

**THE ISSUE OF CONDEMNING STATE-OWNED
PROPERTY PURSUANT TO THE NATURAL GAS ACT:
*IN RE PENNEAST***

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I. INTRODUCTION

On September 10, 2019, the U.S. Court of Appeals for the Third Circuit in *In re PennEast Pipeline Company, LLC (In re PennEast)* reversed the United States District Court for the District of New Jersey¹ and held that multiple sovereign immunity protections afforded to states under the Eleventh Amendment work to deny jurisdiction to eminent domain proceedings brought in federal court by a pipeline company to obtain land interests held by New Jersey, up-ending condemnation proceedings instituted by PennEast Pipeline Company, LLC (PennEast) to acquire

1. *In re PennEast Pipeline Co.*, No. 3:18-CV-1585, 2018 WL 6584893, at *1 (D.N.J. Dec. 14, 2018), *rev'd*, 938 F.3d 96 (3d Cir. 2019).

property for a 116-mile natural gas project approved in January 2018 by the Federal Energy Regulatory Commission (FERC).²

The decision in part rests on a novel conclusion by the Third Circuit that standing jurisprudence with respect to Congressional abrogation of a state's Eleventh Amendment sovereign immunity protections from suit in federal court provides a test applicable to a similar, but distinct question of whether the United States can delegate to a private company its "special exemption" that allows the federal government to sue states despite the Eleventh Amendment protections.³

The Third Circuit noted that its decision may upset a long history of interpretation of eminent domain authority under the Natural Gas Act.⁴ Although the Natural Gas Act (NGA) has been in effect since 1938, and the provision in section 7(h) of the NGA that confers eminent domain authority to regulated natural gas companies has been in effect since 1947, the Third Circuit noted that it was aware of only one reported decision addressing the precise question in this case: whether condemnation actions of state property "under the NGA are barred by Eleventh Amendment immunity."⁵ That case, a 2017 decision in the U.S. District Court for the Eastern District of Texas⁶, arrived at a similar conclusion to the Third Circuit.

As a result of the paucity of NGA precedent, the Third Circuit's opinion relies on significant Supreme Court cases arising long after the adoption of the NGA—cases in the 1980s and 1990s that not only recast the basis and breadth of state sovereign immunity, but that in one instance was subject to especially strong dissents.⁷ Among the most crucial of these opinions upon which the Third Circuit rests its holding are *Blatchford v. Native Village of Noatak*,⁸ *Dellmuth v. Muth*,⁹ and *Seminole Tribe of Florida v. State*.¹⁰

In *Blatchford*,¹¹ the court cast serious doubt on the theory that the United States possesses the authority to delegate to private entities its "special exemption" from the Eleventh Amendment; the "special exemption" is what provides the federal government's capacity to sue a state.¹² In *Dellmuth*, the court held that abrogation of (i.e., legislative action to withdraw) state sovereign immunity may only occur if Congress evinces its intention to so abrogate with "unmistakably clear"

2. See generally *In re PennEast Pipeline Co.*, 938 F.3d 96 (3d Cir. 2019), *petition for cert. filed* (U.S. Feb. 18, 2020) (No. 19-1039).

3. *In re PennEast*, 938 F.3d at 99-100.

4. *Id.* at 113.

5. *Id.* at 106.

6. See *Sabine Pipe Line, LLC v. Orange Cty. Tex. et al.*, 327 F.R.D. 131 (E.D. Tex. 2017).

7. *Id.* Notably, in two separate dissenting opinions, Justices Stevens, Souter, Ginsburg, and Breyer departed from the majority's conclusion in *Seminole Tribe of Florida v. State*, 517 U.S. 44 (1996) (holding that the Eleventh Amendment barred the state of Florida from being sued in federal court). 517 U.S. 44 at 75-85.

8. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

9. *Dellmuth v. Muth*, 491 U.S. 223 (1989).

10. *Seminole Tribe*, 517 U.S. 44.

11. *Blatchford*, 501 U.S. at 779-82. The *Blatchford* court held that the sovereign immunity afforded to states by way of the Eleventh Amendment extends to suits brought by other sovereigns (other than the federal government) in addition to suits brought by individuals.

12. *Id.* at 785.

language.¹³ In *Seminole Tribe*, the court, interpreting the Eleventh Amendment as it applies to the Indian Gaming Regulatory Act, determined by 5-4 majority that Congress lacks authority under the Commerce Clause to abrogate state sovereign immunity in a private cause of action.¹⁴ The dissenters in that case, however, did not find basis for a complete bar to abrogation under the Commerce Clause.¹⁵

Based on these precedents, among others, and its understanding of section 7(h) of the NGA, the Third Circuit vacated the U.S. District Court's order. The Third Circuit noted at the outset that the NGA's grant of eminent domain to private companies was separate from the question of whether those companies could somehow evade the Eleventh Amendment protections of sovereign immunity.¹⁶ After separating those issues, the court turned to the question of sovereign immunity. The court's essential holding is based on two similar but separate theories: (1) abrogation by congressional action of Eleventh Amendment protections; and, (2) delegation of the federal government's "special exemption" from the Eleventh Amendment. The Third Circuit held that because Congress enacted the NGA pursuant to the Commerce Clause, the NGA cannot abrogate sovereign immunity.¹⁷

Turning to PennEast's theory that the "special exemption" can be delegated, the Third Circuit determined that it was doubtful that the United States even could delegate its "special exemption" to private parties; and even if it could, the court determined, delegation of state sovereign immunity would have to be done with "similar clarity" required of abrogation; and even if abrogation were available in this situation, Congress did not state with "unmistakable clarity" that it had intended to abrogate state sovereign immunity.¹⁸

The Third Circuit's opinion is significant in its own right for its effect in high-density Pennsylvania and New Jersey, where developers continue to design and propose large natural gas projects to transport shale-play supplies from the Marcellus region to developing East Coast markets.¹⁹ As noted by the Third Circuit, its holding may also disrupt how the natural gas industry has functioned for the past eighty years.²⁰ The court also noted that a "work-around" exists, in which "an accountable federal official" could initiate the condemnation actions.²¹ However, as of June 29, 2020, the U.S. Supreme Court had invited the Solicitor General

13. *Dellmuth*, 491 U.S. at 230.

