No. 19-1039

IN THE

Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,

Petitioner,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* MARCELLUS SHALE COALITION AND PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION IN SUPPORT OF PETITIONER PENNEAST PIPELINE COMPANY, LLC

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INTEREST OF *AMICI CURIAE*[1]

The Marcellus Shale Coalition ("MSC") represents natural gas producers, midstream and pipeline companies, and local supply-chain companies that promote the safe and responsible development of natural gas from the Marcellus and Utica geological formations located in the Commonwealth. In 2019, Pennsylvania accounted for 20% of the nation's natural gas production and produced more natural gas than any state except Texas, due predominately to the advent of development from tight shale formations like the Marcellus and Utica. MSC members produce more than 90% of the unconventional natural gas in the Commonwealth.

The Pennsylvania Independent Oil & Gas Association ("PIOGA") is the largest and oldest association representing oil and natural gas interests in Pennsylvania. PIOGA' s nearly 500 members - many of which are family-owned small businesses - include oil and natural gas producers, marketers, oil and gas field service companies, engineering companies, legal and accounting firms, and royalty owners. PIOGA producer members develop Pennsylvania crude oil and natural gas reserves under private and public lands.

The natural gas industry is often referred to as having three sectors: "Upstream" - the exploration and production (E&P) companies that drill the wells and

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

produce the gas; "Midstream" - the companies that build the pipelines that gather and transport the gas to market; and, "Downstream" - the end users of the gas, such as electric power generating plants or liquefied natural gas facilities and manufacturers. The MSC and PIOGA both have members in all three sectors. This brief addresses the impacts on the upstream sector of the industry since other entities, including Petitioner, address the direct impact of the Third Circuit's decision on the other sectors. Companies that drill for and produce natural gas must rely on pipelines to get that gas to market. The Third Circuit's decision threatens the ability of E&P companies to market their product for the benefit of end users throughout the country.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Third Circuit at *In re PennEast Pipeline Co. LLC*, 938 F.3d 96 (3d Cir 2019), if upheld, will have major negative impacts on the natural gas industry. Those negative impacts will occur not only to the portion of the industry constructing interstate pipelines but will also extend to the "upstream" companies that drill the wells and produce the natural gas. Without adequate pipelines to get their product to market, E&P companies will need to curtail their drilling of new wells, causing a negative impact on those companies and on the good paying, stable jobs they provide. Additionally, royalty owners, including the Commonwealth, will suffer reduced royalties. The reduction in income for workers and landowners will have a cascade effect on the larger economy in Pennsylvania.

The vast and varied interests claimed by states in real estate, both possessory and non-possessory, make it virtually impossible to route an interstate pipeline through a state if that state can prevent a FERC certificate holder from using eminent domain, if necessary, to acquire state lands along the route approved by FERC.

A plain reading of the statute indicates that Congress could not have intended the Natural Gas Act to work in the manner decided by the Third Circuit.

ARGUMENT

The Third Circuit's Decision Will Have a Significant Negative Impact on the Industry's Ability to Supply Essential Natural Gas across the Country

The decision of the United States Court of Appeals for the Third Circuit at *In re PennEast Pipeline Co. LLC*, 938 F.3d 96 (3d Cir 2019), will have major negative impacts on the natural gas industry and the American economy. The Third Circuit opinion itself provides the strongest argument as to why this Honorable Court should reverse the Third Circuit's holding. The Court recognized "that our 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." *In re PennEast* at 113. There can be no doubt that the decision below will greatly disrupt the construction of critical infrastructure, as the court predicted. Indeed, the State of Maryland has asserted the same Eleventh Amendment grounds to block an interstate pipeline in a case now pending in the United States Court of Appeals for the Fourth Circuit. *See Columbia Gas Transmission,* *LLC v. 12 Acres of Land, More or Less*, No. 19-2040 (U.S. Court of Appeals, 4th Cir.).

