

Nos. 19-1191 and consolidated cases

**In The United States Court of Appeals
For the Third Circuit**

In re: PENNEAST PIPELINE COMPANY, LLC

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,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
No. 3-18-CV-01597

**BRIEF OF *AMICI CURIAE*
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM
INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS,
IN SUPPORT OF APPELLEE**

Anna M. Manasco
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8868
amanasco@bradley.com

Lela M. Hollabaugh
BRADLEY ARANT BOULT
CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, TN 37203
(615) 252-2348
lhollabaugh@bradley.com

Counsel for Amici Curiae
(additional counsel listed on inside cover)

Joan Dreskin
Sandra Y. Snyder
Ammaar Joya
Interstate Natural Gas Association of
America
20 F St., NW, Suite 450
Washington, DC 20001
(202) 216-5900
jdreskin@ingaa.org
ssnyder@ingaa.org
ajoya@ingaa.org
*Counsel for Interstate Natural Gas
Association of America*

Michael L. Murray
Matthew Agen
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
(202) 824-7071
mmurray@aga.org
magen@aga.org
Counsel for American Gas Association

Stacy R. Linden
Andrea S. Miles
American Petroleum Institute
200 Massachusetts Ave., NW
Washington, DC 20001
(202) 682-8000
LindenS@api.org
MilesA@api.org
*Counsel for American Petroleum
Institute*

Michael B. Schon
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5948
mschon@uschamber.com
*Counsel for Chamber of Commerce of
the United States of America*

Peter C. Tolsdorf
Manufacturers' Center for Legal Action
733 10 St. NW, Suite 700
Washington, D.C. 20001
(202) 637-3100
PTolsdorf@nam.org
*Counsel for National Association of
Manufacturers*

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

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s/ Lela M. Hollabaugh

Lela M. Hollabaugh
Counsel

Dated: May 15, 2019

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INTEREST OF *AMICI CURIAE*

These *amici curiae* (“Industry *Amici*”) represent critical domestic infrastructure — namely, the interstate natural gas pipeline industry as well as manufacturers and other companies that depend on pipelines to deliver natural gas. INGAA represents virtually all of the interstate pipeline companies in the United States. INGAA members transport the vast majority of the nation’s natural gas through a network of almost 200,000 miles of interstate pipelines and storage facilities.¹

AGA represents more than 200 local energy companies that deliver natural gas throughout the United States. More than seventy-one million residential, commercial, and industrial gas customers in the country (which is 95% of all such customers) receive their gas from AGA members.²

API represents all facets of the natural gas and oil industry, which supports 10.3 million jobs and nearly 8% of the U.S. economy. API’s 600+ members include exploration, production, refining, marketing, pipeline, service, and supply firms.³

The Chamber is the world’s largest business federation. It represents 300,000

¹ See INGAA, *Pipelines 101: Economics, Natural Gas Facts, Pipeline Fun Facts*, <https://www.ingaa.org/Pipelines101/Economics/25811/PipelineFunFacts.aspx> (last visited May 15, 2019).

² See AGA, *About Us*, <https://www.aga.org/about/> (last visited May 15, 2019).

³ See API, *About API*, <https://www.api.org/about> (last visited May 15, 2019).

direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.⁴ An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

NAM is the voice of the manufacturing industry in the United States, which employs more than 12 million people and contributes \$2.25 trillion to the economy annually.⁵ NAM members depend on natural gas for fuel and heat, and new pipelines have created more than 60,000 manufacturing jobs; for them, “direct access to natural gas pipelines is vital to local production and environmental stewardship.”⁶

The Industry *Amici* have substantial interests in continued investment in and development of interstate natural gas infrastructure, and in ensuring predictable and consistent laws that affect that infrastructure. These interests are increasingly important: according to federal authorities, interstate natural gas pipelines are “[t]he

⁴ See Chamber, *About*, <https://www.uschamber.com/about/about-the-us-chamber> (last visited May 15, 2019).

⁵ See NAM, *About*, <https://www.nam.org/About/> (last visited May 15, 2019).

⁶ See NAM Center for Manufacturing Research, *Energizing Manufacturing: Natural Gas and Economic Growth* (May 2016), <https://www.nam.org/Data-and-Reports/Reports/Natural-Gas-Study/Energizing-Manufacturing-Executive-Summary/>.

arteries of the Nation’s energy infrastructure.”⁷ The natural gas they move heats 69 million American homes,⁸ generates over 30 percent of the nation’s electricity,⁹ provides a key component of fertilizer that is used to grow our food, and in raw form is a component of many manufactured goods.¹⁰ Demand for natural gas continues to increase because it is abundant, clean, and affordable,¹¹ so additional infrastructure will be needed for the foreseeable future.¹²

Through this brief, the Industry *Amici* provide information about the interstate natural gas pipeline industry and other industries that depend on interstate transmission of natural gas. The need to ensure access to a supply of natural gas adequate to meet the nation’s energy requirements demonstrates the importance of

⁷ See U.S. Pipeline and Hazardous Materials Safety Admin., *General Pipeline FAQs*, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last visited May 15, 2019).

