

No. 19-1039

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In The  
**Supreme Court of the United States**

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PENNEAST PIPELINE COMPANY, LLC, PETITIONER

*v.*

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT  
OF ENVIRONMENTAL PROTECTION; NEW JERSEY  
STATE AGRICULTURE DEVELOPMENT COMMITTEE;  
DELAWARE & RARITAN CANAL COMMISSION;  
NEW JERSEY WATER SUPPLY AUTHORITY;  
NEW JERSEY DEPARTMENT OF TRANSPORTATION;  
NEW JERSEY DEPARTMENT OF THE TREASURY;  
NEW JERSEY MOTOR VEHICLE COMMISSION.

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

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**BRIEF FOR THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA AND  
THE PENNSYLVANIA CHAMBER OF BUSINESS  
AND INDUSTRY AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

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DARYL JOSEFFER  
MICHAEL B. SCHON  
U.S. CHAMBER LITIGATION  
CENTER, INC.  
1615 H St., NW  
Washington, DC 20062  
(202) 463-5948

*Counsel for the Chamber of  
Commerce of the  
United States of America*

DEANNE E. MAYNARD  
*Counsel of Record*  
MORRISON & FOERSTER LLP  
2000 Pennsylvania Ave. NW  
Washington, DC 20006  
(202) 887-8740  
DMaynard@mfo.com

JAMES R. SIGEL  
MORRISON & FOERSTER LLP  
425 Market St.  
San Francisco, CA 94105  
*Counsel for Amici Curiae*

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## INTERESTS OF AMICI CURIAE<sup>1</sup>

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A vital function of the Chamber is to represent the interests of its members in matters before this Court. The Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation’s business community, including cases implicating the development of pipelines and other critically needed infrastructure. *See, e.g., U.S. Forest Service v. Cowpasture River Preservation Association*, Nos. 18-1584, 18-1587.

The Pennsylvania Chamber of Business and Industry is the largest broad-based business association in Pennsylvania. It has close to ten thousand member businesses throughout Pennsylvania, which employ more than fifty percent of the Commonwealth’s private workforce. Its members range from small companies to mid-size and large business enterprises. The Pennsylvania Chamber’s mission is to advocate on public

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties listed on the docket received notice at least ten days before the brief was due. Petitioner has filed a blanket consent to the filing of amicus briefs. Respondents have also consented to the filing of this amicus brief.

policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

## SUMMARY OF ARGUMENT

For more than 70 years, the nation's interstate natural gas pipelines have been built using 15 U.S.C. § 717f(h), a key provision of the Natural Gas Act (NGA). After the Federal Energy Regulatory Commission (FERC) has approved the construction of a natural gas pipeline along a specific route, Section 717f(h) enables pipeline companies to condemn any property necessary to the construction of the pipeline, if the owner of that property refuses to sell. A classic exercise of the federal government's eminent-domain authority, Section 717f(h) addresses the hold-out problems that arise when critical infrastructure projects cross the properties of many different owners, all of which may have incentives to refuse to sell their property entirely, or to do so only at exorbitant prices.

But the Third Circuit has drained Section 717f(h) of much of its purpose by holding that the provision does not and cannot apply to state-owned property. This allows individual states' policy concerns and energy desires to undermine FERC's authority to determine the number and location of pipelines needed to serve the nation's energy needs. Contrary to Congress's clearly expressed intent, the Third Circuit would leave the fate of all such pipeline projects to the whims of the various states through which the pipeline must pass. This Court's intervention is needed to restore the scheme that Congress designed.

*First*, as petitioner explains, the Third Circuit's decision is wrong as a matter of law. Section 717f(h)



by its plain terms applies to *all* property necessary for pipeline construction, whoever or whatever its owner may be. The supposed constitutional concerns the Third Circuit raised cannot justify the court's deviation from this plain statutory text. Nor are those concerns valid in the first place. Contrary to the court's reasoning, states have no immunity from federal eminent-domain proceedings, which are an exercise of the authority vested in the federal government by the Constitution.