14. *See generally Seminole Tribe*, 517 U.S. 44.

15. *Id.* at 93-94 (Stevens, J., dissenting); *see also id.* at 100 (Souter, J., dissenting).

16. *In re PennEast*, 938 F.3d at 100.

17. *Id.* at 105.

18. *Id.*

19. For a more in-depth understanding of the Marcellus production and transportation-related issues, see Jude Clemente, *What Happens When You Don't Build Natural Gas Pipelines?*, FORBES (Jan. 7, 2018), <https://www.forbes.com/sites/judeclemente/2018/01/07/what-happens-when-you-dont-build-natural-gas-pipelines/#32adb2625fd6> (explaining how the Northeast region of the United States experienced natural gas prices that were 60-70 times higher in the winter of 2017, as compared to previous rates in 2017, due to a lack of pipelines to supply natural gas).

20. *In re PennEast*, 938 F.3d at 113.

21. *Id.*

to file a brief on PennEast's petition for writ of certiorari, signaling potential deliberation on these issues by the high court, and concomitant potential legal uncertainty.²²

As the Third Circuit's opinion is focused most heavily on issues related to sovereign immunity in light of the Eleventh Amendment, this note provides in Part II.A a brief summary of the right of eminent domain under the NGA, in Part II.B a historical summary of the jurisprudence with regard to the Eleventh Amendment and federal jurisdiction over questions of sovereign immunity, and in Part II.C, a brief discussion of the proceedings in the District Court are provided. In Part III, *In re PennEast* is discussed in detail.

II. BACKGROUND

A. *The Right of Eminent Domain Under the Natural Gas Act*

The Natural Gas Act provides for regulation of interstate transportation and sale for resale of natural gas.²³ To operate or construct an interstate natural gas pipeline, companies must obtain from FERC a certificate of public convenience and necessity pursuant to section 7(c) of the NGA.²⁴ PennEast sought and received certificate approval on January 19, 2018.²⁵

Generally, the federal government's power of eminent domain "derive[s] from the common law concept of necessity and sovereignty."²⁶ Section 7(h) of the NGA sets forth the right of eminent domain under the NGA. It states:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, . . . necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the

22. There is at least one pending appeal in a Fourth Circuit case involving a similar dispute. See *Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less, in Washington Cty., Md., State of Md., Dep't of Nat. Res.*, No. 0:19-CV-01444(GLR) (D. Md. May 2019), *appeal docketed*, No. 19-2040 (4th Cir. Sept. 25, 2019) (appeal filed in response to Maryland court dismissing a private company's condemnation action against the state after the state asserted its Eleventh Amendment immunity). See also Eric N. Holmes, *This Land is Your Land? Eminent Domain Under the Natural Gas Act and State Sovereign Immunity*, CONG. RESEARCH SERV. (Oct. 30, 2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10359>. Additionally, as noted in n.2 of *In re PennEast*, the underlying FERC decision also is subject to challenge. See *Petition for Review, Delaware Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. filed May 9, 2018). That petition remains pending following an order issued by the D.C. Circuit on October 1, 2019, which directed the case to be held in abeyance pending the final disposition of any post-dispositional proceedings in the Third Circuit, any proceedings before the United States Supreme Court as a result of the Third Circuit's decision, or any other proceedings that resolve the obstacle that the Third Circuit's decision in *In re PennEast* poses.

23. 15 U.S.C. § 717(b).

24. 15 U.S.C. § 717f(c).

25. *PennEast Pipeline Co.*, 162 F.E.R.C. ¶ 61,053 at P 2 (2018).

26. PRACTICAL L. REAL ESTATE, EMINENT DOMAIN: OVERVIEW, W-001-6468, Westlaw (2019).

practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.²⁷

B. *The Eleventh Amendment and Sovereign Immunity*

While the *In re PennEast* decision rests on Eleventh Amendment jurisprudence, the history and text of the amendment are both subjects unto themselves and require some introduction before delving into the details of the *In re PennEast* decision.

The text of the Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.²⁸

However, as scholars have noted, “the meaning of these words is hardly self-evident.”²⁹ For one, the amendment does not mention state sovereign immunity. “It is, accordingly, fair to say that the text of the Eleventh Amendment raises as many questions as it answers.”³⁰

The impetus for the Eleventh Amendment was the Supreme Court’s 1793 decision in *Chisholm v. Georgia*,³¹ which was filed as an assumpsit action³² by a South Carolina citizen under the Supreme Court’s original jurisdiction. In *Chisholm*, the court’s majority held that the Constitution did not bar jurisdiction over the South Carolina citizen’s claim against the State of Georgia. In response, Congress rapidly drafted what became the Eleventh Amendment, which was ratified in 1798.³³

27. 15 U.S.C. §717f(h).

28. U.S. CONST. amend. XI.

29. Richard Fallon, et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 871 (6th ed. 2009).

30. *Id.* (citing William R. Casto, *The Supreme Court in the Early Republic 188-97* (1995); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269 (1998); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C.L.Rev. 485 (2001)).

