

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 THE PENNSYLVANIA
MANUFACTURERS' ASSOCIATION AND
THE NEW JERSEY BUSINESS & INDUSTRY
ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES..... | ii |
| STATEMENT OF INTEREST | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT..... | 5 |
| I. THE DECISION BELOW INCORRECTLY ENABLES A STATE TO EMPLOY ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT TO LIMIT THE EXERCISE OF THE FEDERAL EMINENT DOMAIN POWER BY A DELEGEE UNDER SECTION 717f(h) OF THE NGA..... | 5 |
| II. THE DECISION BELOW THREATENS BOTH THE ECONOMY AND ENERGY SECURITY OF THE UNITED STATES BY CRIPPLING THE NATION'S ABILITY TO CONTINUE TO MAINTAIN AND EXPAND THE INFRASTRUCTURE REQUIRED TO MEET THE COUNTRY'S GROWING ENERGY NEEDS | 10 |
| CONCLUSION | 20 |

TABLE OF AUTHORITIES

| CASES | Page(s) |
|---|---------------|
| <i>Berman v. Parker</i> , 348 U.S. 26 (1954)..... | 6 |
| <i>Kohl v. United States</i> , 91 U.S. 367 (1875)..... | 5, 7, 8, 9 |
| <i>Northern Natural Gas Company. v. State Corporation Commission of Kansas</i> , 372 U.S. 84, 83 S. Ct. 646 (1963)..... | 3 |
| <i>PennEast Pipeline Company, LLC v. State of New Jersey</i> , 938 F.3d 96 (3d Cir. 2019) | <i>passim</i> |
| <i>Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange County Texas</i> , 327 F.R.D. 131 (E.D. Tex. 2017)..... | 6 |
| <i>Schneidewind v. ANR Pipeline Company</i> , 485 U.S. 293, 108 S. Ct., 1145 (1988)..... | 3 |
| <i>Tennessee Gas Pipeline Company, LLC v. Permanent Easement for 7.053 Acres</i> , 931 F.3d 237 (3d Cir. 2019) | 5, 6 |
| CONSTITUTION | |
| U.S. Const. amend. V | 5 |
| U.S. Const. amend. XI..... | <i>passim</i> |
| STATUTES | |
| Natural Gas Act, 15 U.S.C. § 717, <i>et seq.</i> | 3, 7, 10, 11 |
| § 717f(h)..... | <i>passim</i> |

TABLE OF AUTHORITIES—Continued

| OTHER AUTHORITIES | Page(s) |
|--|---------|
| Abraham Bell, <i>Private Takings</i> , 76 U. Chi. L. Rev. 517 (2009) | 5 |
| Bernard Bell, <i>Delegation of Eminent Domain Powers to Private Entities: In Re PennEast Pipeline Co.</i> , Notice and Comment, Yale JREG. (Sept. 16, 2019), https://www.yalejreg.com/nc/delegation-of-eminent-domain-powers-to-private-entities-in-re-penneast-pipeline-co/ | 7 |
| <i>Birth of Coryville’s Tidewater Pipe Line</i> , in <i>Timeless Home</i> , Smethport, PA (Ross Porter Ed. 2003), <i>available at</i> https://www.smithporthistory.org/coryville/oilarticle.html | 2 |
| David N. Taylor and Carl A. Marrera, <i>Economic Model Analysis: Polypropylene Manufacturing Plant Expansion in Delaware County, PA</i> (Jan. 15, 2019), <i>available at</i> https://www.pamanufacturers.org/studies-reports/economic-study-urging-pipeline-infrastructure-investment | 18 |
| FERC <i>Declaratory Order</i> , 170 FERC ¶ 61,064 (Jan. 30, 2020)..... <i>passim</i> | |
| Fiona Steele, <i>Third Circuit Halts Interstate Pipeline Construction in PennEast Pipeline: States and Environmentalists Find an Ally in Sovereign Immunity</i> , 65 Vill. L. Rev. 917 (2020)..... | 10, 15 |