*Second*, the Third Circuit's decision will upend the comprehensive scheme Congress created in the Natural Gas Act. Under the court of appeals' reasoning, not only is property in which a state holds a possessory interest exempt from Section 717f(h)'s scope, but so too is property in which the state claims a conservation or similar easement—however recently it may have acquired that nonpossessory interest. Any state thus may effectively exert a veto power over any proposed pipeline. While Congress created extensive procedures to allow states (and other stakeholders) to express their views and concerns with any pipeline, Congress specifically declined to allow states the authority to unilaterally preclude construction altogether. The Third Circuit's decision renders these carefully crafted procedures superfluous, as states may simply exert the ultimate authority to reject a project—an authority that Congress sought to deny them.

*Third*, if left standing, the Third Circuit's decision would have serious economic repercussions. The PennEast pipeline—which alone would generate an

estimated 12,000 jobs, \$740 million in wages, and \$900 million in energy savings—would be only the first casualty. Other natural gas pipelines, particularly those that must meet the swelling demand in the northeast, also may soon meet their demise due to state objections. Given the added risks associated with investment in such projects, even those that do go forward may do so only at greater cost—costs that would be passed on to the millions of consumers and businesses that rely on natural gas. And these costs may soon spread to other sectors of the economy, as the Third Circuit’s decision more broadly threatens congressional efforts to promote infrastructure development.

This Court should grant certiorari to confirm that Section 717f(h) must be read according to its plain terms, to restore the balanced scheme embodied in the Natural Gas Act, and to ensure the continued development of critical infrastructure projects.

## **ARGUMENT**

### **I. THE THIRD CIRCUIT ERRONEOUSLY PRECLUDED PIPELINES FROM CONDEMNING STATE PROPERTY INTERESTS**

#### **A. Congress Can And Did Authorize The Taking Of State-Owned Property**

The terms of the statute are clear. Section 717f(h) provides that whenever FERC has granted a company a “certificate of public convenience and necessity” for “a pipe line or pipe lines for the transportation of natural gas,” that company may “acquire” any property

interests necessary to complete the federally approved project along the approved route “by the exercise of the right of eminent domain” if it cannot secure those interests by contract. 15 U.S.C. § 717f(h). This express delegation of the power of eminent domain does not depend on the nature of the property or the identity of its owner, unlike certain other delegations in similar federal statutes. The Federal Power Act, for example, prohibits the exercise of eminent domain over property that, before 1992, was “owned by a State or political subdivision thereof and [was] part of or included within any public park, recreation area or wildlife refuge.” 16 U.S.C. § 814. The Natural Gas Act contains no such exception. Instead, Section 717f(h) applies to *any* property comprising “the necessary right-of-way to construct, operate, and maintain a pipe line,” along with the “necessary land or other property” for the location of “stations or equipment necessary to the proper operation of such pipe line.” 15 U.S.C. § 717f(h). Whether that “necessary” property is owned by a state, municipality, private party, or some other entity makes no difference—it is subject to the federal eminent-domain power.

Congress’s authority to enact this provision is equally clear. This Court has long held that “[t]he fact that land is owned by a state is no barrier to its condemnation by the United States.” *Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U.S. 508, 534 (1941). It also has long held that Congress may delegate the federal government’s eminent-domain authority to private parties. *E.g.*, *Luxton v. N. River Bridge Co.*,

153 U.S. 525, 533-34 (1894). Simply put, the federal government’s right of eminent domain “can neither be enlarged nor diminished by a State,” no State can “prescribe the manner in which it must be exercised,” and “[t]he consent of a State can never be a condition precedent to its enjoyment.” *Kohl v. United States*, 91 U.S. 367, 374 (1875).

Given the plain text of Section 717f(h) and Congress’s well-established power to enact such a provision, it should come as no surprise that companies with a certificate from FERC have regularly exercised this federal eminent-domain authority to seize the property necessary for pipeline construction along FERC-approved routes, even when that property is state-owned. For the first 70 years following Congress’s enactment of Section 717f(h), no court questioned its application to state-owned property. *See* Pet. App. 16-17. And both FERC and the Federal Power Commission had repeatedly affirmed that “[t]he eminent domain grant to persons holding \* \* \* certificates applies equally to private and state lands.” *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, ¶¶ 65,203-04 (1977); *accord Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at ¶¶ 120-126 (2003); *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. 810, 1454 (1977). FERC reiterated that same view earlier this year, explaining that Section 717f(h) “does not limit a certificate holder’s right to exercise eminent domain authority over state-owned land.” *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at ¶ 25 (2020).

