

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* 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
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST

The following parties respectfully submit this brief as *Amici Curiae*.¹

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.,

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *Amici Curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

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, from, and 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 will 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. Many of the workers who the NJ B&CTC rep-

resents 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 make job sites safer, deliver apprenticeship and journey-level training, and organize new workers. The NJ B&CTC supports legislation that affects working families and assists in securing improved wages, hours, and working conditions through collective bargaining and project labor agreements.

The above *Amici Curiae*, collectively referred to herein as the “Pipeline Crafts” or the “Crafts,” represent the thousands of union workers who would perform all aspects of pipeline construction on the PennEast Pipeline (the “Pipeline”). The Pipeline Crafts represent workers who would be severely impacted by the Third Circuit’s decision and the resulting loss of jobs and associated economic benefits caused by the abrupt halting of the PennEast Pipeline. And the negative effects of the Third Circuit’s decision would not be limited to this case. If the decision stands, it would provide a basis for any State to take the same position and effectively stop interstate natural gas pipeline projects at the very last step after all permits have been obtained, just before construction would begin. The Pipeline Crafts therefore urge the Court to reverse the decision below and thus prevent State interference in the Natural Gas Act (“NGA”) certificate process, as intended by Congress and expressed in the NGA.

SUMMARY OF ARGUMENT

Section 7(h) of the NGA grants an unqualified “right of eminent 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 interstate natural gas infrastructure. 15 U.S.C. § 717f(h). The legislative history of Section 7(h) shows that Congress chose to amend the NGA to give certificate holders this express and unqualified right of eminent domain specifically in order to stop State interference with the building of FERC-approved interstate natural gas pipelines.

Nevertheless, in its decision below, the Third Circuit incorrectly found that Congress's grant of eminent domain in the NGA is not equivalent to the federal power of eminent domain and can be trumped by States' sovereign immunity under the 11th Amendment. The Third Circuit's ruling therefore allows a State to reject FERC's statutorily-guided decision to approve a proposed interstate pipeline project in favor of the State's own judgment on whether the project should move forward—the exact result Congress sought to avoid in enacting Section 7(h).

The Third Circuit's decision will have serious and long-lasting negative consequences on the entire natural gas industry, including the many thousands of union workers who have trained extensively to build and maintain the natural gas pipeline infrastructure. What makes this result even more frustrating is the widely-acknowledged fact that the natural gas infrastructure needs to be upgraded and replaced to ensure that it can provide reliable and affordable energy to American consumers. The need for new and upgraded natural gas pipelines is becoming more imperative due to heavy and increasing demand for natural gas and safety risks posed by the large percentage of the nation's natural gas pipeline system that was built 50 or more years ago. These aging pipelines utilize outdated techniques and technology that increase the likelihood of leaks and other dan-

gers compared to modern pipelines, which feature advanced materials and technology that enhance safety and reliability.

The Pipeline Crafts therefore urge the Court to reverse the Third Circuit's decision in order to fulfill the NGA's purpose of streamlining interstate natural gas pipeline approval under the careful process set forth in the statute, free from State interference.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION ESTABLISHES A BROAD PRECEDENT THAT ALLOWS STATES UNILATERALLY TO NULLIFY FEDERAL PERMITS FOR CONSTRUCTION OF NEW NATURAL GAS INFRASTRUCTURE.

The Third Circuit's decision establishes a new and far-reaching interpretation of the NGA under which States will be able to unilaterally prevent interstate pipelines from being built, even after those pipelines have received all required permits and authorizations. In this brief, the Pipeline Crafts will not repeat all of the Petitioner's legal arguments, but do join in them. The Crafts stress, however, that the Third Circuit's interpretation directly conflicts with Congress's purpose in granting eminent domain authority through the NGA to ensure that natural gas infrastructure is built for the public good and specifically that States be prevented from interfering with that purpose.

Section 7(h) of the NGA grants the "right of eminent domain" to "any holder of a certificate of public convenience and necessity" issued by FERC for the construction of an interstate natural gas pipeline. 15 U.S.C. § 717f(h). Section 7(h) was not part of the NGA when it became law in 1938, but was added in 1947 specifically to address the problem of States in-

terfering with FERC's exclusive jurisdiction over interstate natural gas pipelines. The Senate Committee on Interstate and Foreign Commerce's report recommending passage of Section 7(h) presented, as the sole justification for its recommendation, the problem of States attempting to interfere with certificate holders' construction of interstate natural gas pipelines. *See* S. Rep. No. 80-429 (1947). Thus, the Committee recommended that Congress, "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 concluded 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, more than 70 years later, the Third Circuit's decision allows States to nullify a FERC-issued certificate of public convenience and necessity by asserting blanket 11th Amendment sovereign immunity to an eminent domain proceeding, yielding the exact outcome Section 7(h) was designed to prevent. Even more troubling, the Third Circuit rests its decision on the implausible conclusion that "nothing in the NGA indicates that Congress intended" to prevent this result. *See In re PennEast Pipeline Co., LLC*, 938 F.3d 96, 111 (3d Cir. 2019). This Court should reverse the Third Circuit's holding in this regard in order to restore the NGA's purpose, which establishes a process for interstate infrastructure development at the federal level.

