGAA members transport natural gas through a network of almost 200,000 miles of interstate pipelines and storage facilities.²

The American Gas Association (“AGA”) represents local distribution companies that deliver natural gas. There are more than 74 million retail residential, commercial, government, industrial, and electric generation natural gas customers in the United States, and 95 percent of those customers receive their gas from AGA members.³ AGA’s members are obligated, in

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from the *amici curiae* and their members, and their counsel, made any monetary contribution toward the brief’s preparation and submission. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* further certify that counsel of record for all parties received timely notice of *amici curiae*’s intent to file this brief and provided written consent for *amici curiae* to file the brief.

² See INGAA, *Pipeline Fun Facts*, <https://www.ingaa.org/Pipelines101/Economics/25811/PipelineFunFacts.aspx> (last visited Mar. 10, 2020).

³ See AGA, *About Us*, <https://www.aga.org/about/> (last visited Mar. 10, 2020).

accordance with applicable state law and regulatory requirements, to distribute natural gas transported by interstate pipelines to these customers, and they develop detailed long-term supply and transportation plans to ensure that they can reliably meet the nation's energy requirements. Acquiring necessary pipeline capacity is a critical part of how these companies fulfill their obligation to serve.

The American Petroleum Institute (“API”) represents all facets of the natural gas and oil industry, which supports 10.3 million jobs and nearly 8 percent of the U.S. economy. API’s 600+ members include natural gas and oil exploration, production, refining, marketing, pipeline, service, and supply firms.⁴

Industry *Amici* have substantial and direct interests in continued investment in and development of interstate natural gas infrastructure. These interests are increasingly important because interstate natural gas pipelines have become “[t]he arteries of the Nation’s energy infrastructure.”⁵ The natural gas they move heats 69 million American homes,⁶ generates over 30

⁴ See API, *About API*, <https://www.api.org/about> (last visited Mar. 10, 2020).

⁵ See U.S. Pipeline and Hazardous Materials Safety Admin., *General Pipeline FAQs*, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last visited Mar. 10, 2020).

⁶ See AGA, *Natural Gas Safety Resilience Innovation 2019 Playbook* 61 (2019), <http://playbook.aga.org/#p=61> (last visited Mar. 10, 2020).

percent of the nation's electricity,⁷ provides a key component of fertilizer that feeds our food, and in raw form is a component of many manufactured goods, including medicines, fabrics, plastics, computers, cell phones, furniture, and cosmetics.⁸ Demand for natural gas continues to increase because it is abundant, clean, and affordable,⁹ so additional interstate infrastructure will be needed for the foreseeable future.¹⁰

Industry *Amici* submit this brief because the decision below gravely threatens the continued development of federally approved interstate natural gas infrastructure as well as the ability of the natural gas industry to ensure reliable access to a supply of natural gas adequate to meet the nation's energy requirements. As explained below, this kind of threat is precisely what Congress was trying to avoid when it amended the Natural Gas Act to delegate the federal power of eminent domain to federally approved interstate natural gas pipeline projects.



⁷ See U.S. Energy Info. Admin., *What is U.S. electricity generation by energy source?*, <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (last visited Mar. 10, 2020).

⁸ See INGAA, *Pipelines 101: Economics, Natural Gas Facts, Pipeline Fun Facts*, <https://www.ingaa.org/Pipelines101/Economics/25811/15915.aspx> (last visited Mar. 10, 2020).

⁹ See U.S. Energy Info. Admin., *Annual Energy Outlook 2020*, <https://www.eia.gov/outlooks/aeo/> (last visited Mar. 10, 2020).

¹⁰ See INGAA, *North American Midstream Infrastructure Through 2035: Significant Development Continues* 37 (June 18, 2018), <https://www.ingaa.org/File.aspx?id=34703>.

SUMMARY OF THE ARGUMENT

The decision below works a seismic shift in federal law applicable to the operation and development of critical interstate natural gas pipeline infrastructure: it allows States a unilateral and unconstrained veto, subject to their sole discretion, over federally approved interstate pipeline projects and routes based on an unprecedented view of the Eleventh Amendment. This shift has profoundly disrupted the system of administering the Natural Gas Act (“the Act”) that has been in place for nearly eighty years.

