

No. _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: CONDEMNATION BY SUNOCO PIPELINE,
L.P. OF PERMANENT AND TEMPORARY RIGHTS
OF WAY FOR THE TRANSPORTATION OF
ETHANE, PROPANE, LIQUID PETROLEUM GAS,
AND OTHER PETROLEUM PRODUCTS IN THE
TOWNSHIP OF HEIDELSBURG, LEBANON,
COUNTY, PENNSYLVANIA, OVER THE LANDS
OF HOMES FOR AMERICA, INC.,
Petitioner

vs.

SUNOCO PIPELINE, L.P.
Respondent,

On Petition for Writ of Certiorari from the Supreme
Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

- 1) Whether the Hazardous Liquid Pipeline Safety Act (HLPSA)¹ preempts the Pennsylvania Public Utility Commission's (PUC) jurisdiction to issue Certificates of Public Convenience resulting in eminent domain power when the HLPSA states it has exclusive jurisdiction, and when the PUC specifically states it does not have jurisdiction.

¹ Also commonly referred to as the Pipeline Safety Act of 1979 (PSA).

LIST OF PARTIES

- 1) Homes for America, Defendant and Petitioner;
- 2) Sunoco Pipeline, L.P. Plaintiff and Respondent

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6 Petitioner avers that Homes for America, Inc. has no parent corporation nor does any publicly held company own 10% or more of the corporation's stock.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	2
LIST OF PARTIES	3
CORPORATE DISCLOSURE STATEMENT	4
TABLE OF CONTENTS.....	5
TABLE OF AUTHORITIES	7
OPINIONS BELOW.....	9
JURISDICTION	10
CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE.....	10
STATEMENT OF THE CASE.....	12
REASONS WHY CERTIORARI SHOULD BE GRANTED	15
I. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA CONFLICTS WITH A DECISION OF THE SECOND CIRCUIT.....	16
II. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA CONFLICTS WITH DECISIONS OF THE FIFTH CIRCUIT.....	18
III. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA CONFLICTS WITH DECISIONS OF THE EIGHTH CIRCUIT.....	20

IV. REVIEW IS WARRANTED BECAUSE THE
DECISION OF THE COMMONWEALTH COURT OF
PENNSYLVANIA CONFLICTS WITH A DECISION OF
THE NINTH CIRCUIT. 22

V. REVIEW IS WARRANTED BECAUSE THE
DECISION OF THE COMMONWEALTH COURT OF
PENNSYLVANIA CONFLICTS WITH A DECISION OF
THE COURT OF LAST RESORT OF THE STATE OF
MAINE. 25

CONCLUSION..... 27

TABLE OF AUTHORITIES

Cases

<u>Amoco Pipeline, Co.</u> , 62 F.E.R.C. ¶ 61119, at 61803-61804, 1993 WL 25751, at *4 (Feb. 8, 1993).....	16
<u>ANR Pipeline Co. v. Iowa State Commerce Comm'n.</u> , 828 F.2d 465 (8th Cir. 1987)	20, 21
<u>In re Condemnation by Sunoco Pipeline L.P.</u> , No. 565 C.D. 2016, 2017 WL 2291693, at *1 (Pa. Commw. Ct. May 24, 2017) (Hereinafter “Sunoco II”) 9, 14, 16	
<u>In re Condemnation by Sunoco Pipeline, L.P.</u> , 179 A.3d 456 (Pa. 2018)	9
<u>In re Sunoco Pipeline, L.P.</u> , 143 A.3d 1000, 1002 (Pa. Commw. Ct. 2016) (en banc), <u>appeal denied sub nom. In re Condemnation By Sunoco Pipeline, L.P. of Permanent</u> , 164 A.3d 485 (Pa. 2016)	9, 14, 16
<u>Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dep't of Commerce</u> , 999 F.2d 354 (8th Cir. 1993) 21, 22	
<u>Nat. Gas Pipeline Co. of Am. v. R.R. Comm'n of Texas</u> , 679 F.2d 51 (5th Cir. 1982).....	19
<u>National Fuel Gas Supply Corp. v. Public Service Comm. of the State of New York</u> , 894 F.2d 571 (2 nd Cir. 1990)	16, 17
<u>No Tanks Inc. v. Public Utilities Comm’n</u> , 697 A.2d 1313 (Me. 1997).....	25, 26
<u>Olympic Pipe Line Co. v. City of Seattle</u> , 437 F.3d 872 (9th Cir. 2006).....	22, 23, 24