II. THE THIRD CIRCUIT'S DECISION THREATENS THE LIVELIHOODS OF THOUSANDS OF AMERICANS WHO BUILD AND MAINTAIN THE U.S. NATURAL GAS INFRASTRUCTURE.

The Pipeline Crafts represent the workers who build and maintain the nation's natural gas pipeline infrastructure. These workers are highly trained and experienced; they possess specialized skills that enable them to perform their work according to the highest standards and most up-to-date techniques. The Pipeline Crafts work under collectively bargained agreements, including the National Pipe Line Agreement ("NPLA"), which guarantee hourly wages commensurate with the Crafts' specialized skills; health insurance; hourly pension contributions and other fringe benefits; good working conditions; and job protections, among other valuable tangible and intangible compensation. In recent years, however, legal and other challenges seeking to delay and/or stop new pipeline development have increased dramatically, imperiling workers' livelihoods. The Third Circuit's ruling would exacerbate this problem by allowing States to nullify pipeline permits at the final stage for any reason or no reason at all, whether or not that decision is based on the public's needs.

The PennEast Pipeline presents a prime example of all that the Crafts and the workers they represent stand to lose from the Third Circuit's decision. PennEast has committed to use skilled union workers from the Pipeline Crafts to construct the Pipeline. The Crafts estimate that construction of the Pipeline would create approximately 2.45 million hours of work under the NPLA and generate approximately \$120 million in

wages.² In accordance with the NPLA, the contractors building the Pipeline would also remit fringe benefit contributions in set amounts for each hour worked by every employee. The Crafts expect that, for work on the PennEast Pipeline, fringe benefit contributions under the NPLA would total over \$50 million—approximately \$25.7 million to welfare funds providing health insurance and associated benefits for pipeline workers and their families and \$25 million in payments to workers' retirement funds. About \$1.5 million in hourly fringe benefit contributions would also be remitted to fund training, education, and safety programs, including for new entrants to the industry.

The work that the PennEast Pipeline would create for the Pipeline Crafts is the exact type that is so badly needed in the U.S. today. It is skilled work for blue-collar, highly-trained workers that supplies good wages and benefits and allows the Pipeline Crafts to fund training for existing and new workers looking to build careers. At the same time, it improves the natural gas infrastructure, which benefits the public at large.

Unfortunately, since delays and obstruction of pipeline permitting have become increasingly common nationwide over the last several years, members of the Pipeline Crafts have already seen a dramatic decline in available jobs and have experienced associated hardships. With major mainline pipeline projects canceled or on indefinite hold due to these delays, hours worked by the Pipeline Crafts under the NPLA

² These figures represent only a portion of the over 12,000 jobs and \$740 million in total wages that design and construction of the Pipeline is anticipated to create. *PennEast Pipeline Project Economic Impact Analysis*, Econsult Sol., Inc., Drexel Univ. School of Econ. 3 (2015), <https://bit.ly/3b6MjLs> [hereinafter *Econsult Report*].

have fallen 56 percent since 2018. Obviously, this decline in hours causes a severe decrease in wages for workers in the Pipeline Crafts. Loss of hours also means workers often lose eligibility for health insurance through their jointly-sponsored union and employer health plans, which generally 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.

Nevertheless, a public narrative has developed that the loss of these jobs is insignificant because: (1) pipeline construction jobs are “temporary” and (2) pipeline construction workers can simply slide into jobs in other industries. But these narratives are misguided. When viewed correctly, the points they raise actually illustrate precisely why State obstruction in the permitting process and other specious legal roadblocks to the approval of new pipeline infrastructure pose extreme harm to workers.

First, pipeline construction jobs are only “temporary” to the same extent as any other project-based occupation. Just like a commercial architect relies on new commercial development deals, or a lawyer relies on a steady supply of cases, controversies and clients, 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. Construction, by definition, is a temporary activity, but that only makes the supply of construction projects even more important for the workers who make their careers in it.