31. 2 U.S. (2 Dall.) 419 (1793) (*Chisholm*).

32. Assumpsit was a common law action in equity to recover money. *See, e.g., Vandegrift v. Haughey*, 1 Del. Cas. 338, 339 (Com. Pl. 1793) (“where there is an express promise to account, assumpsit will lie as well as account, and whenever a man acts as bailiff he promises to render an account. *Wilkins v. Wilkins*, Salk. 9. The defendant was bailiff to the plaintiff and assumpsit will lie either upon the equitable obligation to pay the money received to his use or upon his promise as bailiff to account. *Headly v. Lundy* does not apply, for here the money was received from the hands of a third person.”)

33. U.S. CONST. amend. XI.

Although the source and even mere existence of the power of the states' sovereign immunity was not universally agreed upon in the early days of the Republic,³⁴ the Supreme Court has over time expanded, contracted, and expanded again the understanding of state sovereign immunity to the place now, where not only suits against a state by citizens of another state are barred, but suits by citizens against their home states in federal courts are also barred by the Eleventh Amendment.³⁵ As reflected in the Third Circuit's opinion in *In re PennEast*, the current understanding is that despite its express language, "[t]he States' immunity from suit in federal court . . . neither derives from, nor is limited by, the terms of the Eleventh Amendment."³⁶ Rather, courts have reasoned that the states' immunity from suit in federal court is "a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today."³⁷ Thus, the Eleventh Amendment "embodies a recognition that the States . . . maintain certain attributes of sovereignty, including sovereign immunity."³⁸

However, while states possess immunity from being subject to suits commenced by private parties in federal court, this immunity does not apply under several circumstances recognized over the past two centuries. For example, suits against state officers for ongoing constitutional violations are not barred by the Eleventh Amendment.³⁹ In addition, states may voluntarily waive immunity by consenting to suit,⁴⁰ however, a state's waiver of its Eleventh Amendment sovereignty requires express language that "leave[s] no room for any other reasonable construction."⁴¹

Congress also has the power to abrogate the states' immunity, at least in certain limited circumstances.⁴² However, abrogation appears to now be a disfavored exception to the general rule because the "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States. . . ."⁴³ Accordingly, to convince a court that a particular statute is meant

34. See, e.g., Federalist No. 81 ("[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent"); see also, the opinion of Justice Wilson in *Chisholm* (finding that the Constitution did away with state sovereignty); see also, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (Brennan, J., dissenting) (arguing the Eleventh Amendment was not based on sovereign immunity).

35. *Hans v. Louisiana*, 134 U.S. 1 (1890).

36. *In re PennEast*, 938 F.3d at 103 (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

37. *Id.* (internal alterations omitted).

38. *Id.* (citing *Puerto Rico Aqueduct Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

39. *Ex Parte Young*, 209 U.S. 123 (1908).

40. *Hans*, 134 U.S. at 17.

41. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985)).

42. Congress has the authority to abrogate states' sovereign immunity in certain contexts pursuant to section 5 of the 14th Amendment. See U.S. CONST. amend. XIV, § 5 ("[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

43. *In re PennEast*, 938 F.3d at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989)).

to abrogate the states' immunity, the intention of Congress to do so must be "unmistakably clear in the language of the statute."⁴⁴ Further, as a result of the *Seminole Tribe* case, the Supreme Court now appears to only recognize the ability to abrogate state sovereign immunity in the context of Congress acting pursuant to section 5 of the Fourteenth Amendment.⁴⁵

Further, suits commenced by the federal government are not barred by the Eleventh Amendment.⁴⁶ Courts have long recognized a "special exemption" from the states' Eleventh Amendment immunity which allows the federal government to sue states in federal court.⁴⁷ The right of the federal government to sue states in federal court stems from the notion that "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."⁴⁸ Whether the federal government can delegate to a private party its "special exemption" to allow the private party to sue a nonconsenting state in federal court is one of the chief questions at issue in *In re PennEast*.⁴⁹

C. *The PennEast Pipeline Eminent Domain Action*

Subsequent to FERC's 2018 Certificate approval, PennEast filed a condemnation action in the United States District Court for the District of New Jersey asking for orders of condemnation for 131 properties along the pipeline route.⁵⁰ PennEast also sought determinations of just compensation for the affected properties, as well as "preliminary and permanent injunctive relief to gain immediate access to and possession of the properties to begin construction of its pipeline."⁵¹ Of the 131 properties that PennEast sought orders of condemnation for, the state of New Jersey (the State) held property interests, primarily non-possessory interests in the form of easements, in forty-two of those properties.⁵²

The State filed a brief invoking its Eleventh Amendment immunity from being subject to suit in federal court when commenced by a private party in response

44. *Id.* (quoting *Atascadero State Hosp.*, 473 U.S. at 242).

45. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48, 456 (1976) (holding that Congress, when acting pursuant to section 5 of the Fourteenth Amendment, has the power to abrogate states' sovereign immunity by authorizing federal courts to award money damages to a private individual subjected to employment discrimination by a state government). For a short period of time, the Supreme Court recognized in Congress a power to abrogate state sovereign immunity pursuant to the Commerce Clause. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-15 (1989). However, that decision was overruled in *Seminole Tribe*, 517 U.S. at 66. The *Seminole Tribe* court held that Congress cannot abrogate sovereign immunity under its Commerce Clause powers, particularly because "the Eleventh Amendment restricts the judicial power under Article III [of the Constitution], and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 517 U.S. at 72-73 (alterations added). *See also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

46. As part of "the 'plan of the [Constitutional] convention[.]" the States consented to suit by the federal government in federal court. *In re PennEast*, 938 F.3d at 103 (quoting *Blatchford*, 501 U.S. at 779-82); *see also In re PennEast*, 938 F.3d at 104 (citing *Alden*, 527 U.S. at 755).