⁸ See AGA, *Natural Gas Safety Resilience Innovation 2019 Playbook* 61 (2019), <http://playbook.aga.org/#p=61> (last visited May 15, 2019).

⁹ See U.S. Energy Info. Admin., *What is U.S. electricity generation by energy source?*, <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (last visited May 15, 2019).

¹⁰ See INGAA, *Pipelines 101: Economics, Natural Gas Facts, Pipeline Fun Facts*, <https://www.ingaa.org/Pipelines101/Economics/25811/15915.aspx> (last visited May 15, 2019).

¹¹ See U.S. Energy Info. Admin., *Annual Energy Outlook 2019*, <https://www.eia.gov/outlooks/aeo/> (last visited May 15, 2019).

¹² See INGAA, *North American Midstream Infrastructure Through 2035: Significant Development Continues* 37 (June 18, 2018), <https://www.ingaa.org/File.aspx?id=34703>.

an affirmance.¹³

SUMMARY OF THE ARGUMENT

New Jersey is asking the Court for a seismic shift in federal law applicable to the development of critical interstate natural gas pipeline infrastructure in the United States: for States to have a unilateral and unconstrained veto, subject to their sole discretion, over federally approved pipeline projects based on an expansive and unprecedented view of the Eleventh Amendment. No federal court ever has done what New Jersey is asking this Court to do, and this Court should not be the first, for two main reasons.

First, the text, history, and purpose of the Natural Gas Act illustrate how New Jersey's position is an affront to Congress's well-settled constitutional authority to regulate interstate commerce in natural gas. Congress designed the Natural Gas Act to give States the opportunity to have a voice in the approval process for new and expanded interstate natural gas pipeline infrastructure, but Congress did not grant States an unconstrained veto over federal approvals (as it has with respect to land acquisition and eminent domain in other infrastructure statutes). Further, Congress established the Natural Gas Act as entirely dependent on pipeline companies to build

¹³ Industry *Amici* file this brief with the consent of the parties. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for the Industry *Amici* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than the *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief.

and operate federally approved critical pipeline infrastructure for the benefit of all, something that no arm of the federal government did then or does now. Critically, Congress amended the Natural Gas Act to delegate the federal eminent domain power to pipeline companies, thereby placing those companies in the shoes of the federal government, in **direct** response to interference in the development of federally approved critical pipeline infrastructure by numerous States — the same sort of interference that New Jersey now seeks to engage in. Federal courts have long upheld the Natural Gas Act and Congress’s delegation of the federal eminent domain power to interstate natural gas pipeline companies as necessary to regulate interstate commerce in natural gas. New Jersey’s position that PennEast cannot condemn any property in which the State has any kind of property interest cannot be reconciled with this statutory scheme or Congress’s well-settled authority to establish it.

Second, New Jersey’s Eleventh Amendment attack on Congress’s authority to delegate the federal eminent domain power to interstate natural gas pipeline companies under the Natural Gas Act presents serious practical problems. Indeed, the relief that New Jersey is requesting in these appeals demonstrates how a single State could immediately and seriously disrupt the development of critical pipeline infrastructure in the United States, if the door is opened by this Court. If this Court were to create the unconstrained veto that New Jersey has requested, any State could seek to undermine federally approved interstate natural gas pipeline projects simply

by acquiring (or being gifted) any kind of property interest in parcels of land in the proposed pathway of the pipeline. The only limit on the ability of a State to seek to interfere is the State's own whims: if a State pursues land acquisitions as part of a policy agenda, which may change from time to time, the State will be able to claim an unrestricted ability to disrupt, impede, and even block the development of interstate pipeline infrastructure within its borders. This is untenable today for the same reason that the absence of a statutory delegation of the federal eminent domain power was untenable more than seventy years ago: because ultimately, it means that natural gas will not be able to be transported in interstate commerce and get delivered to American citizens and businesses that depend on it. This Court should affirm.

ARGUMENT

I. New Jersey's assertion that the Eleventh Amendment prohibits condemnation of its property interests by interstate pipeline companies is incompatible with the Natural Gas Act and an affront to Congress's well-settled authority to regulate interstate commerce in natural gas.