Second, it is not true that all of the workers who build large diameter, high capacity natural gas pipelines like the PennEast Pipeline can simply transition to other occupations in the energy industry or elsewhere, as policymakers and others have suggested. The idea of finding a job in another industry, including in renewable energy, is not viable for many pipeline construction workers for a number of reasons. For one, jobs in pipeline construction do not necessarily translate to jobs in renewable energy. According to a recent study conducted by North America's Building Trades Unions ("NABTU"), the trades most in demand for renewable energy do not align with the trades most in demand for the natural gas industry. *Construction Job Quality Across the US Energy Industries*, N. Am.'s Bldg. Trades Unions 15 (2020), <https://bit.ly/304KyYO>. See also *Union Workers Prefer Natural Gas, Oil Sector Employment, Surveys Find*, Marcellus Shale Coal. (July 23, 2020), <http://bit.ly/3uD5PXP> (quoting Tom Kriger, NABTU's Director of Education and Research: "You can't just interchange the jobs from oil and gas construction to renewables construction, because you'll leave out many workers, you'll leave out many crafts, and you won't have those pathways into the middle class that these good jobs provide.").

Therefore, in order to transition to jobs in renewable energy, pipeline workers would have to re-train in entirely new skill sets, losing the careers for which they have trained so extensively. In the end, workers affected by the unavailability of pipeline jobs find that the jobs available to them often do not compare in terms of wages and benefits to the skilled pipeline construction jobs for which they have trained. The disparity is even greater when replacement jobs are not covered by a collective bargaining agreement.

Roadblocks to pipeline construction and a corresponding decline in available jobs also make the Pipeline Crafts less able to add new members and advance the ones they have. In the unionized pipeline construction industry, entry-level members require a substantial amount of on-the-job training. When there is a shortage of jobs or uncertain timelines for permitting, unions cannot bring in as many entry-level members as they would otherwise because the opportunities for placing such members in employment are reduced.

For all of these reasons, the Third Circuit's incorrect decision will inflict severe harm on the nation's skilled natural gas pipeline workforce. Sweeping changes to the permitting and construction process for pipelines must be done through Congress, not accomplished by State executives in contravention of federal statutes. Pulling the rug out from under the workers after projects have been approved is not only legally impermissible in this instance, but it also maximizes the harmful economic impacts those workers experience.

III. THE THIRD CIRCUIT'S DECISION WOULD NEGATIVELY IMPACT THE COUNTRY'S OVERBURDENED AND AGING NATURAL GAS PIPELINE INFRASTRUCTURE.

As representatives of the nation's pipeline construction workforce, the Pipeline Crafts are acutely familiar with the condition of the U.S. natural gas infrastructure and the urgent need for it to be updated and upgraded. Simply put, pipelines are the safest and most efficient method to transport natural gas. But the U.S. natural gas infrastructure is subject to demand that exceeds its capacity. The demand continues to grow while the infrastructure suffers from age-related integrity risks that modern pipeline technology prevents. While the NGA tasks FERC with deciding whether

new pipeline infrastructure is in the public interest, the Third Circuit’s ruling allows State executives to unilaterally overrule FERC’s reasoned and expert judgment in this regard for any reason or for no reason at all, exacerbating the potential for disastrous effects on natural gas consumers and the public at large.

A. The Third Circuit’s Decision Threatens to Decrease Reliability and Increase Prices for U.S. Natural Gas Consumers.

Natural gas powers about half of the homes in the United States. *Natural gas explained*, U.S. Energy Info. Admin. (last updated Nov. 30, 2020), <http://bit.ly/2ZO7DiA>. In 2019, the most recent year for which data is available, natural gas was the largest source of U.S. electricity generation by far at 38 percent, followed by coal (23%) and nuclear (20%), with wind (7.3%) and hydro (6.6%) trailing behind. Solar, biomass, petroleum, and geothermal accounted for less than 2 percent each. *Electricity explained*, U.S. Energy Info. Admin. (last updated Mar. 19, 2020), <http://bit.ly/37IKja6>. The share of U.S. electricity generated by natural gas has consistently trended upwards over the years, from 15.8 percent of all sources in 2000 to 24 percent in 2010 and now 38 percent in 2019. *Id.* The U.S. Energy Information Administration, the arm of the Department of Energy tasked with collecting, analyzing, and disseminating energy information, expects this upward trend to continue through 2050, when its projections end. *Annual Energy Outlook 2021*, U.S. Energy Info. Admin. 3 (2021), <https://bit.ly/3sCOeNI>.