TABLE OF AUTHORITIES—Continued

| | Page(s) |
|--|---------|
| ICF, <i>North American Midstream Infrastructure Through 2035: Significant Development Continues</i> (June 1, 2018), available at https://www.ingaa.org/File.aspx?id=34703 | 12, 17 |
| Jackson Bowker, <i>The Issue of Condemning State-Owned Property Pursuant to the Natural Gas Act: In Re PennEast</i> , 41 Energy L. J. 403 (2020) | 15 |
| Jude Clemente, <i>Pennsylvania as the New Natural Gas Giant</i> (March 21, 2019), https://www.forbes.com/sites/judeclemente/2019/03/21/pennsylvania-as-the-new-natural-gas-giant#37853384636c | 14 |
| Jude Clemente, <i>What Happens When You Don't Build Natural Gas Pipelines</i> , Forbes.com (Jan. 7, 2018), https://www.forbes.com/sites/judeclemente/2018/01/07/what-happens-when-you-dont-build-natural-gas-pipelines/?sh=6ccc9b995fd6 | 17 |
| Sam Kalen, <i>A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars</i> , 9 Mich. J. of Env'tl. & Admin. L. 319 (2020). | 11, 17 |
| Tom Johnson, <i>Is New Jersey Becoming the Pipe-line Capital of the Northeast?</i> , NJ Spotlight News (May 28, 2015), https://www.njspotlight.com/2015/05/15-05-28-is-new-jersey-becoming-the-pipeline-capitol-of-the-north-east/ | 14 |

TABLE OF AUTHORITIES—Continued

| | Page(s) |
|---|-----------|
| U.S. Dept. of Trans., Pipeline and Hazardous Material Admin., <i>General Pipeline FAQs</i> , https://www.phmsa.dot.gov/faqs/general-pipeline-faqs (last visited Mar. 4, 2021) | 12, 13 |
| U.S. Energy Information Admin., <i>About U.S. Natural Gas Pipelines, Interstate Natural Gas</i> , https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/interstate.html (last visited Mar. 4, 2021) | 3 |
| U.S. Energy Information Admin., <i>Natural Gas Pipelines</i> , https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php (last visited Mar. 4, 2021)..... | 2 |
| U.S. Energy Information Admin., <i>New Jersey State Energy Profile</i> (last updated Sept. 17, 2020), https://www.eia.gov/state/analysis.php?sid=NJ | 14 |
| U.S. Energy Information Admin., <i>Pennsylvania State Energy Profile</i> (last updated Sept. 17, 2020), https://www.eia.gov/state/analysis.php?sid=PA | 13 |
| U.S. Energy Information Admin., <i>U.S. Energy Facts Explained</i> , https://www.eia.gov/energyexplained/us-energy-facts/ (last visited Mar. 4, 2021) | 2, 11, 12 |

TABLE OF AUTHORITIES—Continued

| | Page(s) |
|--|-----------|
| William Shakespeare, <i>The Tragedy of Macbeth</i> (Folio I, 1623) | 9 |
| Zachary J.H. Wright, <i>Siting Natural Gas Pipelines Post-PennEast: The New Power of State-Held Conservation Easements</i> , 10 <i>Ariz. J. of Env'tl. L. & Pol.</i> 296 (2020)..... | 4, 11, 15 |

STATEMENT OF INTEREST

The Pennsylvania Manufacturers' Association and the New Jersey Business & Industry Association respectfully submit this brief as *amici curiae* in support of Petitioner.¹

Since its founding in 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for business and manufacturing in Pennsylvania. From its headquarters in the Frederick W. Anton, III, Center, across from the steps to the State Capitol Building in Harrisburg, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs. PMA has forcefully advocated for forward-looking strategies that will take full advantage of the Commonwealth's tremendous reserves of natural gas, and ensure a secure, stable supply of market-priced energy for Pennsylvania's businesses and citizenry.

Located in Trenton, New Jersey, the New Jersey Business & Industry Association ("NJBIA") is the nation's largest statewide employer association. Its members employ more than a million people and represent every industry in New Jersey, including manufacturers, contractors, retailers and service providers. For 110 years, the NJBIA has championed a competitive business climate, both locally and

¹ Petitioner and Respondents have filed notices of blanket consent to the filing of *amicus curiae* briefs with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no party, counsel for a party, or person other than *amici curiae*, their members or counsel authored any portion of this brief or made any monetary contribution intended to fund this brief's preparation and submission.

globally, and facilitated partnerships among business, government and academia.