47. *Id.*; *see also Sabine Pipe Line*, 327 F.R.D. at 140.

48. *Id.* (citing *Alden*, 527 U.S. at 755).

49. *In re PennEast*, 938 F.3d at 99.

50. *Id.* at 100.

51. *Id.* at 100-01.

52. *Id.* at 101.

to the district court's order to show cause why PennEast's requested relief should not be granted.⁵³ Additionally, the State argued that PennEast had not satisfied the requirements of the NGA because it had not attempted to contract with the State for its property.⁵⁴ The district court ultimately granted PennEast's orders of condemnation and preliminary injunctive relief.⁵⁵ The court rejected the State's contention that it was immune from suit under the Eleventh Amendment because "PennEast ha[d] been vested with the federal government's eminent domain powers and [stood] in the shoes of the sovereign," thus making Eleventh Amendment immunity inapplicable.⁵⁶ The district court reasoned that because "the NGA expressly allows 'any holder of a certificate of public convenience and necessity' to condemn property, PennEast could do so here – even for property owned by the State."⁵⁷

As to the State's argument that PennEast did not satisfy the three requirements of the NGA, the district court disagreed and concluded that PennEast was entitled to exercise the federal government's power of eminent domain for the following reasons.⁵⁸ First, the court found that PennEast was granted a valid Certificate for its proposed project.⁵⁹ Next, it concluded that PennEast satisfied the second requirement of the NGA because it had been unable to agree with the *owner* of the affected property regarding the amount of compensation to be paid for such property.⁶⁰ Here, the court rejected the State's contention that the relevant language of section 717(f) of the NGA⁶¹ required PennEast to negotiate with the holders of *all* property interests, including holders of non-possessory interests, such as an easement holder.⁶² In rejecting the State's claim, the court narrowly construed the term "owner" to mean only the owner of the possessory interest, thus not requiring PennEast to engage in negotiations with the State.⁶³ Finally, because PennEast had extended to each property owner offers exceeding \$3,000, the court found that the third requirement of the NGA was satisfied.⁶⁴ Accordingly, the district court granted PennEast orders of condemnation for all 131 properties.⁶⁵

53. *Id.*

54. *In re PennEast*, 938 F.3d at 101.

55. *Id.*

56. *Id.* (alteration in original).

57. *Id.* (quoting 15 U.S.C. § 717f(h)).

58. *Id.* at 101-02.

59. *In re PennEast*, 938 F.3d at 102.

60. *Id.*

61. 15 U.S.C. § 717f(h) ("[w]hen any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the *owner* of property to the compensation to be paid for. . . .") (emphasis added).

62. *In re PennEast*, 938 F.3d at 102 (emphasis added).

63. *Id.*

64. *Id.*

65. *Id.*

The court also granted PennEast's requests for preliminary injunctive relief because it was found that PennEast satisfied the four-factor test for whether a party should be granted such relief.⁶⁶

The State, upon the district court's decision to grant PennEast's requested relief, moved for reconsideration of the denial of its Eleventh Amendment immunity, and also "sought a stay of the order to prevent PennEast from taking immediate possession of the State's properties."⁶⁷ The State's argument was based on a Supreme Court decision in which it cast "serious doubt" that the United States possesses the constitutional authority to delegate to private entities its capacity to sue a state in federal court.⁶⁸ The district court again disagreed with the State's arguments, this time on the grounds that the holding in *Blatchford* did not apply to condemnation actions brought pursuant to the NGA.⁶⁹ The State timely appealed from the district court's decision. It also sought to stay the court's order pending resolution of its appeal and to expedite the Third Circuit's consideration of the dispute.⁷⁰ The Third Circuit granted the State's motion in part, thereby preventing construction of the pipeline and expediting the appeal.⁷¹

III. ANALYSIS

With several distinct findings in the arena of state sovereign immunity pursuant to the Eleventh Amendment, the Third Circuit held that the federal District Court in New Jersey did not have jurisdiction to entertain PennEast's actions, which were taken under the aegis of the Natural Gas Act and FERC-approved Certificate to condemn state-owned property interests.

First, the Third Circuit held that Congress did not intend to abrogate the Eleventh Amendment within the NGA. Then, with respect to the delegation argument, the Third Circuit held that "there are powerful reasons to doubt" the ability of the federal government to delegate its "special exemption" from state sovereign immunity to private parties.⁷² In justifying its doubts, the Third Circuit relied on the lack of case law in support of the so-called "delegation theory"; the fundamental differences between suits brought by accountable federal officials and suits brought by private parties; and the ability of delegation to undermine the "careful limits" established by the Supreme Court on the abrogation of states' sovereign immunity.⁷³

66. The district court applied the four-factor test for preliminary injunctive relief set out in *Transcon. Gas Pipe Line Co. v. Conestoga Twp.*, 907 F.3d 725, 732 (3d. Cir. 2018). The test requires that a movant for preliminary injunctive relief show: (1) that there is [a] reasonable probability of success on the merits; (2) that there will be irreparable harm to the movant in the absence of relief; (3) that granting the injunction will not result in greater harm to the nonmoving party; and (4) that the public interest favors granting the injunction. *Id.* at 732.

67. *In re PennEast*, 938 F.3d at 102.

68. *Id.*; see generally *Blatchford*, 501 U.S. 775.

69. *In re PennEast*, 938 F.3d at 102.

70. *Id.*

71. *Id.* at 102-03.

72. *Id.* at 105.