Hindering the ability to construct interstate pipelines will have far reaching consequences since most states do not produce natural gas in significant quantities. According to the U.S. Energy Information Administration, nearly 70% of the nation's natural gas is produced in just five geographically dispersed states - Texas, Pennsylvania, Louisiana, Oklahoma, and Ohio. *See U.S. Energy Information Administration, Natural Gas Explained, Where Our Natural Gas Comes From,* https://www.eia.gov/energyexplained/natural-gas/where-our-natural-gas-comes-from.php. (last visited February 25, 2021). Therefore interstate pipelines are necessary to transport gas from the producing states to the consumers in other states. The recent devastating black swan, cold weather event that began the second week of February and left millions of people throughout the central and southern United States, especially in Texas, without power and water has shown the need for more, not fewer, interstate pipelines. More power generation from wind and solar energy requires more, not less, natural gas to ensure the reliability and resiliency of the electric grids throughout the country. The only safe and efficient way to get gas to the areas of the country where it is needed is through pipelines[2].

2. The Petroleum and Hazardous Materials Safety Administration has stated that pipelines are the safest means of transportation for natural gas. PHMSA estimates that it would require 750 tanker trucks per day moving out every two minutes twenty-four hours a day seven days a week to replace a modest pipeline. Moving this volume by railroad would require 225 tank cars at 28,000 gallons each. Pipeline & Hazardous Materials

The Third Circuit's Decision Will Have a Significant Negative Impact on the Natural Gas Industry and the Commonwealth of Pennsylvania

The natural gas industry in Pennsylvania produces about 20% of the nation's total natural gas production, and interstate pipelines are essential to getting that gas to market throughout the country. The U.S. Energy Information Administration estimates that over 100 trillion cubic feet of proven gas reserves exist in Pennsylvania. *See U. S. Energy Information Administration, U.S. Crude Oil and Natural Gas Proved Reserves, Year-end 2019, Figure 3, https://www.eia.gov/naturalgas/crudeoilreserves (last visited February 25, 2021).* Stranding these valuable natural resources due to a lack of interstate pipelines would be tremendously wasteful. Adequate pipeline capacity is key to connecting more consumers and manufacturers to the benefits made possible by the abundant natural gas supplies in Pennsylvania. Without adequate means to transport the gas, drilling will be reduced and production will be curtailed. As a result jobs will be lost, mineral owners will lose royalties, and even the Commonwealth's revenues will be negatively impacted in myriad ways.

Natural gas producers lease the natural gas rights from the owner thereof and pay royalties for the gas produced and sold. A study by the Pennsylvania Independent Fiscal Office estimated that natural gas companies annually pay hundreds of millions of dollars to owners and in some

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Safety Administration, General Pipeline FAQs 6, https://www.phmsa.dot.gov/faqs/general-pipeline-faqs (last visited February 25, 2021).

years, depending on the price of gas and production volume, more than a billion dollars. *See Natural Gas Royalties Increase in 2017, Independent Fiscal Office, Research Brief*, January 2020 http://www.ifo.state.pa.us/download.cfm?file=Resources/Documents/RB%202019%20Natural%20Gas%20Royalties.pdf (last visited February 25, 2021). It naturally follows that a decline in drilling and production will hurt the Pennsylvania landowners who are receiving royalties. Included in the ranks of lessors standing to lose royalties, should future pipeline projects be checked, is the Commonwealth of Pennsylvania through its Department of Conservation and Natural Resources and Game Commission, both of which receive royalties through oil and gas leases on state lands.