## **B. The Third Circuit’s Contrary Reading Is Wrong**

The Third Circuit has upended this settled understanding. Invoking the Eleventh Amendment, the Third Circuit expressed its “deep doubt” that the federal government could delegate its power to bring condemnation actions against states. Pet. App. 26-27. In light of these supposed constitutional concerns, the Third Circuit read into Section 717f(h) an exception that appears nowhere in its text: “unless that land is state-owned.” See Pet. App. 27-30. In thus carving out from the condemnation provision *all* property interests held by a state, the Third Circuit, under the guise of statutory “interpretation,” effectively held many applications of an act of Congress unconstitutional.

The Third Circuit’s rationale cannot withstand scrutiny. Nothing in the Natural Gas Act’s plain language provides any license for the courts to rewrite Section 717f(h) to apply only to property in which states have no interest. By its terms, the provision applies to any and all “necessary land or other property”—full stop. 15 U.S.C. § 717f(h).

Nor can the purported constitutional concerns the Third Circuit invoked justify the court’s atextual reading. The Third Circuit’s premise was that for Section 717f(h) to provide for condemnation actions against a state, Congress would have had to delegate not only its eminent-domain power (which the Third Circuit acknowledged Congress may do), but also its separate power to bring suit against the states. Pet. App. 13-14.

Yet the two powers are indivisible: the exercise of the eminent-domain power requires a condemnation proceeding in which the property owner is divested of title and awarded with compensation. *See* Restatement (First) Property, § 53 (1936). Without condemnation proceedings, there is no eminent domain, only a request to sell property voluntarily. Because states have no immunity from the federal eminent-domain power (*Atkinson*, 313 U.S. at 534), they have no immunity from the judicial proceedings that this power necessarily entails.

That remains true even when this federal power is delegated to a private party: that party exercises the *government's* power as a *government* actor. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974) (exercise of delegated power “which is traditionally associated with sovereignty, such as eminent domain,” is state action). The states thus have no immunity from this exercise of federal authority. The Third Circuit erred in concluding otherwise.

## **II. THE ISSUE IS IMPORTANT AND WARRANTS THIS COURT'S REVIEW**

That the Third Circuit effectively declared Section 717f(h) unconstitutional in many of its most important applications is reason enough for this Court to grant review. The practical consequences of the Third Circuit's decision only confirm the need for this Court's intervention.

### **A. The Third Circuit’s Decision Undermines Congress’s Carefully Designed Scheme**

“The NGA long has been recognized as a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (quotation marks omitted). Section 717f(h)’s delegation of eminent-domain authority, and its application to state-owned property, is no minor or esoteric provision of this comprehensive scheme—it is a critical element of Congress’s efforts to ensure adequate infrastructure to meet the nation’s energy needs. As FERC found, the Third Circuit’s decision subverts those efforts and will consequently “have profoundly adverse impacts on the development of the nation’s interstate natural gas transportation system.” *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 56.

#### ***1. The decision below grants states a veto power over pipelines***

Section 717f(h) is designed to preclude precisely what the Third Circuit read it to enable. The provision addresses the prototypical problem that calls for the exercise of eminent-domain power. Ideally, the government, like any private party, would acquire property with the current owner’s consent. But when the government seeks to construct a road, pipeline, or similar infrastructure that must cross through many individual parcels of land, market dynamics often will impede such negotiations. Although the value of any one of these property interests may be limited, the value of the public good the government seeks to construct by

combining these individual interests can be considerable. Recognizing as much, each individual owner has the incentive to hold out, refusing to sell unless the government provides compensation or other concessions that may far exceed the worth of the underlying property interest. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75-76 (1986). Eminent domain solves this problem by allowing the sovereign to seize the necessary property interests at a judicially determined fair price. *Ibid.* It likewise solves the problem of individual landowners refusing to sell at any price, whether due to personal opposition to a project, animosity toward the people or institutions involved, or some other reason.