73. *Id.*

Finally, the court borrowed the requirements for “unmistakably clear” text applied to legislative abrogation and applied it to the question – whether in fact the federal government delegated its sovereign immunity special exemption to a private corporation – and found there to be no language of unmistakable clarity within the NGA that signified Congress’ intent to delegate the special exemption.⁷⁴ Thus, the court in effect determined that there could have been no delegation based upon its understanding of the abrogation jurisprudence, and did not reach the more fundamental question of whether such a delegation is constitutionally permissible.⁷⁵

A. Third Circuit Holds NGA Does Not Abrogate the Eleventh Amendment

The Third Circuit initially noted that an important distinction exists between the federal government’s power of eminent domain and its exemption from Eleventh Amendment immunity.⁷⁶ The power of eminent domain is the power of a sovereign to condemn property for its own use,⁷⁷ while the federal government’s exemption from Eleventh Amendment immunity is what allows it to hale states into federal court.⁷⁸ Thus, the court held, the ability of the federal government to condemn state land is a function of the two powers.⁷⁹

Next, with sparing discussion, the Third Circuit held that, “Congress cannot abrogate state sovereign immunity under the Commerce Clause . . . and because Congress enacted the NGA pursuant to that Clause, the statute cannot be a valid congressional abrogation of sovereign immunity.”⁸⁰ The Third Circuit quickly turned to the question of delegation.

B. Third Circuit Finds “Powerful Reasons to Doubt” that the Federal Government Can Delegate its Exemption from Eleventh Amendment Immunity

Despite PennEast’s assertions that the NGA necessarily conferred both the federal government’s power of eminent domain and its exemption from Eleventh Amendment immunity, the court disagreed with PennEast’s contentions, and instead noted that “there are powerful reasons to doubt the delegability of the federal government’s exemption from Eleventh Amendment immunity.”⁸¹ Specifically, the lack of case law supporting PennEast’s “delegation theory,” the fundamental differences between suits brought by accountable federal officials and those brought by private parties, and the potential of the “delegation theory” to undermine the limits on the abrogation of state sovereign immunity all influenced the Third Circuit to express its uncertainty that the federal government is capable of

74. *In re PennEast*, 938 F.3d at 111-12.

75. *Id.* at 100.

76. *Id.*

77. *See Kohl v. United States*, 91 U.S. 367, 371, 373-74 (1875).

78. *See United States v. Carmack*, 329 U.S. 230, 240 (1946).

79. *In re PennEast*, 938 F.3d at 104.

80. *In re PennEast*, 938 F.3d at 105; *see also supra* note 45.

81. *Id.* at 104-05.

delegating to private parties its special exemption from states' sovereign immunity which allows it to sue states in federal court.⁸²

1. Third Circuit Finds No Case Law Supports the Delegation Theory

The Supreme Court and federal Courts of Appeals have not previously addressed the precise issue of whether or not condemnation actions brought under the NGA are barred by Eleventh Amendment immunity; however, the so-called "delegation theory" has been addressed in separate contexts. As discussed in *In re PennEast*, the Supreme Court held in *Blatchford v. Native Village of Noatak* that the delegation theory was nothing more than "a creature of [the tribes'] own invention."⁸³ In *Blatchford*, Native American tribes sued an Alaskan official and sought money allegedly owed to them under a state revenue-sharing statute.⁸⁴ In an attempt to avoid the high threshold of claiming Alaska's sovereignty had been abrogated with unmistakable clarity by statute, the tribes instead argued that Congress effectively delegated to the tribes the federal government's authority to sue states in federal court when it enacted 28 U.S.C. § 1362, which granted district courts the jurisdiction to hear claims brought by Indian tribes arising under federal law.⁸⁵ The *Blatchford* court rejected the tribes' argument, claiming that it was uncertain of whether it was possible to delegate sovereign exemption.⁸⁶ The court noted that a state's consent, "inherent in the [Constitutional] convention, to suit by the United States . . . is not consent to suit by anyone whom the United States might select. . . ."⁸⁷

PennEast urged the Third Circuit to dismiss the holding in *Blatchford* as "so distinguishable as to be useless by analogy" because the statute at issue there was jurisdictional and did not confer any substantive rights on the tribes, while the NGA confers the substantive right of eminent domain on private parties.⁸⁸ The court rejected this argument because the statements in the *Blatchford* holding had "nothing to do with the jurisdictional nature of the statute . . . and everything to do with the Court's deep doubt about the 'delegation' theory itself."⁸⁹

Other federal circuit courts have also expressed skepticism regarding the ability of Congress to delegate Eleventh Amendment immunity even in cases where the private party seeks to assert the interests of the United States rather than the party's own interests.⁹⁰ However, in a notable decision, the Fourth Circuit held

82. *Id.* at 105.

83. *Blatchford*, 501 U.S. 775 at 786.

84. *Id.* at 777-78.

85. *Id.* at 783.

86. *Id.* at 785-86 ("[A]ssuming that delegation of exemption from state sovereign immunity is theoretically possible, there is no reason to believe that Congress ever contemplated such a strange notion.").

87. *Id.* at 785.

88. *In re PennEast*, 938 F.3d at 105.

89. *Id.* at 106.