Pennsylvania, the nation's second largest producer of natural gas, relies on the interstate pipeline system to get its product to end users located primarily in New York, New Jersey, Maryland, Ohio and West Virginia. New Jersey, which does not produce natural gas and has no natural gas reserves of its own, depends on interstate pipelines like the proposed PennEast pipeline to import its entire supply of natural gas from Pennsylvania. Consequently, PMA, NJBIA and their members can offer a unique perspective on the disruptive impact on the nation's energy supply that the Third Circuit's decision will have if allowed to stand.

SUMMARY OF ARGUMENT

The use of pipelines in the United States dates back to 1879, when the Tidewater pipeline transported oil from Coryville, Pennsylvania, across the Allegheny Mountains to Williamsport, in hopes of breaking the Standard Oil Company's grip on oil refining. *Birth of Coryville's Tidewater Pipeline, Pipe Line*, in *Timeless Home*, Smethport, PA (Ross Porter Ed. 2003), available at <https://www.smethporthistory.org/coryville/oilarticle.html>, p. 2. Today, hundreds of thousands of miles of interstate and intrastate pipelines transport and deliver the natural gas that supplies approximately 32 percent of the energy consumed in the United States. U.S. Energy Information Admin., *U.S. Energy Facts Explained*, <https://www.eia.gov/energyexplained/us-energy-facts/> (last visited Mar. 4, 2021), pp. 2. "The U.S. natural gas pipeline network is a highly integrated network that moves natural gas throughout the continental United States" which, in 2019, "delivered about 28.3 trillion cubic feet (Tcf) of natural gas to about 76.9 million customers." U.S. Energy Information

Admin., *Natural Gas Pipelines*, <https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php> (last visited Mar. 4, 2021), p. 1.

According to the United States Energy Information Administration, “[t]wo thirds of the lower 48 States are almost totally dependent upon the interstate pipeline system for their supplies of natural gas, much of which “must be routed through several interstate pipeline systems before it reaches it[s] final destination.” U.S. Energy Information Admin., *About U.S. Natural Gas Pipelines, Interstate Natural Gas*, https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/interstate.html, p. 1. “[A]lmost every major metropolitan area in the United States is supplied by, or is the final destination of, one or more of the major interstate pipeline companies or their affiliates.” *Id.*

In the Natural Gas Act (“NGA”), 15 U.S.C. § 717, *et seq.*, Congress created “a comprehensive scheme of federal regulation of “all wholesales of natural gas in interstate commerce.”” *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 300, 108 S. Ct., 1145, 1152 (1988) (quoting *Northern Natural Gas Company. v. State Corporation Commission of Kansas*, 372 U.S. 84, 91, 83 S. Ct. 646, 650-51 (1963)). Fundamental to this regulatory framework is Congress’s delegation of the federal government’s eminent domain power to the holder of a certificate of public convenience and necessity issued by the Federal Energy and Regulatory Review Commission (“FERC”), to enable the holder to acquire the land necessary to construct an interstate pipeline. 15 U.S.C. § 717f(h).

The federal eminent domain power derives from the federal government’s sovereignty and is complete in itself. Its use to condemn State-owned property does not depend upon the State’s consent, and States do

not enjoy Eleventh Amendment immunity from its exercise. Congress may delegate the federal eminent domain power, and that delegation carries with it the ability to condemn State-owned property interests. Congress made such a delegation in Section 717f(h) of the NGA.

The Third Circuit erred by declaring that Section 717f(h) does not give to the holder of a certificate of public convenience and necessity the right to condemn property owned by a State in federal court. The Third Circuit's decision "has effectively given states 'veto' power over any and every natural gas pipeline siting project within their borders." Zachary J.H. Wright, *Siting Natural Gas Pipelines Post-PennEast: The New Power of State-Held Conservation Easements*, 10 *Ariz. J. of Env'tl. L. & Pol.* 296, 317 (2020). States may now, through the exercise of that veto power, nullify a determination made by FERC that a particular interstate pipeline will serve the public convenience and necessity. And by allowing a State to block the construction of an interstate natural gas pipeline, the Third Circuit's ruling will upend the manner in which pipeline developers have done business for 70 years, and undermine the nation's economy and energy security in at least four ways.