This hold-out problem—and the corresponding need for the exercise of eminent domain—does not evaporate simply because a state rather than a private party owns the relevant property interest. States likewise may hold out by refusing to sell, and they may do so to secure economic rents or to pursue any number of policy or other goals.

Congress expressly recognized this concern in enacting Section 717f(h). As the Senate Report declared, allowing states to “require a natural-gas pipe-line company entering the State to serve the people of that State as a condition to obtaining the right of eminent domain” would “defeat[] the very objectives of the Natural Gas Act.” S. Rep. No. 80-429, 3 (1947). That, the report explained, is because it is the *federal* government, through the Federal Power Commission (and now FERC), that “is given exclusive jurisdiction



to regulate the transportation of natural gas in interstate commerce.” *Ibid.* If state consent were required for acquisition of the property interests necessary to construct and operate a pipeline, “then it is obvious that the orders of the Federal Power Commission may be nullified.” *Id.* at 4.

Under the Third Circuit’s decision, states have reacquired the very veto power that Congress sought to deny them. All states have significant real property holdings. In particular, under the equal footing doctrine, each state owns the land underlying all navigable waters within its borders. *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926). Few if any pipeline projects can completely evade all such state-owned property, and they would be able to do so only at substantial cost. There will thus be few if any projects that could escape the control of every state through which they pass. *See PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 58 n. 221 (“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.”).

The Third Circuit’s decision is all the more problematic because it exempts from Section 717f(h) even the far more intangible property interests that a state might claim. Here, for example, New Jersey holds possessory interests in only two of the relevant properties. Pet. App. 5. In 40 others, it holds certain nonpossessory interests, generally “easements requiring that the

land be preserved for recreational, conservation, or agricultural use.” Pet. App. 5. If such interests are immune from condemnation, then any state that seeks to block or alter a pipeline has an easy means of doing so: it may simply secure a conservation easement or similar property interest somewhere in a pipeline’s path and withhold consent until its demands are met. *See PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 58 n. 221 (“If lands over which a state has asserted any property interest also become impassable 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) [15 U.S.C. § 717f(h)].”).

Congress has recognized that states might take such action to block prospective projects. Thus, in the Federal Power Act, Congress allowed for the exercise of eminent domain over state-owned property interests acquired *after* the passage of the statute, even while exempting those acquired before. 16 U.S.C. § 814. The Natural Gas Act’s condemnation provision is, of course, even broader. *See* 15 U.S.C. § 717f(h); *supra* pp. 5-8. But the Third Circuit’s reading of it allows for no limitations on state immunity from the federal eminent-domain power: *no* state property interests may be condemned under the Natural Gas Act, no matter when or how the state acquired them. Pet. App. 30. By the Third Circuit’s logic, the Constitution would *preclude* any further limitations. Indeed, even the Federal Power Act’s allowance for condemnation of a state’s

recently acquired property interests would be unconstitutional. Pet. App. 26-27; *see infra* pp. 21-22.

## **2. Granting states veto power frustrates Congress's scheme**

Congress was not blind to the interests of the states when it enacted the Natural Gas Act. Rather, as discussed further below, it provided detailed mechanisms for states to express their concerns and for FERC to address them. But if, as the Third Circuit held, states are exempt from Section 717f(h)'s scope, they will have the ultimate trump card: the ability to block any pipeline project passing through their territory. States may exercise this veto power for policy or other reasons inconsistent with the federal interests the Natural Gas Act is intended to advance.

That is just what happened here. After the Third Circuit issued its opinion denying PennEast the ability to condemn state-owned property, a New Jersey agency determined the pipeline project must therefore be terminated. Adam Herman, *New Jersey turns down permits for proposed 120-mile natural gas pipeline*, PHILLY VOICE (Oct. 12, 2019).<sup>2</sup> New Jersey governor Phil Murray declared: "My Administration fought and won in court to stop the proposed 116-mile Penn East natural gas pipeline." *Ibid.* He continued: "We are committed to transitioning New Jersey to 100% clean energy by 2050." *Ibid.*

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<sup>2</sup> <https://www.phillyvoice.com/new-jersey-proposed-natural-gas-pipeline-120-miles-trenton-pennsylvania-penneast/>.