<u>Schneidewind v. ANR Pipeline Co.</u> , 485 U.S. 293, 294, 108 S. Ct. 1145, 1147, 99 L. Ed. 2d 316 (1988)	17
<u>United Gas Pipe Line Co. v. Terrebonne Par. Police Jury</u> , 445 F.2d 301 (5th Cir. 1971).....	18

Statutes

15 U.S.C. § 717	12, 18, 26
28 U.S.C. § 1257(a).....	10
49 U.S.C. § 1 (1988).....	12
49 U.S.C. § 1671 et seq.....	18
49 U.S.C.A. § 60102.....	17
49 U.S.C.A. §§ 60101 et. seq.....	26
66 Pa. C.S. § 104	11, 18
Me. Rev. Stat. Ann. 35-A § 707(3) (1989)	25

Regulations

49 C.F.R. § 195, App. A, Para. 1	11, 17
49 C.F.R. § 195, App. C, para. B(5).....	24
49 C.F.R. § 195.2.....	10, 11, 19, 24

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3.....	10
U.S. Const. art. VI, cl. 2	10

OPINIONS BELOW

The Supreme Court of Pennsylvania's order denying allowance of appeal filed on January 22, 2018 is reported at In re Condemnation by Sunoco Pipeline L.P., 179 A.3d 453 (Pa. 2018). The order is reprinted in the Appendix hereto. App. Vol. I, 1

The opinion of the Commonwealth Court of Pennsylvania decided May 24, 2017 is reported at In re Condemnation by Sunoco Pipeline L.P., No. 565 C.D. 2016, 2017 WL 2291693, at *1 (Pa. Commw. Ct. May 24, 2017) (Hereinafter "Sunoco II") and reprinted in the Appendix hereto. App. Vol. I, 2.

The Order of Court of the Court of Common Pleas of Lebanon County denying Petitioner's Preliminary Objections filed on March 29, 2016 is unreported and reprinted in the Appendix hereto. App. Vol. I, 48. The corresponding opinion filed the same day is unreported and reprinted in the Appendix hereto. App. I, 31

The opinion of the Commonwealth Court of Pennsylvania referenced in Sunoco II above is reported at In re Sunoco Pipeline, L.P., 143 A.3d 1000, 1002 (Pa. Commw. Ct. 2016) (en banc), appeal denied sub nom. In re Condemnation By Sunoco Pipeline, L.P. of Permanent, 164 A.3d 485 (Pa. 2016) (hereinafter "Sunoco I") and reprinted in the Appendix hereto. App. Vol. II, 51.

JURISDICTION

After the Pennsylvania Commonwealth Court (an intermediate appellate court) rendered an adverse opinion dated May 24, 2017, App. Vol. I, 2, Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, the highest court of the Commonwealth of Pennsylvania. That court denied the Petition on January 22, 2018. A copy of the Order is attached to the appendix hereto. App. Vol. I, 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. I, § 8, cl. 3

The Congress shall have power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

49 C.F.R. § 195.2

Interstate pipeline means a pipeline or that part of a pipeline that is used in the transportation of hazardous liquids or carbon dioxide in interstate or foreign commerce.

49 C.F.R. § 195.2

Intrastate pipeline means a pipeline or that part of a pipeline to which this part applies that is not an interstate pipeline.

49 C.F.R. § 195, App. A, Para. 1

The HLPESA leaves to exclusive Federal regulation and enforcement the “interstate pipeline facilities,” those used for the pipeline transportation of hazardous liquids in interstate or foreign commerce.

49 C.F.R. § 195.2

Pipeline Facility means new and existing pipe, rights-of-way and any equipment, facility, or building used in the transportation of hazardous liquids or carbon dioxide.

66 Pa. C.S. § 104

The provisions of this part, except when specifically so provided, shall not apply, or be construed to apply, to commerce with foreign nations, or among the several states, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

STATEMENT OF THE CASE

The federal government regulates hazardous liquid pipelines via the Hazardous Liquid Pipeline Safety Act of 1979 (hereinafter “HLPESA”). In doing so, the Federal Energy Regulatory Commission (hereinafter “FERC”) is tasked with regulating interstate pipeline companies. However, the Act and FERC do not grant the authority to take property via eminent domain.