New Jersey and Pennsylvania, the States the Penn-East Pipeline would serve, are both heavily dependent on natural gas. Natural gas accounted for about 57 percent and 42 percent of New Jersey and Pennsylvania’s total electric power generation in 2019 respec-

tively—percentages that exceed natural gas’s share of the country’s total electrical output. See *State Historical Tables for 2019*, U.S. Energy Info. Admin. (last updated Feb. 2021), <https://bit.ly/381uQSC>. Pennsylvania ranks 4th in the U.S. in terms of natural gas electricity generation, while New Jersey ranks 13th. *Id.*

With natural gas demand high and getting higher, it is imperative that there be a safe and efficient system in place to deliver it to consumers. Unfortunately, the U.S. natural gas infrastructure falls short of this goal, with many portions at or over maximum capacity. *Natural Gas Infrastructure*, Nat. Energy Tech. Lab’y (last visited Mar. 3, 2021), <https://bit.ly/5nFB>. With regard to the PennEast Pipeline specifically, its Final Environmental Impact Statement (“FEIS”) determined that “[t]here is no available capacity for existing pipeline systems to transport the required volumes of natural gas to the range of delivery points proposed by PennEast.” *PennEast Pipeline Project: Final Environmental Impact Statement*, Fed. Energy Regul. Comm’n, Sec. 5.1.13, at 5-18 (2017) [hereinafter *FEIS*]. Lack of pipeline capacity makes natural gas more expensive to consumers and creates supply shortfalls, leaving consumers without power during times of peak demand when electricity is needed most. *Natural Gas Infrastructure Implications of Increased Demand from the Electric Power Sector*, U.S. Energy Info. Admin. 4 (2015), <https://bit.ly/304PZHn>.

It is into this environment of energy insecurity that the PennEast Pipeline would deliver staggering savings to energy consumers. One study of the Pipeline’s expected economic 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*, Concentric Energy Advisors, Inc. 3 (2015), <https://bit.ly/3kBmBBZ>. Several years later, while tied up in a long regulatory process, an updated study showed that the Pipeline 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*, Concentric Energy Advisors, Inc. 3 (2018), <https://bit.ly/3sCbrQ1>. 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, another 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 support 90 jobs. *Econsult Report*, at 16.

By allowing States to nullify permits for new natural gas infrastructure, the Third Circuit's decision poses grave risks to the already maxed-out natural gas infrastructure in the U.S. and the consumers who rely on it for reliable and affordable energy.

B. The Third Circuit's Decision Threatens to Exacerbate Safety Concerns Associated with the Country's Aging and Outdated Natural Gas Infrastructure.

According to data maintained by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA), 54.6 percent

of the more than 300,000 miles of U.S. natural gas transmission pipelines—large diameter pipes that move natural gas around the country—were put in place before 1970. *Gas Transmission Miles by Decade Installed*, U.S. Dep’t of Transp. Pipeline and Hazardous Materials Safety Admin. (last visited Mar. 3, 2021), <https://bit.ly/3pSfVAu>. These pipelines are often referred to as “pre-regulation” because they were built before the first federal pipeline safety regulations were promulgated in November 1970. Pre-regulation pipelines were built using inferior and outdated materials, welding techniques, and quality control compared to modern pipelines, making them more prone to failure and able to transport less capacity. *FEIS*, Sec. 4.11.2, at 4-307 (“The frequency of significant [natural gas pipeline leaks] is strongly dependent on age.”).

By contrast, modern pipelines feature many improvements that promote reliability and safety. The PennEast Pipeline, for example, would be built using modern welding techniques, would feature the most advanced pipe coatings and would be equipped with a cathodic protection system that protects against corrosion, as well as continuous gas and other leak detection devices. *See id.* Sec. 2.6, at 2-17; Sec. 4.10, at 4-250. The Pipeline would also be electronically monitored 24 hours a day, 365 days a year by PennEast’s Gas Control Center, which would use a computerized gas-monitoring system to read pressures along the pipeline on a continuous basis. The Gas Control Center would be able to trigger remote shut-off valves at the first sign of a leak or any other problem to isolate the affected segment of pipe. *Id.* Sec. 5.1.11, at 5-17. Before being placed in service, 100 percent of the Pipelines welds would be inspected (even where federal regulations only require that 10 percent of the welds be tested) and the entire line would be hydrostatically tested at a

maximum pressure exceeding industry standards identified in 49 C.F.R. § 192. *Id.* Sec. 4.11.1, at 4-304. After it is put in service, the Pipeline would be routinely inspected using “smart pig” tools that periodically pass through the entire line checking for corrosion or pitting on the inner pipeline wall that might result in leaks in addition to other on-the-ground and aerial inspections. *Id.* Sec. 4.11.1, at 4-306.

With these extensive safety features, and built by a highly skilled union workforce, PennEast represents the type of modern natural gas infrastructure that is vital to relieve the heavy demands currently afflicting the natural gas pipeline infrastructure. Without this type of new upgraded infrastructure, natural gas transporters 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. By allowing States to effectively nullify FERC decisions to permit new infrastructure, the Third Circuit’s decision contravenes the NGA’s principal purpose of serving 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).

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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