Whether New Jersey's asserted policy preferences are valid is beside the point: Congress did not intend for any one state to be able to unilaterally impose such preferences by blocking infrastructure projects federal authorities have concluded are critical to interstate commerce. To the contrary, although Congress established intricate mechanisms to allow all stakeholders a say in whether and how a pipeline will be constructed, it granted *FERC* the ultimate authority to weigh these interests and make a final determination by issuing a "certificate of public convenience and necessity." 15 U.S.C. § 717f(h). *FERC* may issue such a certificate only if it finds that pipeline construction is "required" by present or future public needs, and it may make that determination only after providing a hearing to "all interested persons" on issues including the specific route the pipeline should take. 15 U.S.C. §§ 717f(c)(1)(B), (e). But it is *FERC*, and not the states, that makes this decision. *Ibid.*

The procedural requirements that precede any such *FERC* determination provide for a full airing of the sorts of concerns that states like New Jersey might raise. Here, *FERC* first published PennEast's application to construct the pipeline in 2015. Pet. App. 38. Before that, *FERC* had published a notice that it intended to prepare an Environmental Impact Statement (EIS) for the contemplated project, which it "sent to more than 4,300 interested entities, including representatives of federal, state, and local agencies." Pet. App. 42. *FERC* received more than 6,000 written comments, along with numerous additional verbal

comments at open public meetings. Pet. App. 42-43. FERC then issued a draft EIS, which was again both published and sent to more than 4,000 interested parties. Pet. App. 43. After receiving and accounting for many additional comments—some of which prompted changes to the proposed route of the pipeline—FERC in 2017 issued a final EIS that addressed “all substantive comments received.” Pet. App. 43. Finally, in 2018, following a proceeding in which “New Jersey State representatives” among others were permitted to intervene (Pet. App. 38), FERC issued a final order reaffirming the agency’s conclusions and addressing (“for over 40 pages”) the “major environmental issues raised.” Pet. App. 47. Only after this elaborate process did FERC approve the proposed pipeline. Pet. App. 48.

Should any stakeholders that participated in these proceedings object to FERC’s determination, still further process is available to them: they may petition for review of the FERC order in the D.C. Circuit. See 15 U.S.C. § 717r(b). New Jersey took advantage of this avenue for review here. See Order, *Delaware Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir., Oct. 1, 2019) (holding case in abeyance pending final resolution of Third Circuit proceedings).

According to the Third Circuit, all of this process is for naught. A state need not convince FERC of the state’s view that pipeline construction is unnecessary or unwarranted. Nor need it convince the D.C. Circuit that FERC’s decision must be set aside. Instead, stymied on these fronts, a state can simply assert

immunity from any condemnation proceeding and stop the project in its tracks.

That is precisely the “nulli[fication]” of FERC orders Congress designed Section 717f(h) to prevent. S. Rep. No. 80-429, at 4. Congress recognized that states are an important voice in the process for siting and approving pipelines. But it intended that they be just one voice of many, and never the determinative one. The Third Circuit’s decision subverts that carefully calibrated approach.

The Third Circuit’s supposed “work-around” fails to resolve this fundamental problem. *Contra* Pet. App. 31. The court suggested that, rather than have Penn-East or a similar private entity condemn state-owned land, an “accountable federal official” could “file the necessary condemnation actions and then transfer the property to the natural gas company.” Pet. App. 30. But as FERC itself explained, the Natural Gas Act grants relevant federal officials no such authority. *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶¶ 51-52. Perhaps Congress could amend the statute to permit FERC itself to condemn state-owned property. Pet. App. 31; *but see PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 52 (highlighting “practical considerations” that might undermine this approach). Presumably, the Third Circuit would require Congress to make FERC more than just a nominal party to such proceedings, as otherwise this legislative fix would be a pointless formality. But if so, requiring FERC to litigate the value of hundreds of individual parcels of land would be a serious drain on the federal government’s

resources. That is why Congress delegated its eminent-domain authority to private parties in Section 717f(h) and other similar condemnation provisions, appointing them as agents of the federal government to exercise its sovereign power. *See supra* pp. 5-7. Contrary to the Third Circuit's decision, nothing required Congress to make a different, more costly, choice.