Here, Sunoco Pipeline is a pipeline company, not an energy company. It is regulated by FERC as a common carrier pursuant to the Interstate Commerce Act, 49 U.S.C. § 1 (1988); 15 U.S.C. § 717. Neither this Act nor FERC provide eminent domain power.

Sunoco Pipeline (hereinafter “Sunoco”) seeks to build, and is currently building, an interstate pipeline from Ohio through Pennsylvania to a port in Delaware for the shipping of petroleum products to markets overseas. Sunoco was initially denied eminent domain authority by a trial court in Cumberland County, Pennsylvania because the pipeline was not an “intrastate” pipeline. In an effort to obtain “intrastate” status Sunoco changed their engineering plans to include off-loading and on-loading points within the Commonwealth of Pennsylvania. Petitioner argued that these on-loading and off-loading points were not necessary as required by the takings clause of both the state and federal constitutions as well as per Sunoco’s own admission approximately one year prior; however, the Pennsylvania Public Utility Commission and the Commonwealth Court of Pennsylvania disagreed. By redefining the federal definition of “interstate” the Commonwealth Court of

Pennsylvania permitted the use of state eminent domain authority to take private property throughout Pennsylvania.

Sunoco took property from Petitioner via state eminent domain authority by filing a Declaration of Taking with the Court of Common Pleas of Lebanon County (i.e. trial court). Petitioner filed timely Preliminary Objections alleging, among other things, that Sunoco's eminent domain authority obtained from the PUC was preempted by federal law and associated regulations and thereby preserving the issue for appeal to this Court. A record of this objection is found on pages 2-3 of the Preliminary Objections and at Preliminary Objection 1 appended hereto. App. Vol. IV., 201-206. The trial court denied Petitioner's Preliminary Objections on March 24, 2016 via an Order and Opinion. App. Vol I, 48. Petitioner filed a timely Notice of Appeal and instead of directing that Petitioner file a Concise Statement of Errors Complained of On Appeal the trial court rendered what amounted to a 1925 Opinion in which it adopted its previous Opinion relating to the Preliminary Objections. App. Vol I, 27. Petitioner again raised the issue on page 24 of its appellate brief under the heading "Summary of Argument." The relevant portion states "[f]ederal regulation preempts PUC regulation of Sunoco's Mariner East 2 pipeline. The Mariner East 2 is a proposed interstate pipeline in interstate commerce. The primary purpose, admittedly by Sunoco, is to move NGLs away from the fracking locations to the Marcus Hook Facility. Well-established law provides that the proposal to add service locations within Pennsylvania does not change the exclusively interstate commerce nature of the pipeline, nor does it allow the PUC to regulate the

interstate pipeline. The PUC can only regulate pipeline facilities within Pennsylvania. The PUC does not have authority over interstate service on an interstate pipeline.” App. Vol. III., 147 Petitioner also raised the issue in the body of his Appellate Brief at roman numeral II on page 30. App. Vol. III, 153. On May 24, 2017 the Commonwealth Court of Pennsylvania held that the expanded Mariner East 2 pipeline would involve both interstate service subject to FERC regulation and intrastate service subject to PUC regulation. In re Condemnation by Sunoco Pipeline L.P., No. 565 C.D. 2016, 2017 WL 2291693, at *1 (Pa. Commw. Ct. May 24, 2017) (Hereinafter “Sunoco II”), App. Vol. I, 2. The court cited the companion case to the instant matter, In re Sunoco Pipeline, L.P., 143 A.3d 1000, 1002 (Pa. Commw. Ct. 2016) (en banc), appeal denied sub nom. In re Condemnation By Sunoco Pipeline, L.P. of Permanent, 164 A.3d 485 (Pa. 2016) (hereinafter “Sunoco I”). App. Vol. II, 51. Petitioner timely petitioned the Supreme Court of Pennsylvania for Allowance of Appeal; however the court denied allowance of appeal on January 22, 2018. App. Vol. I, 1.

That state authority is allegedly derived from the Pennsylvania Public Utility Commission (hereinafter “PUC”); however, the PUC’s authority is preempted by federal regulations that define what constitutes an “interstate pipeline.” In doing so the PUC is engaging in the regulation of interstate commerce and therefore violating the Supremacy Clause and the Commerce Clause of the United States Constitution.