Industry *Amici* support certiorari review because the practical consequences of this shift are urgent and exceptionally important to the nation’s infrastructure. It is difficult to overstate the scope or scale of the problems that the decision below creates. Most federally approved interstate natural gas pipeline projects involve some location on state land interests. Any State may now delay or halt the development of necessary infrastructure simply by acquiring (or being gifted) a property interest (and not even a fee interest) in land in the federally approved pathway of a pipeline. Likewise, any State may now impede the operation of existing infrastructure simply by acquiring (or being gifted) a property interest in a parcel in the pathway of the pipeline that is subject to a renewable easement, crossing permit, or right-of-way license, and then refusing to renew the easement, crossing permit, or right-of-way license. **States now have a mechanism to block the operation and development of**

federally approved interstate infrastructure within their borders, and this is untenable.

Our country has tested such an unconstrained state veto once before, and Congress amended the Natural Gas Act to address the dire consequences that ensued. Congress expressly recognized when it added the eminent domain provision to the Natural Gas Act that its earlier omission of an eminent domain delegation from the Act had created serious problems, including that natural gas often could not cross state lines to get to where it was needed, triggering residential, commercial, and industrial shortages and shutdowns. Certiorari review is essential to give effect to Congress's choice and prevent the many millions of American citizens and businesses who depend on a reliable supply of natural gas from revisiting those calamitous circumstances.

ARGUMENT

I. The decision below has dire practical consequences for the development and operation of the nation's critical infrastructure.

The decision below has dire practical consequences for the development and operation of the nation's critical interstate natural gas pipeline infrastructure. With the stroke of a pen, the decision grants States the power to use their property interests unilaterally to override the federal government's decisions about where to site such infrastructure, even

after the responsible federal agency (the Federal Energy Regulatory Commission, or “the Commission”) has issued the requisite approval for a project – namely, a Certificate of Public Convenience and Necessity (“Certificate”).

The veto power created by the decision below is **unconstrained** – there are no legal standards or criteria for when or how it may be used. There is no requirement that the State even own in fee the property that it seeks to immunize from condemnation: the great majority of New Jersey’s property interests at issue in this case are not fee interests. Moreover, in the world that the decision below has created in the Third Circuit and heralds for other circuits, once a State exercises its veto power, a pipeline company that is building or operating interstate natural gas pipeline infrastructure has no legal recourse to override the State’s veto.

States’ new unconstrained veto also is apparently **perpetual** – it may be exercised even after the Commission has issued a Certificate for an infrastructure project, which necessarily reflects the agency’s conclusion (following a lengthy administrative process in which States may participate) that a proposed interstate pipeline project and its route is in the public convenience and necessity. *See* 15 U.S.C. § 717f(c).

Indeed, the decision below provides States numerous opportunities to thwart federal approval: States may acquire parcels of or interests in property along a proposed pipeline route, wait until after a project is

federally approved to immunize from condemnation parcels along the approved route, or even disrupt the operation of existing infrastructure by refusing to renew previously granted easements, crossing permits, or right-of-way licenses necessary for the pipeline to operate. Alarming, this cycle may repeat as often as a State wishes.

This case illustrates perfectly how a State may force a pipeline company to re-route a proposed project after both industry and federal authorities have sunk many years and expenses into developing a route and obtaining or providing federal approval for it, conducted extensive environmental analyses and reviews, and consulted numerous stakeholder populations (including the States).

Ultimately, if federally approved interstate natural gas pipeline infrastructure is forever vulnerable to a State's unconstrained veto, with no legal recourse, many federally approved pipeline projects may not be completed, and existing infrastructure may not be operable.

Additionally, following the decision below, States likely will have the opportunity to exercise their new veto power in **many, many cases**, including any case involving any property in which the State or any subdivision of the State has any kind of property interest, including property interests that will endure in perpetuity, thereby forever immunizing that property from condemnation for necessary interstate infrastructure. The decision below creates the opportunity for States

to expand their unconstrained veto with relatively little effort: even private landowners may permanently immunize more and larger parcels of privately-owned property from condemnation for interstate pipeline infrastructure by selling a parcel to the State or conveying to the State an inexpensive, easy-to-transfer conservation, agricultural or other easement interest in the property.