First, it will severely impede the continued orderly development of critically needed natural gas infrastructure. Second, it will render large reserves of natural gas in states like Pennsylvania unavailable to meet the growing energy needs of states like New Jersey. Third, by slowing or potentially halting interstate pipeline development, it will deprive the nation of the substantial economic activity associated with both the construction of the pipelines themselves, and the upstream and downstream users of the

natural gas they transport. Finally, by introducing delay and uncertainty into the approval process, and casting into doubt the utility of a FERC-issued certificate of public convenience, it will make pipelines more difficult to finance and more expensive to build.²

For these reasons, the Court should reverse the judgment of the Third Circuit.

ARGUMENT

I. THE DECISION BELOW INCORRECTLY ENABLES A STATE TO EMPLOY ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT TO LIMIT THE EXERCISE OF THE FEDERAL EMINENT DOMAIN POWER BY A DELEGEE UNDER SECTION 717f(h) OF THE NGA

As this Court recognized 145 years ago in *Kohl v. United States*, 91 U.S. 367 (1875), the right of eminent domain “is inseparable from sovereignty;” it was “well known when the Constitution was adopted;” and it may be exercised by the federal government. *Kohl*, 91 U.S. at 371-372. Although the “Constitution never explicitly grants the power of eminent domain to the national government,” the “Fifth Amendment – which, at the time of its adoption applied only to the national government – requires that ‘just compensation’ be paid for takings, making evident that such a power was assumed to be within the scope of enumerated powers.” Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 525 (2009) (footnotes omitted). *See also Tennessee Gas Pipeline Company, LLC v. Permanent*

² For the reasons set forth in Argument III of Petitioner’s brief, *Amici Curiae* PMA and NJBIA also believe that the Third Circuit properly exercised jurisdiction over this case.

Easement for 7.053 Acres, 931 F.3d 237, 242 (3d Cir. 2019) (“It is well-established that the federal government wields the authority to exercise eminent domain.”)

As the Third Circuit acknowledged, “[t]he federal government can exercise that power to condemn State land in federal court.” *PennEast Pipeline Company, LLC v. State of New Jersey*, 938 F.3d 96, 104 (3d Cir. 2019). In a separate case, decided less than two months before *PennEast Pipeline*, another panel of the Third Circuit explained that “because ‘the power of eminent domain is merely the means to the end,’ the federal government also has the power to delegate its eminent domain power to private entities.” *Tennessee Gas Pipeline*, 931 F.3d at 242 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)). In Section 717f(h) of the NGA, Congress delegated the federal government’s eminent domain power to the “holder of a certificate of public convenience and necessity” issued by FERC, to enable the holder to acquire “the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas. . . .” 15 U.S.C. § 717f(h).

The Third Circuit recognized that in Section 717f(h) Congress delegated the federal government’s eminent domain power to the holders of a FERC-issued certificate of public convenience and necessity. *PennEast Pipeline*, 938 F.3d at 100. Relying primarily on a solitary district court decision, however, *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange County Texas*, 327 F.R.D. 131 (E.D. Tex. 2017), the court then erred by concluding, first, that “the federal government’s ability to condemn State land. . . is, in fact, the function of two separate powers: the government’s eminent domain power and its exemption from Eleventh Amendment immunity,” and, second, that “[a] delegation of the former must

not be confused for, or conflated with, a delegation of the latter.” *PennEast Pipeline*, 938 F.3d at 104 (citations omitted). In the Third Circuit’s view, “[a] private party is not endowed with all of the rights of the United States by virtue of a delegation of the government’s power of eminent domain.” *Id.*

Although the Third Circuit expressed its “deep doubt that the United States can delegate its exemption from state sovereign immunity to private parties,” rather than confront the constitutional question, the court instead held that, because the NGA contains no mention of the Eleventh Amendment nor any reference to “the federal government’s ability to sue the states,” the “NGA does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.” *PennEast Pipeline*, 938 F.3d at 111, 112-113.

The Third Circuit wrongly bifurcated the federal government’s eminent domain power. The ability to exercise eminent domain power cannot be divorced from the ability to enforce that power in court, regardless of whether the property taken belongs to a State or a private individual or entity. Bernard Bell, *Delegation of Eminent Domain Powers to Private Entities: In Re PennEast Pipeline Co.*, Notice and Comment, Yale JREG. (Sept. 16, 2019), <https://www.yalejreg.com/nc/delegation-of-eminent-domain-powers-to-private-entities-in-re-penneast-pipeline-co/> (“The Third Circuit’s decision...splits two aspects of eminent domain that are not, as a practical matter, divisible. It is difficult to understand why Congress would delegate the power to invoke eminent domain, but not the power to effectuate it.”)