The federal government chose to provide eminent domain power for the transportation of

natural gas via the Natural Gas Act but did not provide eminent domain power for pipeline companies to transport hazardous liquids such as those at issue here. The Federal government, via FERC regulations and various court decisions have defined such interstate pipelines as within exclusive federal jurisdiction. The Commonwealth Court of Pennsylvania overreached when it redefined an interstate pipeline, which lacks eminent domain authority, to be intrastate so as to allow state eminent domain power. The Pennsylvania Commonwealth Court decision conflicts with circuit decisions and a decision of the Supreme Court of Maine.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In the instant case, Sunoco II, Sunoco exercised state eminent domain to condemn private property to construct a second pipeline known as Mariner East II that would run from Ohio, through Pennsylvania, and end in Delaware for shipment to markets overseas. The pipeline was initially slated to be entirely interstate. After being denied state eminent domain authority by a trial judge in a prior, but similar, case Sunoco redesigned its plans to include on-loading and off-loading points within Pennsylvania in an attempt to obtain the intrastate designation required to petition the PUC for the authority to condemn under the state eminent domain code. The PUC granted Sunoco a Certificate of Public Convenience. On May 24, 2017 the Pennsylvania Commonwealth Court held that the expanded Mariner East II pipeline would involve both interstate service subject to FERC

regulation and intrastate service subject to PUC regulation. Sunoco II, 2017 WL 2291693, at *5. The court deferred to its reasoning in Sunoco I. Id. at 1. The Sunoco I court reasoned that the regulation by FERC of interstate movement and the regulation by the PUC of intrastate movement are not mutually exclusive. Sunoco I, 164 A.3d at 1004 (citing Amoco Pipeline, Co., 62 F.E.R.C. ¶ 61119, at 61803-61804, 1993 WL 25751, at *4 (Feb. 8, 1993)(finding that “the commingling of oil streams is not a factor in fixing jurisdiction under the ICA”).

The Pennsylvania courts may have been persuaded by arguments of reduced transportation costs and/or job creation. Such arguments must fail when in conflict with fundamental property rights protections of federal law. The issue has frequent impacts nationwide.

I. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA² CONFLICTS WITH A DECISION OF THE SECOND CIRCUIT.

In National Fuel Gas Supply Corp. v. Public Service Comm. of the State of New York, 894 F.2d 571 (2d Cir. 1990), an interstate natural gas company brought suit seeking declaratory judgment and injunction to prevent Public Service Commission of the State of New York from regulating its pipeline facilities under the state’s Public Service Law. The

² The Pennsylvania Supreme Court is the highest court of the Commonwealth of Pennsylvania; however, that court denied discretionary review on January 22, 2018.

court held that the state regulatory scheme encroached upon the jurisdiction of the FERC and was preempted. *Id.* at 576. Basing its decision in large part on this Court’s holding in Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 294, 108 S. Ct. 1145, 1147, 99 L. Ed. 2d 316 (1988) the court reasoned that; Congress intended to vest exclusive jurisdiction to regulate pipelines in the FERC. *Id.* at 576; that the FERC has exclusive authority over the “rates *and facilities*” of interstate gas pipelines. *Id.* (emphasis in original); state proceedings would certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities. *Id.* at 576 – 577; that preemption may be inferred because Congress has occupied the field of regulation regarding interstate gas transmission facilities and the overlap of the pertinent federal and state regulatory regimes is substantial. *Id.* at 577; that state law is not amenable to piecemeal application. *Id.* at 578; and lastly, that the language of Section 121(4)(c) is most easily read as a statement that Article VII is inapplicable in its entirety when federal authority has been exercised *Id.*

Similar to the court’s reasoning in National Fuel Oil, Congress intended to vest exclusive jurisdiction to regulate pipelines in the FERC as stated in 49 C.F.R. § 195, App. A, Para. 1. “The HLPESA leaves to exclusive Federal regulation and enforcement the ‘interstate pipeline facilities,’ those used for the pipeline transportation of hazardous liquids in interstate or foreign commerce.” FERC has exclusive authority over “facilities.” 49 U.S.C.A. § 60102. Preemption can be inferred because Congress has occupied the field of regulation regarding

interstate gas transmission facilities and the overlap of the pertinent federal and state regulatory regimes is substantial. State law is not amenable to piecemeal application of eminent domain authority where none was granted by Congress. Lastly, the PUC's own statutory language divests itself of any authority over interstate pipelines. "The provisions of this part, except when specifically so provided, shall not apply, or be construed to apply, to commerce with foreign nations, or among the several states, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress." 66 Pa. C.S. § 104

II. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA CONFLICTS WITH DECISIONS OF THE FIFTH CIRCUIT.