In Industry *Amici*'s experience, most federally approved interstate pipeline projects cross some state property interests. In some States, *all* federally approved interstate natural gas pipeline projects developed by a particular company cross state property interests.¹¹ Most States have numerous state highways and roadways that cross the State both north to south and east to west. Most States have numerous streams and creeks in which the State owns the riverbed or other submerged land. Often, rivers form the borders between States. Depending on how States use their new veto powers, each and all of these roadways and waterways could easily become an insurmountable barrier to the development of interstate natural gas pipeline infrastructure.

¹¹ See *Columbia Gas Transmission, LLC v. 0.12 Acres*, No. 1:19-cv-01444-GLR (D. Md.), Doc. 38 at 6 (pipeline's pleading stating that "every single one" of its Commission-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).

This case illustrates the scale of the problem. One of the New Jersey governmental entities that is a respondent, the New Jersey State Agriculture Development Committee, operates a Farmland Preservation Program in which the State offers “valuable incentives to landowners” to sell or gift development easements or fee interests in property to the State to preserve that property for agricultural purposes.¹² A quick glance at just one of the State’s county-level maps reveals that if the State were to use the property interests it has acquired with this program to veto the development of interstate infrastructure on affected parcels of property (as the State has done in this case), it would be extremely difficult and likely impracticable for a pipeline company to re-route the pipeline to avoid those parcels.¹³ To use an unscientific description, the pipeline would need to look like a tangled spaghetti noodle just to get through this one county, if a route were even possible.

Disturbingly, States’ new unconstrained veto power over federally approved interstate pipeline projects is **limited only by each State’s then-current policy whims and desires**. If the rule set forth in the decision below becomes the rule nationwide, federally approved pipeline companies will be unable to apply to

¹² See generally New Jersey Department of Agriculture State Agriculture Development Committee, *Overview*, <https://www.nj.gov/agriculture/sadc/farmpreserve/> (last visited Mar. 10, 2020).

¹³ See Hunterdon County map, *available at* <https://www.nj.gov/agriculture/sadc/farmpreserve/progress/maps/maphunco.pdf> (last visited Mar. 10, 2020).

state courts for relief because States may unilaterally refuse to waive their sovereign immunity in those courts, and federal courts will be unable to enter condemnation orders against any governmental entity or subdivision of a State.

The upshot is that an Eleventh Amendment objection, once raised, necessarily will be fatal to any attempt by a pipeline company to exercise the federal eminent domain power to build or operate interstate pipeline infrastructure. Eager States now have every incentive to try to expand this new power, and they may assert that numerous kinds of state property interests that touch property in the path of a pipeline completely foreclose condemnation of the affected parcels. If the opinion below remains in place, the only limitation on how many projects are delayed, disrupted, or halted, and how fast these effects materialize, will be the political whims of the States.

This case exemplifies this problem and provides a clear roadmap for how a State may tactically maneuver its property interests to advance a discretionary policy agenda. New Jersey historically has acknowledged that interstate natural gas pipeline companies have the authority to exercise the federal eminent domain power to condemn lands in which New Jersey has a property interest. New Jersey's recognition dates as far back as the early 1950s, and it continued until just last year.¹⁴

¹⁴ See Br. of *Amici Curiae* Interstate Natural Gas Association of America, *et al.*, Nos. 19-1191 thru 19-1232 (3d Cir. May 15,

Similarly, New Jersey historically has not resisted condemnation of its property interests under the Natural Gas Act on the basis of the Eleventh Amendment; on the very few occasions that New Jersey even has pleaded an Eleventh Amendment objection, the State has not seriously pursued the argument. Instead, New Jersey governmental entities have an established history of contracting for interstate natural gas pipeline companies with Commission Certificates to access lands in which the State has a property interest, or in the alternative (if state law does not allow the agency to contract for the sale of a property interest) of ultimately allowing “friendly” condemnation actions regarding such properties to proceed to resolution without objection.¹⁵

Put simply, New Jersey has very rarely raised, has never seriously maintained, and (until the decision

2019), at 24-26 & Ex. A (2008 lease agreement between New Jersey Department of Environmental Protection (“DEP”) and federally approved interstate pipeline company reciting that it was executed because 50-year right-of-way agreement executed prior to condemnation had expired); Letter from Ruth Foster, Acting Dir., NJ DEP, to Kimberly Bose, Secretary, FERC (July 25, 2018) (on file in FERC Docket No. PL18-1-000, acknowledging to Commission that Commission Certificate holders may condemn land in which New Jersey has a property interest and urging Commission to take measures to reduce the impact of condemnation on New Jersey’s land preservation efforts).