90. See *U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 882 (D.C. Cir. 1999) (holding that "permitting a *qui tam* relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar involves just the kind of delegation that *Blatchford* so plainly questioned."); see also *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999).

that Eleventh Amendment immunity was not a bar in *qui tam* suits⁹¹ because “the United States [was] the real party in interest. . . .”⁹² PennEast’s analogies to *qui tam* actions were of minimal value in the view of the Third Circuit, however, because of the significant differences in the nature of *qui tam* actions and condemnation proceedings.⁹³ *Qui tam* actions are brought “in the name of the government” and the government receives most of any amount recovered, whereas condemnation suits commenced by a private party are filed in the party’s own name, the private party gains title to the land, and the private party maintains sole control over the action.⁹⁴

While the federal appellate courts have not addressed the precise issue at hand—whether condemnation actions under the NGA are barred by Eleventh Amendment immunity—the Eastern District of Texas did so in 2017.⁹⁵ In *Sabine Pipe Line, LLC v. Orange County, Texas*, a natural gas company filed a condemnation action against tracts of land and landowners, including a state agency, and sought to exercise its right of eminent domain under the NGA.⁹⁶ The state agency invoked its Eleventh Amendment immunity, and sought dismissal of the natural gas company’s claims against it.⁹⁷ The company contended that the Eleventh Amendment “[was] not at issue . . . as the practical effect of the NGA is to treat holders of FERC certificates . . . as delegates of the federal government, with the unquestionable right to file a condemnation case in federal court.”⁹⁸ Additionally, the company argued that because the federal government could exercise its right of eminent domain against state-owned property, there “[was] no reason to treat a delegation of the same authority any differently.”⁹⁹ The *Sabine* court disagreed, and noted that the company erred in assuming a delegation of the power of eminent domain necessarily confers upon a private party the additional power to sue the states.¹⁰⁰ The court concluded “a private party does not become the sovereign such that it enjoys all the rights held by the United States by virtue of Congress’s delegation of eminent domain powers.”¹⁰¹

The Third Circuit noted its “full agreement” with the *Sabine* court, and in recognizing the skepticism expressed by the Supreme Court and its sister circuits, concluded that “there is no authority for PennEast’s delegation theory of sovereign

91. “In a *qui tam* action, a private party called a relator brings an action on the government’s behalf. The government, not the relator, is considered the real plaintiff.” CORNELL LAW SCHOOL: LEGAL INFO. INST., QUI TAM ACTION, https://www.law.cornell.edu/wex/qui_tam_action (last visited Nov. 14, 2019).

92. *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992).

93. *In re PennEast*, 938 F.3d at 109-10.

94. *See United States ex rel. Milam*, 961 F.2d at 48-49; *In re PennEast*, 938 F.3d at 109.

95. *See generally Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131 (E.D. Tex. 2017).

96. *Id.* at 135.

97. *Id.* at 136.

98. *Id.* at 139.

99. *Id.*

100. *Sabine Pipe Line*, 327 F.R.D. at 140.

101. *Id.* at 141.

immunity.”¹⁰² However, the Third Circuit did not definitively answer the question of whether or not the federal government can delegate to private parties its exemption from state sovereign immunity.¹⁰³ Rather, the court simply noted “the caselaw *strongly suggests*” that it is not possible to delegate such a power.¹⁰⁴

2. Fundamental Differences Exist between Suits Brought by Accountable Federal Agents and Suits Brought by Private Parties

The Third Circuit also emphasized the notion that the “identity of the party filing the condemnation action is not insignificant” in assessing the ability to delegate sovereign immunity to private parties.¹⁰⁵ More specifically, the court noted that there are meaningful distinctions between suits brought by the United States and suits brought by private citizens.¹⁰⁶ Such distinctions include the obligations, and the lack thereof, that the respective parties face when bringing a suit in federal court.¹⁰⁷ For example, “[s]uits brought by the United States are ‘commenced and prosecuted . . . by those who are entrusted with the constitutional duty to “take Care that the Laws be faithfully executed[.]”’¹⁰⁸ The court reasoned that private parties have no similar Constitutional duties.¹⁰⁹ Private parties also are not required to exercise political responsibility for each suit prosecuted against a state.¹¹⁰ More simply put, the Third Circuit determined that private parties are not accountable in the same way as the United States and its federal officials.¹¹¹

As it applies in the condemnation context, the court noted that the same “considerations are clearly in play.”¹¹² For example, “the condemning party controls the timing of the condemnation actions, decides whether to seek immediate access to the land, and maintains control over the action through the just compensation phase, determining whether to settle and at what price.”¹¹³ The United States, “a sovereign that acts under a duty to take care that the laws be faithfully executed and is accountable to the populace,” may have very different incentives than those faced by a private, for-profit entity.¹¹⁴ The Third Circuit emphasized these differences in the obligations and accountability between the United States and private citizens in refuting PennEast’s delegation theory of sovereign immunity.¹¹⁵

102. *In re PennEast*, 938 F.3d at 106.

103. *Id.* at 111.

104. *Id.* at 106-07 (emphasis added).

105. *Id.* at 107.

106. *In re PennEast*, 938 F.3d at 107.

107. *Id.*

108. *Id.* (citing *Alden v. Maine*, 527 U.S. at 755 (quoting U.S. CONST. art. II, § 3)).

109. *In re PennEast*, 938 F.3d at 107.

110. *Id.* (citing *Alden*, 527 U.S. at 756).

111. *In re PennEast* 938 F.3d at 107.

112. *Id.*

113. *Id.*

114. *In re PennEast*, 938 F.3d at 107.