In United Gas Pipe Line Co. v. Terrebonne Par. Police Jury, 445 F.2d 301 (5th Cir. 1971) (per curiam) a parish ordinance required, as condition to issuance of permit to construct, maintain and operate interstate gas transmission pipeline under public road within the parish, that the pipeline company pay the cost of relocating, altering or removing pipelines of gas company outside of the highway or road right-of-way. The court held that the parish ordinance conflicted with the Natural Gas Pipeline Safety Act and was invalid and not severable. The court reasoned that the ordinance is in conflict with the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1671 et seq. (see also Natural Gas Act, 15 U.S.C. § 717 et seq.) Id.

Here, the Commonwealth Court of Pennsylvania's assertion of PUC jurisdiction and conferring of state eminent domain authority is similarly in conflict with the HLPSA and amending the Natural Gas Pipeline Safety Act of 1968, because that act specifically states that its purpose is to "provide standards with respect to the **siting**, construction, and operation of liquefied natural gas facilities and for other purposes." Pipeline Safety Act of 1979, Preamble (emphasis added).

In Nat. Gas Pipeline Co. of Am. v. R.R. Comm'n of Texas, 679 F.2d 51 (5th Cir. 1982) the Texas Railroad Commission maintained a regulation requiring persons or firms involved in the gathering, processing, or transportation of natural gas to provide specified safeguards to protect the general public against the accidental release of hydrogen sulfide from their facilities. The court held that the regulation was preempted with respect to the facilities of an operator of an interstate natural gas pipeline system by provisions of the Natural Gas Pipeline Safety Act. Id. The court reasoned that Congress had explicitly preempted the regulations in question because the act defines "interstate transmission facilities" as "pipeline facilities used in the transportation of gas which are subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act." Id. at 53 (citing 49 U.S.C. § 1671(8)).

Similar to the instant case, Sunoco's pipelines are subject to the jurisdiction of the FERC because FERC defines interstate pipeline as "a pipeline or that part of a pipeline that is used in the transportation of hazardous liquids or carbon dioxide in interstate or foreign commerce." 49 C.F.R. § 195.2. Therefore, the Commonwealth Court of Pennsylvania's jurisdictional

overreach as approved in the Pennsylvania Commonwealth Court's opinion below is preempted.

III. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA CONFLICTS WITH DECISIONS OF THE EIGHTH CIRCUIT.

In ANR Pipeline Co. v. Iowa State Commerce Comm'n, 828 F.2d 465 (8th Cir. 1987) a pipeline company brought an action for declaratory and injunctive relief from imposition of fines under Iowa law regulating construction of gas pipeline. Id. at 466. The court held that Natural Gas Pipeline Safety Act preempted state law on substantive safety regulation of interstate gas pipelines, regardless of whether local regulation was more restrictive, less restrictive, or identical to federal standards. Id. at 469-470. The court reasoned that; a state's participation in federal enforcement activities concerning safety of interstate facilities was limited to activities specified by federal regulations and such activities did not create enforcement authority in states, since that authority was preempted by federal government. Id. at 470; that the Iowa statute undertook safety regulation of gas pipelines which was explicitly preempted by Natural Gas Pipeline Safety Act and did not constitute an acceptable dual permit system, notwithstanding contention of state that the Iowa regulations merely facilitated state's inspection for compliance with federal safety standards. Id.; and that, the Iowa statute specifically allowed the state to impose safety conditions on

issuance of gas pipeline permit and was preempted by safety provisions of Natural Gas Pipeline Safety Act, notwithstanding state's contention that safety provisions merely provided mechanism for enforcement of federal law. Id. 472.