This Court recognized in *Kohl* that the federal government’s eminent domain power flows from its

sovereignty and that the right of eminent domain was “well known when the Constitution was adopted. . . .” *Kohl*, 91 U.S. at 372. The Court further observed that:

Such an authority is essential to [the federal government’s] independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. . . . If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.

* * *

If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment.

Kohl, 91 U.S. at 368, 374.

The federal government’s eminent domain power, the source of which pre-dates the Eleventh Amendment, is “complete in itself.” *Id.*, at 374. It does not depend for its exercise against State-owned property upon the federal government’s exemption from Eleventh Amendment immunity; the federal government does

not need a State's consent to exercise its eminent domain power. And Congress can delegate that power, like it did pursuant to Section 717f(h) of the NGA to the holder of a certificate of public convenience, to acquire the land necessary – whether owned by a private party or by a State – to build interstate pipelines to transport natural gas. To hold otherwise would render Section 717f(h) a nullity, since the right to condemn, absent the right to compel, would reduce the eminent domain power, in the hands of Congress's delegee, to little more than “sound and fury, signifying nothing.” William Shakespeare, *The Tragedy of Macbeth* 5.5. 27-28 (Folio I, 1623).

The Third Circuit erred by holding that the federal government's eminent domain power is not complete in itself, and that the federal government's right to condemn State-owned property depends upon its Eleventh Amendment immunity. “The consent of a State can never be a condition precedent to” the exercise of the federal power of eminent domain. *Kohl*, 91 U.S. at 374. The Third Circuit's decision incorrectly enables a State to control how Congress elects to exercise the federal eminent domain power by blocking the use of that power by Congress's delegee – even though the federal government, through FERC, has selected the properties to be condemned by approving the pipeline's route. The Third Circuit's ruling also empowers States effectively to invalidate certificates of public convenience and necessity issued by FERC based on FERC's conclusion that the pipeline at issue will serve the public interest.

Finally, the Third Circuit suggests that a “work-around” exists for its decision, i.e., an “accountable federal official” can “file the necessary condemnation actions and then transfer the property to the natural

gas company.” *PennEast*, 938 F.3d at 113. FERC disagrees, stating in its Order on Petition for Declaratory Order (“Declaratory Order”) entered on January 30, 2020, that “NGA section 7(h) confers authority to exercise eminent domain to certificate holders [pipeline developers] alone. And because neither NGA section 7(h) nor any other provision of the NGA authorizes the Commission to exercise eminent domain, the Commission lacks statutory authority to do so.” *Declaratory Order*, 170 FERC ¶ 61,064, ¶ 50, p. 39. Additionally, FERC noted that the NGA contains no provisions explaining “how the Commission would pay just compensation in the absence of an appropriation to do so, and the process of transferring the property from the Commission to the pipeline.” *Id.*, at ¶ 51, p. 40.

The Court should reverse the Third Circuit’s decision.

II. THE DECISION BELOW THREATENS BOTH THE ECONOMY AND ENERGY SECURITY OF THE UNITED STATES BY CRIPPLING THE NATION’S ABILITY TO CONTINUE TO MAINTAIN AND EXPAND THE INFRASTRUCTURE REQUIRED TO MEET THE COUNTRY’S GROWING ENERGY NEEDS

“The purpose of Section 717f(h) of the NGA is to encourage and facilitate the construction of natural gas pipelines; even though the NGA mainly impacts private parties, its intended purpose is to benefit the public interest.” Fiona Steele, *Third Circuit Halts Interstate Pipeline Construction in PennEast Pipeline: States and Environmentalists Find an Ally in Sovereign Immunity*, 65 Vill. L. Rev. 917, 920 (2020) (footnote omitted). The NGA has enabled the natural gas industry to avoid “[i]nconsistent regulation at the

hands of states as a result of the existing framework of natural gas regulation,” which, “in turn, has given the natural gas industry the flexibility to respond to changing market pressures.” *Sighting Natural Gas Pipelines Post-PennEast*, 10 Ariz. J. Envtl. L. & Pol. at 305 (footnote omitted). “The federal-level regulatory scheme for natural gas has enabled consistent industry growth since its implementation.” *Id.* at 306 (footnote omitted).