¹⁵ See, e.g., *Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipeline Co. v. 2.705 Acres of Land*, No. 3:15-cv-00397 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipe Line Co. v. 2.163 Acres of Land*, No. 3:12-cv-07511 (D.N.J. Jan. 10, 2013) (examples of “friendly” condemnation orders involving New Jersey governmental entities).

below) has never prevailed on an Eleventh Amendment argument in connection with condemnation actions brought by interstate natural gas pipeline companies. And yet the State now asserts an aggressive Eleventh Amendment position that is unprecedented in any federal court in the country and which would afford the State a unilateral and unconstrained veto over a federally approved pipeline project.

New Jersey's about-face illustrates perfectly how a change in the political winds in a single State may adversely affect interstate infrastructure development. Indeed, following the decision below, all States have an incentive to avail themselves of the opportunity to frustrate the operation and development of interstate natural gas pipeline infrastructure by raising Eleventh Amendment objections. New Jersey's example leaves no doubt that, absent certiorari review by this Court, other States will have a similar opportunity to wield their property interests to advance a discretionary policy agenda with respect to the development of interstate pipeline infrastructure.

Ultimately, the victims of this circumstance will include not only the interstate natural gas pipeline industry, but also citizens and businesses in neighboring States who are unable to develop and access an adequate supply of natural gas to meet their energy requirements. The local distribution companies that distribute natural gas foresee that this circumstance will frustrate and interfere with their legal obligation to safely and reliably serve such customers.

Finally, States' new unconstrained veto is **unpredictable**. Because States may exercise their veto at any point in the federal approval process (or afterwards), for any reason (or no reason), pipeline companies and the Commission will never know whether or how much difficulty in infrastructure development or operation is just around the corner.

This uncertainty is inherently volatile and disruptive. In a worst-case scenario, it will foreclose the operation and development of federally approved interstate natural gas pipeline infrastructure if pipeline companies are unable to re-route around state property interests, cutting off pipeline companies' ability to transport natural gas to citizens and businesses who depend on it. Residential, commercial, and industrial shortages are not far-fetched.

In a best-case scenario, the mere presence of this uncertainty and risk will be priced into project financing for such infrastructure, diminishing pipeline companies' ability to develop and operate infrastructure sufficient to meet the nation's growing energy needs. Even projects that are entirely self-financed by pipeline companies will be adversely affected, as constant uncertainty in project planning makes such projects more expensive and difficult, if they can even be completed after they are begun.

This problem will not be limited to projects in the Third Circuit, as States in other federal circuits follow New Jersey's lead and assert Eleventh Amendment objections to advance a discretionary policy agenda. The

problem is highly consequential even in only the Third Circuit; the States in the Third Circuit have significant natural gas resources, including substantial portions of the Marcellus and Utica Shale formation, which is found beneath approximately sixty percent of Pennsylvania's total land mass.¹⁶

Ultimately, there can be no serious dispute that States' new unconstrained veto will be extremely disruptive to the operation and development of interstate natural gas pipeline infrastructure in the United States. Alarming, the decision below creates not only the opportunity, but also powerful incentives for these dire consequences to materialize. It opens the door for state governments or governmental entities to succumb to political whims or parochial views of their constituents, to the detriment of other States and their citizens. It creates an incentive for private landowners to sell or gift to States any kind of property interest to avoid condemnation.

Depending on the kind of property interest conveyed, the conveyance may forever immunize a parcel from condemnation for interstate infrastructure. A large number of permanently immunized parcels scattered throughout a State may make the operation and development of pipeline infrastructure in that State impossible.

¹⁶ Marcellus Shale Coalition, *Marcellus and Utica Shale Formation Map*, <https://marcelluscoalition.org/pa-map/> (last visited Mar. 20, 2020).