New Jersey's assertion that the Eleventh Amendment prohibits condemnation of its property interests by interstate pipeline companies is fundamentally incompatible with numerous aspects of the text, history, and purpose of the Natural Gas Act. *See* 15 U.S.C. §§ 717, *et seq.* That is important because, as explained below, Congress's authority to regulate interstate commerce empowers it to delegate to private companies its power to exercise eminent domain over lands owned by States. That is precisely what Congress did in the Natural Gas Act, in direct response

to efforts by States to block much-needed interstate pipeline infrastructure. Indeed, the expressly stated purpose of the amendment to the Natural Gas Act delegating the federal eminent domain power to federally approved pipelines was to “correct this deficiency and omission” in the Act. *See* S. REP. 80-429 at 3 (1947).

A. The Natural Gas Act provides a statutory framework that allows States to have a voice but not an unconstrained veto in the development of interstate natural gas infrastructure.

The Natural Gas Act was passed in 1938 to “to protect the interest of consumers in an adequate supply of gas and at reasonable rates.” *Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1145–46 (3d Cir. 1977). To accomplish this purpose, Section 7 of the Act provides for a process in which an interstate natural gas pipeline company must apply to the Federal Energy Regulatory Commission (“FERC”) for a Certificate of Public Convenience and Necessity (“Certificate”) to build new or expand existing interstate natural gas infrastructure. *See* 15 U.S.C. § 717f. The threshold inquiry for the pipeline company before seeking a Certificate and for FERC before issuing a Certificate is whether evidence of the demand for the project necessitates new or expanded infrastructure.

After determining that there is sufficient demand for a project, pipeline companies consider extensive information about where to site new infrastructure, much of which is also ultimately considered and reviewed by FERC during the application process. These considerations include, among other things, locations of

available connections to existing pipelines, existing right of way, terrain, waterbodies, population density, environmental justice concerns, potential environmental impacts, constructability, existing utility corridors, cemeteries, tribal interests, and areas of historical and cultural significance.

Only after a very thorough agency review, evaluation and approval of a pipeline company's proposed project does FERC issue a Certificate. In deciding whether to issue a Certificate, FERC also considers extensive information relating to the proposed project, including existing natural gas market impacts, potential adverse impacts on affected landowners and communities, environmental and economic impacts, and comments and arguments from numerous stakeholders.¹⁴ One of the many factors that FERC considers is the extent to which it will be necessary for the pipeline company to use eminent domain to place the pipeline into service. *See* 88 FERC ¶ 61,227, at 61,737 (1999).

The Natural Gas Act delegates the federal power of eminent domain to pipeline companies only if they (1) hold a FERC Certificate and (2) are unable to acquire by contract the property interests necessary to complete the federally approved project. *See* 15 U.S.C. § 717f(h). Importantly, eminent domain may be

¹⁴ *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

used to acquire only the property interests that are specifically reviewed and determined by FERC to be necessary for the project. *See id.* Additionally, the pipeline company must establish in court that it meets these statutory requirements before it may condemn any necessary land. *Id.*¹⁵

Two features of this statutory framework are particularly important in these appeals. *First*, States (as well as private citizens and private and public organizations) have a voice (if they choose) in the federal approval process at multiple points before an interstate natural gas pipeline project is approved and before the pipeline company becomes a federal delegee of the power of eminent domain.¹⁶ Indeed, numerous New Jersey government entities participated extensively in the FERC Certificate proceedings relating to these appeals.¹⁷

¹⁵ *See also Columbia Gas Trans., LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa.*, 768 F.3d 300, 304 (3d Cir. 2014).

¹⁶ *See* FERC, *Process for Natural Gas Certificates*, <https://www.ferc.gov/resources/processes/flow/gas-2.asp> (last visited May 15, 2019) (flow chart explaining process and identifying opportunities for public input).

¹⁷ *See, e.g.*, Letter from John Gray, Deputy Chief of Staff, N.J. Dept. of Env'tl. Prot., to Kimberly Bose, Secretary, FERC (Dec. 20, 2016) (on file FERC Docket No. CP15-558); Letter from Michael Catania, Chair, N.J. Nat. Lands Tr., to Kimberly Bose, Secretary, FERC (Feb. 9, 2018) (on file FERC Docket No. CP15-558); Comments of the N.J. Div. of Rate Counsel, FERC Docket No. CP15-558 (Sept. 12, 2016); Letter from Katherine Marcopul, Deputy State Historic Pres. Officer, N.J. Historic Pres. Office, to Kimberly Bose, Secretary, FERC (April 11, 2019) (on file FERC Docket No. CP15-558); Letter from Margaret Nordstrom, Exec. Dir., N.J. Highlands Water Prot. and Planning Council, to Kimberly Bose, Secretary, FERC (August 23, 2016) (on file FERC Docket No. CP15-558); Letter from Susan Payne,

Second, although States have a voice in the federal approval process for interstate natural gas pipelines, the text of the Natural Gas Act does not allow States an unconstrained power to veto federal approval for a pipeline project. 15 U.S.C. § 717f(h).¹⁸ As discussed below, Congress intentionally did not grant States this authority. *See infra* Part I.C.