This consistent growth enabled natural gas to surpass coal as the principal fuel used by electric utilities in 2018. Sam Kalen, *A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars*, 9 Mich. J. of Envtl. & Admin. L. 319, 336 (2020). It has also helped break the cycle of energy dependence. In 2019, energy production in the United States exceeded energy consumption – for the first time since 1957. U.S. Energy Information Admin., *U.S. Energy Facts Explained*, <https://www.eia.gov/energyexplained/us-energy-facts/> (last visited Mar. 4, 2021), pp. 4.

The Third Circuit acknowledged 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.” *PennEast Pipeline*, 938 F.3d at 113. In its Declaratory Order, FERC voiced its concern in starker terms: “If the Third Circuit’s opinion stands, we believe it 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 industry has operated for decades.” *Declaratory Order*, 170 FERC ¶ 61,064, ¶56, p. 42 (2020).

As noted above, natural gas supplies about 32 percent of the energy consumed in the United States. A study prepared by ICF for the Interstate Natural

Gas Association of America in June, 2018, projects that the demand for natural gas in the United States and Canada, including liquid natural gas exports and pipeline exports to Mexico, will increase from 91 billion cubic feet per day in 2017 to 130 billion cubic feet per day in 2035. ICF, *North American Midstream Infrastructure Through 2035: Significant Development Continues*, available at <https://www.ingaa.org/File.aspx?id=34703>, p. 34 (June 18, 2018). Indeed, natural gas production in the United States reached record highs in 2017, 2018 and 2019. U.S. Energy Information Admin., *U.S. Energy Facts Explained*, <https://www.eia.gov/energyexplained/us-energy-facts/> (last visited Mar. 4, 2021), p. 2. The ICF Study “projects the need for 57 billion cubic feet per day of new gas pipeline capacity to support the levels of production and market growth that are projected through 2035.” *Id.*, at p. 37.

The construction of this new capacity will require a “total investment of \$685 to \$898 billion,” which will add \$1.3 trillion to U.S. and Canadian GDP from 2018 through 2035.” *Id.*, at p. 68. Infrastructure development will support on average “725,000 jobs each year throughout the projection including 242,000 direct jobs.” *Id.* The study concludes that “[i]nfrastructure development will have wide-ranging benefits for millions of Americans. The midstream business is critical to the growth of the upstream and downstream portions of the oil and gas business.” *Id.*

According to the United States Department of Transportation’s Pipeline and Hazardous Safety Administration (“PHMSA”), “[p]ipelines enable the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life.” U.S. Dept. of Trans.,

Pipeline and Hazardous Material Admin., *General Pipeline FAQs*, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last visited Mar. 4, 2021), p. 1. Pipelines are “[t]he arteries of the Nation’s energy infrastructure” and “provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system,” by safely delivering “trillions of cubic feet of natural gas and hundreds of billions of ton/miles of liquid petroleum products each year.” *Id.*, at p. 2. In short, pipelines “are essential: the volumes of energy products they move are well beyond the capacity of other forms of transportation.” *Id.* Most importantly, according to the PHMSA, “[p]ipeline systems are the safest means to move these products.” *Id.*

Amici curiae represent manufacturers and other businesses in Pennsylvania and New Jersey. “The Marcellus Shale, the largest U.S. natural gas field,” underlies about three-fifths of the Commonwealth of Pennsylvania. U.S. Energy Information Administration, *Pennsylvania State Energy Profile* (last updated Sept. 17, 2020), <https://www.eia.gov/state/analysis.php?sid=PA>, p. 1. “Pennsylvania’s marketed natural gas production was 7 trillion cubic feet in 2019, more than 11 times larger than in 2010.” *Id.*, at p. 2. The Commonwealth’s “annual marketed natural gas was equal to about one-fifth of total U.S. gas production, making Pennsylvania the second-largest natural gas producer in the nation, after Texas.” *Id.* Pennsylvania “is the third largest net supplier of energy to other states,” and the Commonwealth serves as an important source of natural gas for neighboring states, since “[m]ost of the natural gas shipped by pipeline from Pennsylvania goes to New Jersey, New York, Maryland, Ohio and West Virginia.” *Id.*, p.p. 1, 2. Still, “[e]ven with booming production, Pennsylvania’s role as a gas

giant continues to be constrained by a lack of pipelines that ship gas out of the state.” Jude Clemente, *Pennsylvania as the New Natural Gas Giant*, <https://www.forbes.com/sites/judeclemente/2019/03/21/pennsylvania-as-the-new-natural-gas-giant#37853384636c> (March 21, 2019).