Similarly, in the instant case the Commonwealth Court of Pennsylvania's authority to confer eminent domain power on hazardous liquid pipeline companies via the PUC is less restrictive than HLPSA because the HLPSA does not grant such eminent domain authority. Therefore, as the ANR Pipeline case explained, regardless of whether the local standards are more restrictive, less restrictive, or identical to federal standards, the HLPSA preempted state standards all together. Similarly, as ANR Pipeline did not permit a dual permit system, the HLPSA does not permit the PUC dual or concurrent jurisdiction as the Pennsylvania Commonwealth Court stated.

In Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dep't of Commerce, 999 F.2d 354 (8th Cir. 1993) Owner and operator of interstate hazardous liquid pipeline brought suit against state utilities board, challenging state statute regulating transportation of hazardous liquids by pipeline. Id. at 356. The court held that the state statute purporting to regulate pipeline distribution of hazardous liquids was preempted by federal Hazardous Liquid Pipeline Safety Act, to the extent that the state statute purported to regulate safety aspects of hazardous liquid movement; statute expressly provided that no state agency could adapt or continue to enforce safety standards applicable to interstate facilities or transportation of hazardous liquids associated with facilities. The court reasoned; that in enacting the

Hazardous Liquid Pipeline Safety Act, Congress intended to establish statutory framework similar to Natural Gas Pipeline Safety Act, to regulate transportation of hazardous liquids by pipeline. *Id.* at 358; and that Federal regulation exempting from federal safety and accident reporting requirements transportation of hazardous liquid through pipelines operating at specified low stress level, did not allow for state statutory regulation of low stress pipelines, as a supplement to the federal Hazardous Liquid Pipeline Safety Act; Act's provision barring any state agency from adapting any safety standards for transmission of liquids prohibited any "gap-filling" regulations by state. *Id.* at 359.

Like in Kinley, the instant case is governed by the HLPSA which was modeled after the Natural Gas Pipeline Safety Act (NGPSA). Similar to the way the HLPSA's exemption of low stress level pipelines does not allow for state statutory regulation of low stress level pipelines in Kinley, the HLPSA's lack of eminent domain authority in the instant case does not permit the Commonwealth Court of Pennsylvania (and therefore the PUC) to confer eminent domain authority on hazardous liquid pipeline companies.

IV. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA CONFLICTS WITH A DECISION OF THE NINTH CIRCUIT.

In Olympic Pipe Line Co. v. City of Seattle, 437 F.3d 872 (9th Cir. 2006) a pipeline operator brought an action seeking declaration that a city was

preempted by Pipeline Safety Act and state law from interfering with operation of the pipeline. The court held that the city's attempts to impose additional safety conditions upon operation of hazardous liquid pipeline, through agreements with operator of pipeline, were preempted by Pipeline Safety Act, where Department of Transportation delegated authority to conduct inspections of pipeline operators and facilities to state utilities commission, not city. The court reasoned; that the city's attempts to impose safety conditions upon continued operation of hazardous liquid pipeline were taken as regulator of private conduct rather than as market participant, and thus were preempted by Pipeline Safety Act, where city owned land under which pipeline ran in its sovereign capacity for purposes of maintaining surface transportation system and made safety demands in effort to prevent pipeline accident pursuant to general duty to protect public health and safety. *Id.* at 881; and that Public policy did not require courts to enforce safety demands in city's agreement with operator of hazardous liquid pipeline, which were preempted by Pipeline Safety Act (hereinafter "PSA"), to prevent other pipeline companies from agreeing to contracts they did not intend to honor; Congress had selected applicable public policy through express preemption provision of PSA and there was federal need to maintain PSA's policy of providing national uniformity in establishment and enforcement of hazardous liquid pipeline safety regulations. *Id.* at 883.

Like in Olympic, the Commonwealth Court of Pennsylvania, via the PUC, is acting to regulate private conduct and is not a market participant; therefore, the PUC cannot be saved by the market