The absence of an unconstrained State veto power in the Natural Gas Act stands in stark contrast to other statutory delegations of the federal eminent domain power, some of which do provide States an unconstrained veto with respect to land acquisition and eminent domain. *See, e.g.*, 49 U.S.C. § 24311(a) (statute delegating federal eminent domain power to Amtrak, but providing that Amtrak cannot condemn property owned by a State); 16 U.S.C. § 814 (Federal Power Act provision restricting federal licensees' authority to condemn public parks owned by a State).

B. The Natural Gas Act provides a statutory framework that relies entirely on interstate natural gas pipeline companies to ensure an adequate supply of gas at a reasonable price, and the federal eminent domain power is a critical element of that framework.

The Natural Gas Act establishes a framework that depends **entirely** on interstate natural gas pipeline companies to build and operate natural gas

Exec. Dir., Agric. Dev. Comm., to Kimberly Bose, Secretary, FERC (May 31, 2017) (on file FERC Docket No. CP15-558).

¹⁸ The Natural Gas Act expressly does not affect States' rights under the Coastal Zone Management Act, Clean Air Act, and Clean Water Act. *See* 15 U.S.C. § 717b(d).

infrastructure for the benefit of all Americans, and the federal eminent domain power is a critical element of that framework. FERC has recognized that “[t]he power of eminent domain conferred by NGA section 7(h) is a necessary part of the statutory scheme to regulate the transportation and sale of natural gas in interstate commerce.” *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 at 29 (2018) (citing *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950); *Williams v. Transcon. Gas Pipe Line Corp.*, 89 F. Supp. 485, 487-88 (W.D.S.C. 1950)).

FERC, however, does not condemn property. Instead, the federal government relies exclusively on interstate natural gas pipeline companies that have FERC Certificates and satisfy the requirements of the Natural Gas Act to condemn property for natural gas infrastructure. Put differently, there is no arm of the federal government that exercises the federal eminent domain power to build interstate pipelines and meet the public need of reliably transporting affordable natural gas across the country. Rather, the Natural Gas Act provides the interstate pipeline companies that fulfill this public need the federal eminent domain power often exercised by federal entities. *See* 15 U.S.C. § 717f(h). When Congress designed the Natural Gas Act this way, it intentionally put interstate pipeline companies in the shoes of the federal government for purposes of the federal eminent domain power as it relates to interstate commerce in natural gas. *See id.*; *see infra* Part I.C.

This exclusive reliance on interstate natural gas pipeline companies to condemn property is a unique aspect of the Natural Gas Act. Although there are many similarities between the Natural Gas Act and the Federal Power Act, *see Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 n. 7 (1981), the Federal Power Act expressly provides that before a license may be issued to allow a utility to exercise the federal eminent domain power, FERC must make a determination that the utility's project does not affect the "development of any water resources for public purposes [that] should be undertaken by the United States itself," 16 U.S.C. § 800(b). If the evidence does not support that determination, FERC is not authorized under the Federal Power Act to issue a license to the utility and any condemnation must be accomplished by the federal government itself. *See id.* "Thus, by definition, a licensed project [under the Federal Power Act] does not implicate the interests of the United States to the degree that it is thought desirable that the project be undertaken by the United States itself." *Ga. Power Co. v. Sanders*, 617 F.2d 1112, 1118 (5th Cir. 1980) (*en banc*). So although the United States itself may condemn property for the purposes of power generation, there is no federal entity that condemns property to facilitate the interstate transportation of natural gas.

This distinction between the two statutes is important because of New Jersey's significant concession in the district court proceedings that the State's property interests at issue in these appeals could be subject to condemnation by the federal

government itself. *See* Doc. 36 at 24. This concession obfuscates the fact that condemnation by PennEast is the equivalent of condemnation by the federal government because PennEast is the federal government's delegee and there is no arm of the federal government that condemns property in connection with interstate natural gas infrastructure.

C. The delegation of the federal eminent domain power in the Natural Gas Act was added by amendment for the express purpose of ensuring that States could not interfere with the development of interstate natural gas pipeline infrastructure.