New Jersey, by contrast, “does not produce natural gas, nor does the state have any natural gas reserves.” U.S. Energy Information Admin., *New Jersey State Energy Profile* (last updated Sept. 17, 2020), <https://www.eia.gov/state/analysis.php?sid=NJ>, p. 4. “All of the state’s natural gas supply enters New Jersey from Pennsylvania, and nearly half of that natural gas is then shipped on to other states.” *Id.* In addition, “several interstate pipelines cross New Jersey and bring natural gas into New York and New England.” *Id.* The amount of natural gas delivered to New Jersey’s electric power generators almost doubled between 2009 and 2019, and “[i]n 2018 three out of four New Jersey households used natural gas as their primary heating fuel.” *Id.* “Inexpensive natural gas from Pennsylvania has been a boon to both customers who heat their homes with the fuel and to businesses that rely on it as a basic building block of their manufacturing processes.” Tom Johnson, *Is New Jersey Becoming the Pipeline Capital of the Northeast?*, NJ Spotlight News (May 28, 2015), <https://www.njspotlight.com/2015/05/15-05-28-is-new-jersey-becoming-the-pipeline-capitol-of-the-northeast/>.

Against this background, it can be fairly seen that the Third Circuit’s decision will detrimentally impact the nation’s energy security and economy in at least the following ways. First and foremost, as several commentators have recognized, the Third Circuit’s holding hands to individual States the ability to cancel a

certificate of public convenience and necessity issued by FERC by blocking construction of any interstate pipeline which crosses over land which the State either owns, or in which the State owns some interest, such as a restrictive easement. See Jackson Bowker, *The Issue of Condemning State-Owned Property Pursuant to the Natural Gas Act: In Re PennEast*, 41 Energy L. J. 403, 418 (2020) (“[T]he Third Circuit’s decision provides states and other parties with an additional tool to hinder the construction of natural gas pipelines.”); *Third Circuit Halts Internet Pipeline Construction*, 65 Vill. L. Rev. at 931 (“*PennEast Pipeline* incentivizes states, environmental groups, and private landowners to work together ‘for the sole purpose of thwarting pipelines.’”) (quotation and footnote omitted); *Sighting Natural Gas Pipelines Post-PennEast*, 10 Ariz. J. of Env’tl. L. & Pol. at 334 (“States that wish to halt a natural gas pipeline now have a means to do so wholly independent from the federal approval and permitting process.”)

Similarly, through the simple expedient of conveying a portion of their property, or an interest in their property, to the State, private landowners who oppose the building of a pipeline can effectively prevent the pipeline’s construction. *Sighting Natural Gas Pipelines Post-PennEast*, 10 Ariz. J. Env’tl. L. & Pol. at 299 (“*PennEast* allows a state that wishes to stop a natural gas pipeline to obtain a conservation easement over property in the pipeline route and then assert sovereign immunity to prevent the condemnation of the underlying land restricted by the conservation easement.”) (footnote omitted). For this reason alone, the Third Circuit’s holding threatens to subvert the continued maintenance (some pipelines have rights-of-way which need to be renewed periodically) and

development of the nation's natural gas infrastructure. As FERC summarized in its Declaratory Order:

We note that the court's interpretation would permit states to block construction both on land a state owns (e.g., along or across all state roads and the bottoms of navigable water bodies), and on land over which the state asserts some lesser property interests (e.g., conservation easements). If state-owned lands are treated as impassable barriers for purposes of condemnation, the circumvention of those barriers, if possible at all, would require the condemnation of more private land at significantly greater cost and with correspondingly greater environmental impact. If lands over which a state has asserted any property interest also become barriers for purposes of condemnation, a state could unilaterally prevent interstate transportation of an essential energy commodity through its borders, thus eviscerating the purpose of NGA section 7(h).

Declaratory Order, 170 FERC ¶ 61,064 at ¶ 58, n. 221, p.p. 43-44.