115. *Id.*

3. Third Circuit Finds That Supporting PennEast's Delegation Theory Would Undermine the Careful Limits on the Abrogation of State Sovereign Immunity

In addition to the uncertainty expressed by the Third Circuit concerning the United States' ability to *delegate* its power to override a state's Eleventh Amendment immunity to a private party, the court recognized that Congress can only abrogate states' sovereign immunity in very limited circumstances, thereby subjecting states to suits in federal court commenced by private parties.¹¹⁶ At least from the viewpoint of *Seminole Tribe*, the Third Circuit said, "[t]he Supreme Court has recognized that Congress can abrogate sovereign immunity only when it acts pursuant to § 5 of the Fourteenth Amendment."¹¹⁷ In recognizing that "state sovereign immunity goes to the core of our national government's constitutional design," the Third Circuit concluded that accepting PennEast's delegation theory would "dramatically undermine the careful limits" the Supreme Court has previously placed on abrogation.¹¹⁸

4. Third Circuit Rejects Various PennEast Additional Arguments

Having set forth the structure of why the Third Circuit was uncertain that the United States could delegate the "special exemption," the court rejected a number of PennEast's additional arguments. In response to arguments that the project did not interfere with sovereignty, present harm to New Jersey, or prevent recourse by New Jersey, the Third Circuit found those arguments missed the mark of speaking to the Eleventh Amendment.¹¹⁹ As discussed above, the court was also unconvinced of PennEast's comparison of its facts to cases involving *qui tam* actions.¹²⁰ Furthermore, the court rejected the notion that because eminent domain proceedings were *in rem* proceedings, questions of sovereign immunity could be avoided.¹²¹

C. Delegation of the "Special Exemption" Would Require "Unmistakable Clarity," Which the NGA Lacks

As discussed above, a valid abrogation of the states' sovereign immunity requires the intention of Congress to do so to be "unmistakably clear in the language of the statute."¹²² The Supreme Court has held language in a statute that grants "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."¹²³ Rather, "[w]hen Congress chooses to subject the states to federal jurisdiction, it must do

116. *Id.* at 108.

117. *Seminole Tribe*, 517 U.S. at 59; *see also supra* note 45.

118. *In re PennEast*, 938 F.3d at 108.

119. *Id.* at 108-09.

120. *Id.* at 109-10.

121. *Id.* at 110-11.

122. *Dellmuth*, 491 U.S. 223; *see also* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (overruled on other grounds).

123. *Atascadero*, 473 U.S. at 246.

so specifically.”¹²⁴ The Third Circuit applied this reasoning to its analysis of PennEast’s delegation theory, positing that the rule for delegation of the “special exemption” would be based upon the rule that abrogation of sovereign immunity must be “unmistakably clear in the language of the statute.”¹²⁵

Against this backdrop, the court proceeds to interpret the NGA, stating:

If delegation were a possibility, one would think some similar clarity would be in order. But the NGA does not even mention the Eleventh Amendment or state sovereign immunity. Nor does it reference “delegating” the federal government’s ability to sue the States. It does not refer to the States at all. If Congress had intended to delegate the federal government’s exemption from sovereign immunity, it would certainly have spoken much more clearly. Cf. *Dellmuth*, 491 U.S. at 232, 109 S.Ct. 2397[;] *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) [.] And while the NGA confers jurisdiction where the amount in controversy exceeds \$3,000, “it would be quite a leap” to infer from that “grant of jurisdiction the delegation of the federal government’s exemption from the Eleventh Amendment.” *Sabine*, 327 F.R.D. at 141. In short, nothing in the text of the statute even “remotely impl[ies] delegation[.]” *Blatchford*, 501 U.S. at 786, 111 S.Ct. 2578.¹²⁶

Rejecting PennEast’s interpretive arguments with respect to legislative history and purpose of the NGA, the court stated:

Whatever the force of those arguments – and it is slight, at best[] – it does not change the text of the statute. In the absence of any indication in the text of the statute that Congress intended to delegate the federal government’s exemption from state sovereign immunity to private gas companies, we will not assume or infer such an intent. That is to say, we will not assume that Congress intended – by its silence – to upend a fundamental aspect of our constitutional design. Cf. *King v. Burwell*, — U.S. —, 135 S. Ct. 2480, 2494, 192 L.Ed.2d 483 (2015) [;] *Guerrero-Sanchez*, 905 F.3d at 223[.] Accordingly, we hold that the NGA does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.¹²⁷

Therefore, in its final analysis of the text of the NGA’s eminent domain provisions, the Third Circuit blends textual rules applicable to statutes abrogating sovereign immunity with more generalized textual rules of constitutional avoidance to arrive at its final holding that the NGA did not confer the federal government’s “special exemption.”¹²⁸

D. Practical Implications

The Third Circuit’s opinion opens many practical and academic questions for exploration. A likely inexhaustive listing might begin with the fact that, as previously noted, the court did not definitively resolve the issue of whether it is even possible for the federal government to delegate its Eleventh Amendment immunity. A corollary question is, if it can, what branch would or could do this? Addi-

124. *Id.*

125. *In re PennEast*, 938 F.3d 96 at 111 (citing *Blatchford*, 501 U.S. 775, and *United States v. Carmack*, 329 U.S. 230 (1946)).

126. *In re PennEast*, 918 F.3d at 111-112 (brackets added).

127. *Id.* at 112-13 (brackets added).

128. *Id.* at 111-13.

tionally, it remains to be seen if other courts will look to the Third Circuit's application of the abrogation test to the question of special exemption delegation as common-sense constitutional jurisprudence, or as a thinly supported judicial overreach – or something entirely different.