The reason why the Natural Gas Act was amended to delegate the federal eminent domain power to interstate pipeline companies with a FERC Certificate is critically important in these appeals. *See* 61 Stat. 459 (1947). According to a well-developed legislative history and context, disparate state-law provisions relating to interstate pipelines posed problems for the development of much-needed interstate pipeline infrastructure. Multiple States would not grant the right of eminent domain to pipelines that crossed but did not distribute natural gas in that State, and in other States state law expressly denied the right of eminent domain to federally approved interstate pipelines. *See* S. REP. 80-429 at 2-3 (1947). As a result, federally approved interstate pipelines lacked eminent domain authority in numerous States. The expressly stated purpose of the amendment to the Natural Gas Act delegating the federal eminent domain power to federally approved pipelines was to **“correct this deficiency and omission”** in the Act. *See id.* at 3 (emphasis added).

Extensive hearings established that Congress's earlier omission of an eminent domain delegation from the Natural Gas Act created very serious problems.¹⁹ At that time, because 94% of the country's natural gas reserves were located in four contiguous states (Kansas, Oklahoma, Texas, and Louisiana), most natural gas had to be transported across many states to supply heat and energy to the country's most densely populated areas (such as New York and New Jersey).²⁰ Because the pipelines could not exercise the federal eminent domain power (and there was no arm of the federal government that condemned land to build natural gas infrastructure, *see supra* Part I.B), natural gas often simply could not get to where it was needed. Citizens and businesses across the country suffered the consequences of these problems: during the Congressional Hearings, the governor of Kentucky submitted a statement that described natural gas shortages during winter that caused the state to limit the availability of natural gas for heat and for industrial purposes, and a similar statement from the governor of West Virginia addressed industrial

¹⁹ *See Amendments to the Natural Gas Act: Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569, and H.R. 2956 Before the H. Comm. on Interstate and Foreign Commerce*, 80th Cong. (1947) ("Congressional Hearings"); *see also* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 996-98 (2015).

²⁰ *See* Congressional Hearings, *supra* n.19, at 544 (statement of David T. Searls, Texas Eastern Transmission Corp.)

shutdowns that left citizens out of work.²¹ Members of Congress from States with natural gas shortages voiced support for the eminent domain delegation because it would facilitate the transportation of much-needed gas to citizens in their State.²²

Other testimony at the Congressional Hearings expressly called to members' attention a concern that if the proposed eminent domain provision became law, then pipeline companies could use the federal eminent domain power to condemn State property.²³ Nevertheless, the amendment passed both the House and Senate as it was written, with no exception or limitation restricting any federal delegee from condemning State property under any circumstance. *See* 15 U.S.C. § 717f(h).

D. Federal courts have long recognized that the delegation of the federal eminent domain power in the Natural Gas Act was and is necessary to regulate interstate commerce.

Finally, Congress's authority to regulate interstate commerce is the source of its authority to enact the Natural Gas Act and delegate the federal eminent domain power to interstate natural gas pipeline companies for purposes of interstate commerce in natural gas. Federal courts have long recognized that the Act's delegation of the federal eminent domain power to interstate pipeline companies is necessary to regulate interstate commerce. As the United States Supreme Court

²¹ *See id.* at 46-48.

²² *See id.* at 622 (statement of Rep. Carson of Ohio).

²³ *See id.* at 611 (House committee hearing); *id.* at 105 (Senate committee hearing).

explained before the Act was passed, “[n]atural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law . . . which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference.” *Pennsylvania v. West Virginia*, 262 U.S. 553, 596–97 (1923); accord, e.g., *Transcon. Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n*, 464 F.2d 1358, 1362 (3d Cir. 1972).

When the constitutionality of the eminent domain delegation was first attacked and upheld, the Fifth Circuit explained why granting this authority was necessary to regulate interstate commerce in natural gas: “Consideration of the facts, and the legislative history, plan and scope of the Natural Gas Act, and the judicial consideration and application the Act has received, [left that Court] in no doubt that the grant by Congress of the power of eminent domain to a natural gas company . . . is clearly within the constitutional power of Congress to regulate interstate Commerce.” *Thatcher*, 180 F.2d at 646–47. “Indeed,” that Court continued, “when Congress determined it in the public interest to regulate the interstate transportation and interstate sale of natural gas . . . it was proper to make provision whereby the full statutory scheme of control and regulation could be made effective, by the grant to such company of the right of eminent domain.” *Id.* Ultimately, the Fifth Circuit concluded, “[t]he possession of this right could well be considered **necessary** to

insure ability to comply with [FERC] requirements as well as with all phases of the statutory scheme of regulation.” *Id.* (emphasis added).