Numerous economic studies have demonstrated that the natural gas industry supports a wide range of related industries and trades. For example, a study that examined construction jobs related to the shale gas industry found that numerous trades, including boilermakers, operating engineers, electricians, pipefitters, ironworkers, plumbers, laborers, insulators, painters, plasterers, masons, carpenters, sheet metal workers, and teamsters, all benefited from a healthy gas industry. *See* Dr. Robert Bruno & Michael Cornfield, *Study of Construction Employment in Marcellus Shale Related Oil and Gas Industry 2008-2014* University of Illinois, August 2014, https://ler.illinois.edu/wp-content/uploads/2015/01/Marcellusjobsstudy_FINAL.pdf (last visited March 1, 2021). A report released by the U.S. Bureau of Labor Statistics found a significant growth in jobs in the gas industry in Pennsylvania and throughout the Marcellus region, with employment in Pennsylvania growing 121 percent between 2007 and 2016. *See* Monthly

Labor Review, *Shale gas production and labor market trends in the U.S. Marcellus–Utica region over the last decade, https://www.bls.gov/opub/mlr/2018/article/shale-gas-production-and-labor-market-trends-in-the-us-marcellus-utica-region-over-the-last-decade.htm* (last visited March 1, 2021). An earlier study showed a significant increase in average annual income among gas industry workers in Pennsylvania. *See* Monthly Labor Review: *The Marcellus Shale gas boom in Pennsylvania: employment and wage trends*, https://www.bls.gov/opub/mlr/2014/article/the-marcellus-shale-gas-boom-in-pennsylvania.htm (last visited March 1, 2021). All of these jobs and the wages and other economic benefit that flow from them are at risk if the industry is unable to maintain or expand upon existing levels of production due to a lack of interstate pipeline capacity.

Lastly, the Commonwealth of Pennsylvania may suffer a decline in several sources of revenue if production is curtailed. The Commonwealth collects a fee for every shale gas well that is "spud" (i.e. drilled) in the state and continues to collect a fee on that well for a period of 15 years. *See* 58 Pa.C.S. § 2302(b). Through 2020, according to the Pennsylvania Public Utility Commission, the agency that collects the fee, the Commonwealth has collected and distributed over $1.8 billion to state agencies and to local governments. *See PA Public Utility Commission, Act 13 Reports, https://www.act13-reporting.puc.pa.gov/Modules/Reports/Reports.aspx. (last visited March 1, 2021)* [3] A decline in the drilling of new wells due to inadequate interstate pipeline capacity will necessarily lead to less revenue to the Commonwealth.

3. The total distribution is derived from adding together all "Disbursement Report" for the years 2011 through 2019.

Impact fees are not the only Commonwealth revenue source that will be detrimentally affected if natural gas production is curtailed due to the lack of interstate pipeline capacity. The private royalty owners mentioned above pay state income tax on the hundreds of millions of dollars in royalties paid each year. Less production means less royalties and less taxes to the state. As noted above, a wide array of trades benefit from employment in a robust natural gas industry. Those workers also pay income taxes. In addition they purchase goods and services on which they pay sales tax. In turn, local merchants derive increased revenues on which they pay income taxes. All those tax revenues will be in jeopardy if upstream producers are forced to reduce production and lay off workers.

The Third Circuit's Decision Would Make Construction of an Interstate Pipeline through Pennsylvania Virtually Impossible

The potential impact of the Third Circuit's decision can be readily seen by looking at the public land holdings in Pennsylvania, as an example. Although Pennsylvania has not, at this point, asserted Eleventh Amendment immunity from eminent domain proceedings brought pursuant to the Natural Gas Act, 15 U.S.C.S. §§ 717-717z ("NGA"), examining the Commonwealth's interests in land can be instructive, should such a position be motivated by the Third Circuit's holding. The Commonwealth has possessory interests in approximately four million acres.[4] Thus, more than 13.5% of the land area of the

4. According to publicly available information the Commonwealth owns almost 300,000 acres in state parks, 2.2

state[5] is owned in fee by Commonwealth agencies, creating a significant potential obstacle to any interstate pipeline route crossing through Pennsylvania. Those four million acres account for only the lands in which the Commonwealth has a possessory interest and omits lands on which it or a political subdivision of the Commonwealth may hold an agricultural preservation or conservation easement under various conservation statutes. For example, the Pennsylvania Land Trust Association reports that as of 2017 an additional 4 million acres are enrolled in Agricultural Security Areas.[6] The lower Court's opinion is not clear on the exact interest that must be held by a state or state-related entities, but similar non-possessory interests held by the State of New Jersey were assumed to be adequate to invoke Eleventh Amendment immunity.