### **B. The Third Circuit's Decision Will Have Serious Economic Repercussions**

The Third Circuit's rejiggering of Congress's carefully crafted scheme will have significant practical implications. Indeed, just the single pipeline at issue in this case is a matter of economic importance. Nearly 75 percent of New Jersey households rely on natural gas, the vast majority of which must be transported into the state via pipeline. Comment of New Jersey Natural Gas, Oct. 18, 2019, at 3-4, *PennEast Pipeline Company, LLC*, FERC Docket No. RP20-41. Recent independent reviews have determined that existing New Jersey natural gas pipelines are fully subscribed—which can cause supply outages and other reliability concerns on high-demand days (*e.g.*, during cold weather, when people are attempting to heat their homes). *Id.* at 4-5. The PennEast pipeline would address these concerns by delivering roughly a billion cubic feet of natural gas every day, serving the energy needs of as many as 4.7 million households. PennEast

Pipeline, *Overview 1* (Sep. 21, 2016).<sup>3</sup> According to PennEast's estimates, this added supply will save consumers approximately \$900 million annually. *Ibid.* And the construction of the pipeline alone would itself generate more than 12,000 jobs and \$740 million in wages. *Id.* at 4. If the Third Circuit's decision is left standing, none of these benefits will materialize.

The threat to future pipeline projects is no less real. Indeed, even were the Third Circuit's ruling confined to the three states within its jurisdiction, the economic impact would be significant. Pennsylvania is, after Texas, the second largest producer of natural gas in the country (with more than double the output of Louisiana, which comes in a distant third). U.S. Energy Information Administration, *Frequently Asked Questions* (Nov. 1, 2019).<sup>4</sup> In part as a result, numerous natural gas pipelines must cross through the Third Circuit to serve the energy needs of the densely populated northeast:

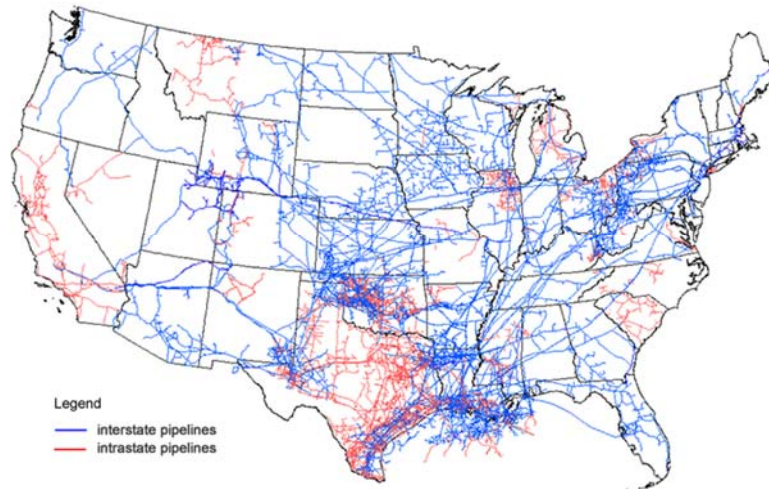
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<sup>3</sup> [https://penneastpipeline.com/wp-content/uploads/2016/10/PennEast\\_Overview\\_9-21-16\\_9pm.pdf](https://penneastpipeline.com/wp-content/uploads/2016/10/PennEast_Overview_9-21-16_9pm.pdf).

<sup>4</sup> <https://www.eia.gov/tools/faqs/faq.php?id=46&t=8>.



Map of U.S. interstate and intrastate natural gas pipelines



Source: U.S. Energy Information Administration, *About U.S. Natural Gas Pipelines*

U.S. Energy Information Administration, *Natural gas explained* (Dec. 5, 2019).<sup>5</sup> The Third Circuit's allowance for state vetoes puts all such new pipeline projects at risk.

Moreover, states outside the Third Circuit may be emboldened by New Jersey's success and seek to employ the same tactics. Already, Maryland has invoked its supposed Eleventh Amendment immunity to attempt to prevent construction of a FERC-approved pipeline linking Pennsylvania to West Virginia. Comment of TC Energy Corp., Oct. 18, 2019, at 19, *PennEast Pipeline Company, LLC*, FERC Docket No. RP20-41. Other states may soon follow.