As the *Thatcher* court recognized, practical circumstances that are “implicit in the provisions of” the Natural Gas Act drive the need for Congress to delegate the federal eminent domain power to pipeline companies — namely, the reality that “vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital need of the product; and that the only way this natural gas can be feasibly transported from one State to another is by means of a pipe line.” *Id.* As the Fifth Circuit appreciated, “[n]one of the means of transportation by water, land or air, to which mankind has successively become accustomed, suffices for the movement of natural gas.” *Id.*

As the *Thatcher* court explained, the Natural Gas Act was not the first time that Congress had delegated the federal eminent domain power to private companies out of practical necessity. *See id.* (“There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign.”).

As the United States Supreme Court explained long ago, the federal eminent domain power “is essential to [the United States’] independent existence and

perpetuity.” *Kohl v. United States*, 91 U. S. 367, 368 (1875). As *Kohl* explained, the federal eminent domain power is “an inseparable incident of sovereignty,” and it is “not changed by transfer to another holder.” *Id.* at 370, 372. Further, the Court continued, the power of eminent domain “must be complete in itself. It can neither be enlarged nor diminished by a State....**The consent of a State can never be a condition precedent to its enjoyment.**” *Id.* at 374 (emphasis added).

The common thread of this jurisprudence is the repeated recognition that Congress’s authority to regulate interstate commerce empowers it to delegate the federal power of eminent domain to private companies; and further that the delegated power is inherent in the sovereignty of the United States, not dependent upon the consent of any State, and not changed by virtue of its delegation.

E. New Jersey’s expansive and unprecedented position is fundamentally inconsistent with Congress’s authority to regulate interstate commerce as provided in this statutory framework.

New Jersey’s expansive and unprecedented position about the Eleventh Amendment is fundamentally inconsistent — indeed, irreconcilable — with Congress’s exercise of its constitutional authority in the Natural Gas Act. New Jersey’s position is that PennEast should be precluded from condemning more than forty parcels of land in which New Jersey has a wide range of property interests, including recreational, conservation, or agricultural easement interests, some of which relate to only part of the property, and such interests that extend in perpetuity.

New Jersey does not own the vast majority of the properties it has sought to immunize from condemnation. *See* Blue Br. at 1; Red Br. at 11.

At its core, New Jersey's position asserts that States have unilateral and unconstrained veto power over federally approved interstate natural gas pipeline projects insofar as State property interests are concerned — and more particularly, that States may use their property interests to unilaterally override FERC's decisions about where to site infrastructure to ensure the reliable and affordable provision of natural gas across the country.

Very few States ever have resisted condemnations under the Natural Gas Act on the basis of the Eleventh Amendment, and the Industry *Amici* are aware of no reported decision of any federal court indicating that any State ever has asserted, let alone prevailed on, an Eleventh Amendment “veto” argument as broad as the one that New Jersey is making now. As a result, there are no federal precedents, binding or persuasive, that have done what New Jersey is asking this Court to do.

As a result, New Jersey cites a single district court case as “in accord” with its Eleventh Amendment position. *See* Blue Br. at 21 (citing *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cty., Texas*, 327 F.R.D. 131, 139-42 (E.D. Tex. 2017)). But the facts of *Sabine Pipe Line* were very different from the facts for PennEast: at the time that the federal approval for that pipeline was issued, the single property at issue was privately owned (ownership was only

later transferred to the Texas Parks and Wildlife Department). *See* 327 F.R.D. at 136. Accordingly, there was no basis for a conclusion that the State owner's voice was considered as part of the federal approval process, nor for the conclusion that a federal agency had issued the approval under the Natural Gas Act knowing that the pipeline might condemn State property interests. *See id.* In addition, the *Sabine* court does not appear to have considered any of the statutory analysis about the framework set forth in the Natural Gas Act that has been provided to this Court. *See id.* at 137–143; *see also* Red Br. at Part I; *supra* Parts I.A–I.D. Indeed, because of the many reasons that compromise that statutory analysis, *Sabine Pipe Line* was wrongly decided.

New Jersey's expansive and unprecedented position about the Eleventh Amendment is irreconcilable with Congress's decision about how to regulate interstate commerce in natural gas with the Natural Gas Act. *See supra* Parts I.A–I.D. Congress provided for a process in which States have a voice in but no unconstrained veto over federally approved interstate pipeline projects. Congress could have provided States such a veto for State-owned property (as it did in the Amtrak statute and the Federal Power Act, *see supra* Part I.A), but it did not. *See* 15 U.S.C. § 717f(h).

Likewise, New Jersey's position is irreconcilable with Congress's good, clear, and stated reason for delegating the federal eminent domain power to interstate

pipeline companies in the Natural Gas Act. In the years that the Natural Gas Act was in operation with no delegation of the federal eminent domain power, numerous States frustrated the development of critical pipeline infrastructure and hampered the interstate transmission of natural gas. New Jersey's current position is simply a new chapter in that story, with the same old theme of State interference in federally approved pipeline infrastructure development. But New Jersey simply cannot account for the reality that when Congress enacted the eminent domain delegation (and did so without creating an exception for State property interests), Congress deliberately closed the book on such improper interference.