Furthermore, perhaps because of its apparent development and application of the “unmistakable clarity” rule to the delegation context, the Third Circuit's opinion focused on a narrow examination of the language of the NGA, as opposed to a more expansive review of the NGA's legislative history and purpose in determining whether or not Congress intended to delegate to private parties the ability to condemn state-owned property in federal court. For instance, it is left to wonder why – when applying one non-textual rule of statutory interpretation (constitutional avoidance) – would the court then avoid or limit another standard non-textual interpretive method of reviewing legislative history by its backward look in time to 1947, as opposed to the seemingly richer history up to and including adoption of the NGA in 1938. Furthermore, given the NGA's adoption in 1938 and section 7(h) following in 1947, some readers may be wanting further clarity of how it is that late-stage, post-enactment holdings, such as *Union Gas* (decided in 1988) and *Seminole Tribe* (overruling *Union Gas*, decided in 1996),¹²⁹ affect Congress' intent at the time of drafting in 1938, and later in 1947, with respect to eminent domain and sovereign immunity.

Beyond some of the broad legal questions arising from the decision, the Third Circuit's holding in *In re PennEast* may have a number of future implications for pipeline companies and other parties involved in the approval process. As recognized by the Third Circuit, the natural gas industry has “used the NGA to construct interstate pipelines over State-owned land for the past eighty years.”¹³⁰ As it stands, the Third Circuit's decision provides states and potentially other parties with an additional tool to hinder the construction of natural gas pipelines. Further, the court's holding seems likely to cause natural gas companies to reevaluate potential routes for pipeline construction in order to avoid state-owned property, which may in turn lead to longer, costlier pipeline project proposals.

The court addresses some of the potential concerns in its opinion. Most significantly, the court recognizes that its holding may give states “unconstrained veto power over interstate gas pipelines.”¹³¹ The court noted that it is not insensitive to such a concern.¹³² However, states may always consent to suit in federal court, in which case the Third Circuit's holding would have no effect. For example, states that acknowledge the need for additional pipeline capacity are not required to assert Eleventh Amendment immunity in a federal condemnation action

129. See *supra* note 45.

130. *In re PennEast*, 938 F.3d at 113.

131. *Id.*

132. *Id.*

such as was filed by Penn East; rather, in such an instance, the NGA would function as it always has in situations where there are no disputes as to the necessity of additional pipelines and the state voluntarily becomes a party to the proceeding.¹³³

So, it is likely that the holding will be most problematic to natural gas companies in the situation in which a state, such as New Jersey in *In re PennEast*, opposes the expansion and development of oil and gas. In such a case, so long as the proposed route crosses state-owned property, or property in which the state owns a possessory interest, the Third Circuit's holding poses an obstacle that natural gas companies must overcome – state sovereign immunity.

How much of an obstacle the opinion presents remains to be seen. As the Third Circuit explained,¹³⁴ the court's holding does not concern New Jersey's ability to stop pipeline condemnations in general; rather, the holding is centered on whether or not the State itself can be subject to suit in federal court by a private party.¹³⁵ The court suggests a “work-around” of the issue by seeking to have an accountable federal official file the condemnation actions and then transfer the condemned property to the natural gas company.¹³⁶ However, the court also emphasized that it “is not [its] call to make” in determining the best solution from a policy standpoint.¹³⁷ Instead, the Third Circuit deferred to Congress, and even suggested that a “different statutory authorization” may be necessary.¹³⁸

Thus, another question unaddressed by *In re PennEast* is whether such a statutory amendment could overcome the constitutional concerns set forth in the Third Circuit's decision and *Blatchford* that the federal government is likely incapable of delegating to private parties its power to sue the states.¹³⁹ The Third Circuit's decision is unlikely to be the last word on the issue of state sovereignty in the context of the natural gas industry. On September 25, 2019, another pipeline company filed an appeal in the Fourth Circuit after a Maryland district court summarily dismissed its eminent domain actions against the state,¹⁴⁰ raising the possibility of a circuit split on questions addressed in *In re PennEast*. A circuit split would be a reason for the Supreme Court to weigh in and add clarity to this area of law. But even absent a circuit split, the Court may still weigh in. As of this writing, PennEast's petition for writ of certiorari is still pending. Regardless, because of the

133. *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) (“Although a state may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a state voluntarily become[s] a party to a cause . . . [it] cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.”) As a general matter, voluntary participation in a lawsuit brought in federal court will amount to waiver of Eleventh Amendment immunity. *See also* *Lapides v. Board of Regents*, 535 U.S. 613 (2002).

134. *In re PennEast*, 938 F.3d at 113.

135. Niina H. Farah, *4 Pipeline Fights to Watch this Term*, ENERGYWIRE (Sep. 30, 2019), <https://www.eenews.net/stories/1061181927>.

136. *In re PennEast*, 938 F.3d at 113.

137. *Id.*

138. *Id.*

139. Holmes, *supra* note 22.

140. *See* *Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less, in Washington Cty., Md., State of Md., Dep't of Nat. Res.*, No. 0:19-CV.PR-02040 (4th Cir. filed Sep. 25, 2019).

Third Circuit's holding, the issue of a private entity's ability to condemn state-owned property will likely be the subject of many judicial challenges in the future.

IV. CONCLUSION

As the demand for natural gas supply continues to increase in areas where pipeline capacity is limited, the Third Circuit's holding in *In re PennEast* presents potentially significant obstacles in the process of obtaining land rights for interstate natural gas transmission.¹⁴¹ While the court did not definitively conclude that the federal government is incapable of delegating to private parties its ability to sue the states in federal court (for purposes of condemning state-owned property to construct a pipeline), it did express extreme skepticism regarding the so-called "delegation theory" advanced by PennEast.¹⁴² In so doing, the Third Circuit has staked a holding with respect to NGA section 7(h) on a novel interpretation of sovereign immunity case law, which presents numerous avenues of practical and academic exploration on issues of sovereign immunity, the Natural Gas Act, statutory interpretation, and others upon which other parties and courts appear ready to opine.

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141. Clemente, *supra* note 19.

142. *In re PennEast*, 938 F.3d at 106.

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