Ultimately, if a State decides that it wants **no** further interstate natural gas pipeline projects within its borders, the decision below affords a mechanism for the State to pursue that goal. This is unsustainable. In 2018, the United States consumed more energy than ever before, and natural gas consumption reached a record high.¹⁷ Domestic energy companies already are challenged to meet existing peak demand during winter months and have assessed their current and planned future capacity as insufficient to meet forecast demand.¹⁸ As just one example of a concerning forecast in just one area of one State, National Grid assesses for Brooklyn, Queens, Staten Island and Long Island “a gap between expected demand and capacity of supply that grows to a range of 265–415 MDth/day by 2032-2035.”¹⁹

Notably, the Commission issued a Certificate for the PennEast project at issue in this case primarily because of existing demand, placing less emphasis on forecast demand. *See PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at ¶ 29 (2018). Before PennEast even applied for its Certificate, it already had entered into long-term, firm precedent agreements with twelve shippers for approximately 90 percent of the pipeline’s

¹⁷ See U.S. Energy Info. Admin., *Today in Energy* (Apr. 16, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=39092>.

¹⁸ See, e.g., National Grid, *Natural Gas Long-Term Capacity Report for Brooklyn, Queens, Staten Island and Long Island* (“National Grid Report”) (Feb. 2020) at 9, https://millawesome.s3.amazonaws.com/Downstate_NY_Long-Term_Natural_Gas_Capacity_Report_February_24_2020.pdf.

¹⁹ See National Grid Report, *supra* n.18 at 9.

total capacity of approximately 1,107 MDth/day. *See id.* at ¶¶ 1, 28. Standing alone, New Jersey's decision to veto this one pipeline project pertains to an amount of capacity that is of great practical significance to demand for natural gas that is already here and simply waiting to be met.

Given the United States' increasing reliance on natural gas and the concomitant need for new interstate transportation capacity, the scale of the gap between demand and supply is virtually guaranteed to grow if pipeline companies face new and extreme difficulties in developing additional capacity. The United States cannot afford for any State to be off limits for the operation and development of interstate natural gas pipeline infrastructure.

The bottom line is this: certiorari review is essential to ensure that there are boundaries on States' opportunity to interfere with federally approved interstate infrastructure that has been determined to be in the public interest, convenience and necessity. The process of siting, building, operating, and expanding such infrastructure cannot be subject to the unpredictable free-for-all of States' selfish political whims.

In Industry *Amici*'s experience, federally approved interstate natural gas pipeline projects take many years to study, design, permit, and build. As a result, the decision below is a disruptive force now and sows seeds of disruption that will be felt by millions of American businesses and citizens for years to come. As the ability of pipeline companies to complete and maintain

federally approved interstate projects is called into question, uncertainty threatens all stages of project development, planning, and operation. Accordingly, the need for certiorari review in this case is not only acute, but urgent.

II. These practical problems are not theoretical – they are acknowledged by the Third Circuit and emphasized by the Commission, and they were one of the key reasons Congress long ago amended the Natural Gas Act to add the eminent domain delegation.

The profound practical consequences of the decision below are not merely theoretical. As an initial matter, they were expressly acknowledged by the Third Circuit in its decision: the appellate court understood PennEast’s “warn[ing] that [its] holding . . . will give States unconstrained veto power over interstate pipelines, causing the industry and interstate gas pipelines to grind to a halt – the precise outcome Congress sought to avoid in enacting the NGA.” *In re PennEast Pipeline Co., LLC*, 938 F.3d 96, 113 (3d Cir. 2019). In response, the court was “not insensitive to those concerns and recognize[d] 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.*

Likewise, the practical consequences of the decision below have since been emphasized by the Commission, which did not participate in the proceedings

in the Third Circuit. In issuing a rare declaratory order providing its interpretation of how the Natural Gas Act's grant of eminent domain authority to federally approved pipelines is intended to operate, the Commission described the Third Circuit's acknowledgment that its decision would be disruptive as "correct," and predicted that the decision "would have profoundly adverse impacts on the development of the nation's interstate natural gas transportation system, and will significantly undermine how the natural gas transportation industry has operated for decades." *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 56 (2020).