Ultimately, New Jersey's Eleventh Amendment position is an affront to Congress's well-settled authority to regulate interstate commerce in natural gas by delegating the federal eminent domain power to interstate natural gas pipeline companies independent of the consent of any State. Congress has validly exercised its constitutional authority in making this delegation, and this Court should not permit New Jersey to interfere with that authority.

II. If the Court were to adopt New Jersey's attack on Congress's constitutional authority to place interstate natural gas pipeline companies in the shoes of the federal government for eminent domain purposes under the Natural Gas Act, that shift could seriously and immediately disrupt or halt the development of interstate natural gas infrastructure in the United States.

New Jersey's Eleventh Amendment position presents serious practical problems as well: indeed, the relief that New Jersey has requested in these appeals

illustrates perfectly how New Jersey (or any other State acting alone, or number of States acting in concert) could swiftly seek to disrupt or halt the development of critical pipeline infrastructure in the United States, if allowed to do so by the Court. Both the scope and nature of this potential disruption are extremely concerning.

A. Allowing States to use their property interests to veto federally approved pipeline projects could disrupt or halt the development of critical natural gas infrastructure.

If this Court were to create the State veto power over federally approved interstate pipeline projects that New Jersey has requested, that ruling could seriously and immediately disrupt the development of critical natural gas infrastructure on a large scale. New Jersey is asserting an unconstrained veto power that if granted could apply in many, many cases: any case involving any property in which the State or any subdivision of the State has any kind of property interest, including interests that will endure in perpetuity, thereby forever immunizing that property from condemnation.

In light of New Jersey's recent push to acquire property interests in privately-owned land, the amount of land that New Jersey could immunize from condemnation on this broad theory is substantial. New Jersey boasts in its brief that as part of its Green Acres Program, the State has acquired interests in over 650,000 acres of land, and further that as part of the actions of the State Agriculture Development Committee, the State has acquired interests in over 200,000 acres of farmland. *See*

Blue Br. at 6. Together, these acquisitions represent more than **thirteen hundred square miles** of land in that State.

There can be no question that creating 1,300 square miles of no-build zone and dispersing it in numerous parcels scattered across New Jersey will disrupt the continued development of critical pipeline infrastructure in that State, particularly in light of the numerous factors that interstate pipeline companies and FERC already consider in deciding where to site new or expanded infrastructure. *See supra* Part I.A.

Likewise, there can be no question that if the Court opens the door for such disruption, the no-build zone will quickly grow to much larger than 1,300 square miles, because it will take little effort on the part of the State and private landowners to seek to immunize more and larger parcels of privately-owned property from condemnation for critical pipeline infrastructure. The application to sell or donate a property interest to New Jersey's Green Acres Program is a two-page PDF readily available online,²⁴ allowing any private landowner to easily sell a property to the State or convey to New Jersey an inexpensive conservation easement interest in the property to try to permanently prevent its condemnation for pipeline infrastructure.

²⁴ *See* NJ DEP, https://www.nj.gov/dep/greenacres/pdf/offer_7_2010.pdf.

To facilitate sales, the Green Acres Program touts numerous financial and other “benefits” of selling property interests to the State.²⁵

If the Court opens the door to such disruption, there will be few if any subsequent opportunities to close it. In the world that New Jersey envisions, the State veto power over federally approved interstate pipeline projects is unlimited — or rather, limited only by the State’s then-current policy whims and desires. According to New Jersey’s position, pipeline companies could not apply to New Jersey state courts for relief because New Jersey has not waived its sovereign immunity in those courts. And federal courts would be unable to enter condemnation orders against any New Jersey governmental entity. Thus, under New Jersey’s reasoning, an Eleventh Amendment objection, once raised, necessarily would be fatal to **any** attempt by a pipeline company to exercise the federal eminent domain power.

B. Allowing States to use their property interests to veto federally approved pipeline projects opens the door for States to disrupt or halt the development of critical natural gas infrastructure based on current policy agendas.