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<sup>5</sup> <https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php>.

Even if other lower courts ultimately reject the Third Circuit’s approach (as they should), the uncertainty created by the Third Circuit’s opinion will have widespread ramifications. Pipelines require significant capital investment, and the costs of raising such capital depend on the associated risks. The Third Circuit’s decision multiplies that risk for all natural gas pipelines. No longer can investors be confident that FERC’s approval of a project will be the final word. Instead, they must account for the possibility that one or more states might subsequently step in and prohibit a pipeline’s construction. To account for this risk, investors will either increase the interest rate at which they lend funds or they will refuse to provide financing at all. “This,” as FERC recognized, “would result in either increased costs for natural gas consumers or greater supply constraints as a result of pipeline[s]’ inability to secure capital for construction.” *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at ¶ 62. Any increase in the costs of capital for natural gas pipelines may have broad effects on the national economy: over a quarter of the country’s energy needs are currently met by natural gas. American Gas Association, 2019 AGA Overview (Mar. 4, 2019).<sup>6</sup>

Nor are the effects of the Third Circuit’s decision limited to this particular segment of the energy market. As noted above (*supra* pp. 13-14), the court’s opinion also calls into question the constitutionality of the Federal Power Act’s eminent-domain provision,

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<sup>6</sup> <https://www.aga.org/globalassets/2019-aga-overview-updated.pdf>.

16 U.S.C. § 814. Nearly seventy-five years ago, this Court recognized that the Federal Power Act generally preempts state laws imposing permitting requirements that would effectively grant states a “veto power over the federal project.” *First Iowa Hydro-Electric Cooperative v. Federal Power Comm’n*, 328 U.S. 152, 164 (1946). Having a “dual final authority \* \* \* would be unworkable.” *Id.* at 168. The Third Circuit’s decision would grant states this same authority through other means. The Federal Power Act authorizes FERC-approved licensees to condemn the property necessary to construct hydro-electric power projects. 16 U.S.C. § 814. Although *some* state-owned property is exempt from this condemnation provision, other state-owned property—including, most significantly, property interests a state acquired after 1992—is not. *Ibid.* Under the Third Circuit’s reasoning, Congress’s delegation of the power to acquire these state-owned lands would violate the Eleventh Amendment. Pet. App. 26-27. States could thus use this immunity from condemnation to block the construction of key hydro-electric power projects. Again, as with the Natural Gas Act, that would subvert Congress’s clearly expressed intent and increase the costs of energy.

More generally, the Third Circuit’s decision threatens to remove a critical tool from Congress’s toolkit. For most of this nation’s history, Congress has delegated its eminent-domain power to private corporations in order to protect and promote interstate commerce. *E.g., Luxton*, 153 U.S. at 533-34. Without this authority, the railroads, telegraph lines, pipelines,

and other key infrastructure projects that knit the nation together and constitute the foundation of our economy might never have been built with such speed and scope. *E.g.*, *California v. Central Pac. R. Co.*, 127 U.S. 1, 38-39 (1888) (discussing 1862 Act authorizing Central Pacific Railroad Company of California to construct railroad and telegraph lines connecting San Francisco to the Missouri river, and observing that “[t]he power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce”). The Third Circuit would impose a newfound limit on this well-established authority: it may be exercised only if each state through which these infrastructure networks extend provides its consent. If left uncorrected, the Third Circuit’s novel decision may severely hamper Congress’s ability to spur the development of infrastructure needed to sustain and promote economic growth.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

DARYL JOSEFFER  
MICHAEL B. SCHON  
U.S. CHAMBER LITIGATION  
CENTER  
1615 H St., NW  
Washington, DC 20062  
(202) 463-5948

*Counsel for the Chamber of  
Commerce of the  
United States of America*

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Respectfully submitted,

DEANNE E. MAYNARD  
*Counsel of Record*  
MORRISON & FOERSTER LLP  
2000 Pennsylvania Ave. NW  
Washington, DC 20006  
(202) 887-8740  
DMaynard@mofocom

JAMES R. SIGEL  
MORRISON & FOERSTER LLP  
425 Market St.  
San Francisco, CA 94105  
*Counsel for Amici Curiae*