History makes clear that the predictions of the Third Circuit, the Commission, and Industry *Amici* are well-founded: such dire circumstances are a key reason why Congress amended the Natural Gas Act to delegate the federal eminent domain power to interstate pipeline companies with the requisite federal approvals. *See* 61 Stat. 459 (1947).

According to a well-developed legislative history, in the period leading up to the amendment of the Natural Gas Act in 1947, disparate state-law provisions relating to interstate natural gas pipelines posed problems for the development of much-needed interstate infrastructure. *See* S. REP. 80-429 at 2-3 (1947). Multiple States would not grant the right of eminent domain to pipelines that crossed but did not distribute natural gas in that State, and in other States, state law expressly denied the right of eminent domain to federally approved interstate pipelines. *See id.* As a result, federally approved interstate pipelines lacked any

eminent domain authority in numerous States. The expressly stated purpose of the amendment to the Natural Gas Act delegating the federal eminent domain power to federally approved pipelines was to “correct this deficiency and omission” in the Act. *See id.* at 3.

Extensive congressional hearings established that Congress’s earlier omission of an eminent domain delegation from the Natural Gas Act created very serious problems.²⁰ At that time, because 94 percent of the country’s natural gas reserves were located in four contiguous States (Kansas, Oklahoma, Texas, and Louisiana), most natural gas had to be transported across many States to supply heat and energy to the country’s most densely populated areas (such as New York and New Jersey).²¹

Because the pipeline companies could not exercise the federal eminent domain power, and there was no arm of the federal government that condemned land to build natural gas infrastructure, natural gas often simply could not get to where it was needed. Citizens and businesses across the United States suffered serious consequences as a result.

²⁰ *See Amendments to the Natural Gas Act: Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569, and H.R. 2956 Before the H. Comm. on Interstate and Foreign Commerce, 80th Cong. (1947) (“Congressional Hearings”); see also Alexandra B. Klass & Danielle Meinhardt, Transporting Oil and Gas: U.S. Infrastructure Challenges, 100 IOWA L. REV. 947, 996-98 (2015).*

²¹ *See Congressional Hearings, supra n.20, at 544 (statement of David T. Searls, Texas Eastern Transmission Corp.)*

During the Congressional Hearings, the governor of Kentucky submitted a statement that described natural gas shortages during winter that caused that State to limit the availability of natural gas for heat and for industrial purposes.²² A similar statement from the governor of West Virginia addressed industrial shutdowns that left citizens out of work.²³ Members of Congress from States with natural gas shortages voiced support for the eminent domain delegation because it would facilitate the transportation of much-needed gas to citizens and businesses in their States.²⁴

Notably, other testimony at the Congressional Hearings expressly called to members' attention a countervailing concern highly relevant here – namely, that if the proposed eminent domain provision became law, then pipeline companies could use the federal eminent domain power to condemn State property.²⁵ Nevertheless, the eminent domain amendment passed both the House and Senate as it was written, with no exception or limitation restricting any federal delegee from condemning State property under any circumstance. *See* 15 U.S.C. § 717f(h).

Consistent with this result, the Senate Report concluded that if States were permitted to “nullif[y]” federal approvals issued by the Commission by frustrating a

²² *See id.* at 46-48.

²³ *See id.*

²⁴ *See id.* at 622 (statement of Rep. Carson of Ohio).

²⁵ *See id.* at 611 (House committee hearing); *id.* at 105 (Senate committee hearing).

pipeline's exercise of the federal eminent domain power within their borders, that circumstance would "defeat[] the very objectives of the Natural Gas Act," including the Commission's "exclusive jurisdiction, to regulate the transportation of natural gas in interstate commerce." *See* S. REP. 80-429, at 3-4.

This historical evidence makes clear that the United States has been down this road before, that the practical problems of an unconstrained state veto over federally approved interstate infrastructure are grave, and that Congress has taken affirmative, deliberate steps to correct and avoid the very problems that the decision below threatens to revisit. The decision below is irreconcilable with the controlling and unambiguous Act of Congress, not to mention Congress's good, clear, and stated reasons for its chosen solution. Certiorari review is necessary to give effect to Congress's choice and prevent these problems from recurring.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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