Second, affording to individual States the ability to block construction of interstate gas pipelines threatens to rob the nation of its energy independence – and businesses and residential consumers of a steady, market-priced supply of energy – by stranding large quantities of natural gas. Pennsylvania, the second largest producer of natural gas in the country, whose marketed natural gas in 2019 amounted to one-fifth of the total gas production in the United States, relies on interstate pipelines to get its gas to consumers in New Jersey, New York and elsewhere. Without an

adequate interstate pipeline infrastructure, this gas will remain in Pennsylvania, and will not be available to meet an ever-expanding nationwide demand.

Likewise, states like New Jersey which do not produce substantial amounts of natural gas depend on interstate pipelines to deliver the energy needed by their residents and businesses. “New Jersey Natural Gas states that if interstate pipeline companies such as PennEast are frustrated in their attempts to provide this needed additional capacity ‘a significant outage event is a realistic threat.’” *Declaratory Order*, 170 FERC ¶ 61,064 at ¶ 63, p. 47. “With a pipeline shortage, a natural gas shortage is created, prices for natural gas and electricity skyrocket, and CO2 emissions go up because more carbon-intensive fuels are forced to compensate.” Jude Clemente, *What Happens When You Don’t Build Natural Gas Pipelines*, Forbes.com, <https://www.forbes.com/sites/judeclemente/2018/01/07/what-happens-when-you-dont-build-natural-gas-pipelines/?sh=6ccc9b995fd6> (January, 7, 2018). “While regions with highly interconnected pipeline systems are less vulnerable to supply disruptions, regions such as the northeast are less interconnected and more susceptible to supply disruptions and power outages.” *A Bridge to Nowhere?*, 9 Mich. J. of Env’tl. & Admin. Law at 320-21 (footnote omitted).

Third, the Third Circuit’s decision, by slowing and potentially halting the needed expansion of the country’s pipeline infrastructure, will deprive the nation of significant anticipated economic growth. As noted in the IFC study, over the next 15 to 20 years investments in the development of pipeline infrastructure could add as much as \$1.3 trillion to the Gross Domestic Product of the United States and Canada, and support as many as 725,000 jobs each year. These

figures “do not consider employment in the upstream and downstream portions of the oil and gas business.” *ICF Report*, available at <https://www.ingaa.org/File.aspx?id=34703>, p. 68.

For example, Pennsylvania recently lost out on the expansion of a polypropylene manufacturing facility in Marcus Hook that, according to an analysis performed by *amicus curiae* PMA, would have supported more than one billion dollars of expanded economic activity in Southeastern Pennsylvania over the course of five years. David N. Taylor and Carl A. Marrera, *Economic Model Analysis: Polypropylene Manufacturing Plant Expansion in Delaware County, PA* (Jan. 15, 2019), available at <https://www.pamanufacturers.org/studies-reports/economic-study-urging-pipeline-infrastructure-investment>. “The reason why was clear: Pennsylvania lacked sufficient pipeline networks to provide natural gas liquids (NGL) feedstock to the proposed plant site.” *Id.*, p. 2. The manufacturers of everything from military aircraft to medical equipment rely on natural gas to power their plants, and the pharmaceutical industry employs natural gas liquids in the production of needed medicines. These businesses and many others count on pipelines to meet their energy demands.

Finally, by introducing uncertainty into the approval and development process, and by undermining the value and effectiveness of a certificate of public convenience issued by FERC, the Third Circuit’s ruling will render it difficult to finance new pipeline projects and make building those projects more expensive. Institutional investors and lenders will be less likely to commit to finance a pipeline that may never be built due to an inability to obtain the needed right-of-way. Similarly, if a State or private individual can delay indefinitely, or even stop, the construction

of a pipeline, it will be very difficult for the developer to estimate accurately the pipeline's cost, given the variance in wages and the cost of employee benefits and materials that can occur over time. The uncertainty flowing from the Third Circuit's ruling will, in and of itself, hamper the expansion of the nation's energy infrastructure, and in turn slow the economic growth fostered by a steady supply of affordable energy.

If permitted to stand, the Third Circuit's incorrect application of Eleventh Amendment immunity in *PennEast* will upset the regulatory scheme set forth in the NGA which has (i) worked for 70 years, (ii) enabled the development of a natural gas infrastructure that can supply natural gas to the two-thirds of States that need it, and (iii) contributed to this nation finally achieving its goal of energy independence. Unless this Court reverses the Third Circuit's decision, American businesses and consumers dependent upon a secure supply of market-priced energy will pay the price.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's brief, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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