Additionally, New Jersey’s very recent litigation paradigm shift illustrates not only how disruptive a single State could be, if permitted by the Court, but also how a State could tactically maneuver its property interests to advance a discretionary

²⁵ See NJ DEP, *Green Acres Program: The Benefits of Leaving a Legacy . . . Selling Your Land to Green Acres*, <https://www.nj.gov/dep/greenacres/whysell.html> (last visited May 15, 2019).

policy agenda. New Jersey historically has acknowledged that interstate natural gas pipeline companies have the authority to exercise the federal eminent domain power to condemn lands in which New Jersey has a property interest. New Jersey's recognition dates as far back as the early 1950s, and it continued until just last year. *See* Ex. A (2008 lease agreement between New Jersey Department of Environmental Protection ("DEP") and federally approved interstate pipeline company reciting that it was executed because 50-year right-of-way agreement executed prior to condemnation had expired); Letter from Ruth Foster, Acting Dir., NJ DEP, to Kimberly Bose, Secretary, FERC (July 25, 2018) (on file FERC Docket No. PL18-1-000, acknowledging to FERC that FERC Certificate holders may condemn land in which New Jersey has a property interest and urging FERC to take measures to reduce the impact of condemnation on New Jersey's land preservation efforts).

Similarly, New Jersey historically has not resisted condemnation of its property interests under the Natural Gas Act on the basis of the Eleventh Amendment; indeed, on the very few occasions that New Jersey has mentioned the Eleventh Amendment, the State has not seriously pursued the argument. Instead, New Jersey governmental entities have an established history of contracting for interstate natural gas pipeline companies with FERC Certificates to access lands in which the State has a property interest, or in the alternative (if state law does not allow the agency to contract for the sale of a property interest) of allowing "friendly"

condemnation actions regarding such properties to proceed to resolution without objection. *See, e.g., Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipeline Co. v. 2.705 Acres of Land*, No. 3:15-cv-00397 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipe Line Co. v. 2.163 Acres of Land*, No. 3:12-cv-07511 (D.N.J. Jan. 10, 2013) (examples of “friendly” condemnation orders involving New Jersey governmental entities).

New Jersey has very rarely raised, has never seriously maintained, and has never prevailed on an Eleventh Amendment argument in connection with condemnation actions brought by interstate natural gas pipeline companies. And yet the State now asserts in these appeals an aggressive Eleventh Amendment position that is unprecedented in any federal court in the country; that would afford the State a unilateral and unconstrained veto over a federally approved pipeline project that was extensively deliberated by the expert federal agency for more than two years; and that would also afford the State a unilateral and unconstrained veto over any and all future federally approved pipeline projects in New Jersey, so long as the State could acquire (or be gifted) some kind of property interest in the path of the proposed pipeline.

Ultimately, if States are permitted, at their sole discretion, an unlimited veto power over federally approved interstate natural gas pipeline projects, the critical question is not whether the development of critical pipeline infrastructure will be

severely disrupted, but (1) how quickly severe disruption will occur, and (2) who among the country's citizens, businesses, and industries will feel its harmful effects the most. Because there is no controlling or persuasive circuit-level precedent on the Eleventh Amendment issues that New Jersey has raised in these appeals, an affirmance is especially important to avoid these serious difficulties in the development of critical interstate natural gas infrastructure. The Court should not open the door for New Jersey or any other State to have the extraordinary and unprecedented veto power it requests.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Dated: May 15, 2019

Respectfully Submitted,

s/ Lela M. Hollabaugh

Lela M. Hollabaugh
Counsel for Amici Curiae

Of Counsel

Lela M. Hollabaugh (TN Bar Number 14894)
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, TN 37203
(615) 252-2348
lhollabaugh@bradley.com

Anna M. Manasco (AL Bar Number 6527A62D)
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8868
amanasco@bradley.com

Joan Dreskin
Sandra Y. Snyder
Ammaar Joya
Interstate Natural Gas Association of America
20 F St., NW, Suite 450
Washington, DC 20001
(202) 216-5900
jdreskin@ingaa.org
ssnyder@ingaa.org
ajoya@ingaa.org
*Counsel for Interstate Natural Gas
Association of America*

Michael L. Murray
Matthew Agen
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
(202) 824-7071
mmurray@aga.org
magen@aga.org
Counsel for American Gas Association

Stacy R. Linden
Andrea S. Miles
American Petroleum Institute
200 Massachusetts Ave., NW
Washington, DC 20001
(202) 682-8000
LindenS@api.org
MilesA@api.org
Counsel for American Petroleum Institute

Michael B. Schon
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5948
mschon@uschamber.com
Counsel for Chamber of Commerce of the United States of America

Peter C. Tolsdorf
Manufacturers' Center for Legal Action
733 10 St. NW, Suite 700
Washington, D.C. 20001
(202) 637-3100
PTolsdorf@nam.org
Counsel for National Association of Manufacturers

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I hereby certify that pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), Federal Rule of Appellate Procedure 32(g)(1), and Federal Rule of Appellate Procedure 32(a)(7), this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, and contains 6,470 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that Lela M. Hollabaugh and Anna M. Manasco are members of the bar of this Court.

Dated: May 15, 2019

s/ Lela M. Hollabaugh

Lela M. Hollabaugh

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

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