In fact, the Commonwealth takes a view of its ownership of the land under certain stream beds that would greatly increase the obstacles to construction of a pipeline were Pennsylvania to follow the Third Circuit's

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million acres of state forest lands in 48 of the 67 counties, and 1.5 million acres of state game lands, accounting for approximately four million acres or 6250 square mileshttps://www.dcnr.pa.gov/StateParks/Pages/default.aspx; https://www.dcnr.pa.gov/StateForests/Pages/default.aspx; https://www.pgc.pa.gov/hunttrap/stategamelands/Pages/default.aspx, respectively. (last visited March 1, 2021).

5. 6250 square miles divided by 46,058 square miles - https://www.netstate.com/states/geography/pa_geography.htm (last visited March 1, 2021).

6. https://conservationtools.org/guides/49 (last visited March 1, 2021).

lead. Generally, states, in their capacity as sovereigns, hold title to the beds under navigable waters, whether navigable in law or in fact. See, *PPL Montana v. Montana*, 565 U.S. 576, 590 (2012); *Leaf v. Pennsylvania Co.*, 112 A. 243, 244 (PA 1920). However, Pennsylvania has recently taken a more expansive view of its stream bed ownership, claiming ownership of beds beneath every stream that the Pennsylvania General Assembly has ever designated as a public highway, regardless of their navigability in fact. See, *Shale Gas Development Beneath Publicly Owned Streambeds, https://www.dcnr.pa.gov/Business/StreambedGasLeasing/Pages/default.aspx.* (last visited February 25, 2021). While many individuals and organizations, including the MSC and PIOGA, disagree with the Commonwealth's position, it is instructive to see the significant swaths of Pennsylvania that could be barred from pipeline infrastructure development if Pennsylvania were to adopt the position taken by New Jersey and Maryland. The Pennsylvania Department of Conservation and Natural Resources has produced a map illustrating the stream beds to which it claims ownership. One need only look at that map, included in the Appendix (App. 1a),[7] to see the impossibility of constructing an interstate pipeline through Pennsylvania should the Third Circuit's decision be upheld. Additionally, the Delaware River is clearly a navigable river and forms the border between Pennsylvania and New Jersey, with approximately half of the river's width in each state. Accepting New Jersey's position would allow it to claim an ownership interest in its half of the riverbed and create an impenetrable wall blocking any pipeline or other infrastructure coming from the west.

7. The map can also be viewed at: http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_009716.pdf.

A Plain Reading of the Statute Indicates That Congress Could Not Have Intended the Result Reached by the Third Circuit

Although the MSC and PIOGA will not repeat the arguments of the Petitioner, one point seems apparent. A plain reading of the statute in question would suggest that the Third Circuit strained to avoid the obvious. 15 U.S.C. § 717f(h) provides in relevant part:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

It should be presumed that Congress did not intent an absurd result when enacting a statute. Moreover, the courts should avoid interpretations that produce absurd results or thwart the intent of Congress. *See United States v. Turkette*, 452 U.S. 576, 580 (1981); *Commissioners v. Brown*, 380 U.S. 563, 571 (1965). As the examples noted above illustrate, given the extensive possessory and non-possessory interests in real estate claimed by the states, Congress must have intended to delegate the federal government's power to condemn state property. Otherwise, it would have created a very odd if not absurd situation. Congress would have established a complex process under the NGA for the review and approval of the routing of interstate pipelines only to allow states, after participating in the FERC process and suggesting route changes, as New Jersey did here, to undo that process by claiming that their large land holdings and even larger non-possessory interests could not be acquired by eminent domain. To construe the NGA in such a manner would be to produce an absurd result and thwart the intent of Congress.

CONCLUSION

For the reasons set forth above the Marcellus Shale Coalition and the Pennsylvania Independent Oil and Gas Association support the Petitioner's request to reverse the Third Circuit's decision.

Respectfully submitted,

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