participant defense to the dormant commerce clause. Similarly, the Olympic court's deference for national uniformity is sound. If Congress felt the need to grant eminent domain authority to hazardous liquid pipeline companies it would have done so as evidenced by the fact that Congress did such that when enacting the Natural Gas Act. Petroleum is defined as "crude oil, condensate natural gasoline, natural gas liquids, and liquefied petroleum gas." 49 C.F.R. § 195.2. Petroleum Product is defined as "flammable, toxic, or corrosive products..." 49 C.F.R. § 195.2. The regulations contemplate all kinds of "highly volatile liquids. 49 C.F.R. § 195, App. C, para. B(5). Congress rightly felt that hazardous liquids were more dangerous than natural gas and felt that forcing property owners to accept hazardous liquid pipelines on their property was not an appropriate use of the awesome power of eminent domain for a public purpose. If a pipeline company wishes to construct a pipeline over property belonging to another it must obtain the consent of the landowner and pay them an amount commensurate with the very high risk associated with these pipelines. If a landowner does not consent or demands too much compensation the pipeline company can always go around the property or negotiate with a neighbor for a better deal. By permitting natural gas companies the power of eminent domain, but not hazardous liquid pipeline companies, Congress intended that hazardous pipeline companies compete in the free market for profit. This lack of eminent domain power for hazardous liquid pipelines is also consistent with such pipeline use for profit, rather than for some valid public purpose. In this way the free hand of the market regulates, not the forced hand of eminent

domain for a valid public purpose. Eminent domain here discriminates against property owners to the benefit of for profit interstate pipeline companies. To permit states to circumvent the intent of Congress causes economic discrimination, lack of uniformity among states and violates the plain language of the Supremacy Clause of the United States Constitution.

V. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA CONFLICTS WITH A DECISION OF THE COURT OF LAST RESORT OF THE STATE OF MAINE.

In No Tanks Inc. v. Public Utilities Comm'n, 697 A.2d 1313 (Me. 1997) a nonprofit citizens' organization of ratepayers and residents of a town, opposed agreements among affiliated companies, namely, a local utility, a gas supplier, and an interstate pipeline company, for the construction of a liquefied natural gas storage tank and a pipeline. The local utility filed the two agreements with the PUC seeking review and approval pursuant to Me. Rev. Stat. Ann. 35-A § 707(3) (1989), providing the public utility could contract with an affiliated interest without approval. The PUC approved the agreements. The court held that the state PUC did not have authority to adjudicate safety and environmental issues related to the siting of a proposed liquefied natural gas storage tank because such regulation was preempted under the Natural Gas Pipeline Safety Act (NGPSA). The court reasoned that the storage tank would be used to sell natural gas in interstate commerce and the tank was an interstate natural gas

pipeline facility subject to regulation by the FERC. The court said the siting of the facility was subject to FERC approval pursuant to the Natural Gas Act (15 U.S.C.A. § 717 et. seq.), and the NGPSA (49 U.S.C.A. §§ 60101 et. seq.). The court noted that pursuant to the PSA, the U.S. Department of Transportation had promulgated comprehensive safety standards for all pipeline and storage facilities and administered an inspection program to ensure compliance with standards. Therefore, the court said that a PUC review of safety and environmental issues surrounding the siting of the tank would be an attempt to regulate matters within FERC's exclusive jurisdiction. States could not engage in concurrent site-specific environmental review. Id.

Similar to the way the court in No Tanks held that the PUC cannot regulate the siting of liquefied natural gas storage tanks because they were used to sell gas in interstate commerce and supplied by an interstate natural gas pipeline facility subject to regulation by FERC so too is the PUC in the instant case attempting to regulate the siting of hazardous liquid pipelines concurrently with FERC. This, like in No Tanks, amounts to an attempt to regulate matters within FERC's exclusive jurisdiction. Like the court in No Tanks said, states cannot engage in concurrent site-specific environmental review which is analogous to what the Pennsylvania Commonwealth Court did in the case *sub judice* when it held that the expanded Mariner East II pipeline would involve both interstate service subject to FERC regulation and intrastate service subject to PUC regulation.

Petitioner respectfully request review by the United States Supreme Court to: explicate jurisdiction, reverse an unauthorized taking and

direct an award, with fees and costs, for the interim taking of Petitioner's property.

CONCLUSION

The Pennsylvania Commonwealth Court's decision *sub judice* conflicts with decisions of the second, fifth, eighth, and ninth circuits as well as the court of last resort of the state of Maine. Congress has spoken in the area of hazardous liquid pipelines and therefore the HLPSA preempts the PUC's authority to grant pipeline companies the power of eminent domain. If pipeline companies wish to run pipelines they must buy land from property owners in the free market without the threat of condemnation such that property owners can price into the sale all of the very serious risks associated with pipelines or alternatively choose not to sell at all.

Respectfully Submitted,

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