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## Third Circuit Halts Interstate Pipeline Construction in PennEast Pipeline: States and Environmentalists Find an Ally in Sovereign Immunity

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2020]

THIRD CIRCUIT HALTS INTERSTATE PIPELINE CONSTRUCTION  
IN *PENNEAST PIPELINE*: STATES AND ENVIRONMENTALISTS  
FIND AN ALLY IN SOVEREIGN IMMUNITY

“The [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.”<sup>1</sup>

INTRODUCTION

The Supreme Court has historically recognized that, in particular circumstances, it is necessary for the federal government to seize privately held property to benefit the public good.<sup>2</sup> Known as eminent domain, the Fifth Amendment of the Constitution enables the federal government to seize private property so long as that property is taken for public use and the original owner is provided with just compensation.<sup>3</sup> Although this power is traditionally held only by the federal government, Congress delegated its eminent domain power to certain private parties when it enacted the Natural Gas Act (NGA).<sup>4</sup> In order for private parties to exercise this power, they must adhere to certain processes. This includes filing condemnation suits against any properties that the pipeline developer wishes to take through eminent domain.<sup>5</sup>

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1. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (discussing history and interpretation of Eleventh Amendment and sovereign immunity).

2. *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (holding that taking through eminent domain is constitutional if it is “rationally related to a conceivable public purpose” (internal quotation marks omitted) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984))); *see also* Jeremy P. Hopkins & Elisabeth M. Hopkins, *Separation of Powers: A Forgotten Protection in the Context of Eminent Domain and the Natural Gas Act*, 16 *REGENT U. L. REV.* 371, 372 (2004) (“The power of eminent domain is one of the most invasive powers the government possesses.”). Although eminent domain is historically a federal power, it was implicitly conferred to the states as well through the enactment of the Fourteenth Amendment. *See* Natalie M. Jensen, Note, *Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation*, 29 *FORDHAM ENVTL. L. REV.* 320, 325 (2017).

3. *See* U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

4. *See* Natural Gas Act, 15 U.S.C. § 717f(h) (2018) (detailing process through which pipeline developers may exercise eminent domain to facilitate construction of interstate pipelines); *see also* Victoria Mazzola, Comment, *Putting the Pieces of the Puzzle Together: The Natural Gas Pipeline Approval Process Is A Procedural Jigsaw*, 64 *VILL. L. REV.* 459, 467 (2019) (highlighting congressional authorization of eminent domain in NGA).

5. *See* Mazzola, *supra* note 4, at 468.

A pillar of federalism in the American constitutional system is that individual states retain some forms of sovereign immunity.<sup>6</sup> One example of this residual sovereign immunity is that states are generally immune from suit in federal court, and therefore condemnation suits by private parties, such as pipeline developers, are largely impossible.<sup>7</sup> This legal reality for private parties sharply contrasts with the exemption the federal government enjoys from the Eleventh Amendment's sovereign immunity mandate.<sup>8</sup> This means that, unlike the federal government, private parties are unable to hale states into federal court unless the state in question has consented to that suit.<sup>9</sup> Therefore, the NGA creates a paradox for private parties; although Congress delegated eminent domain powers to pipeline developers under the NGA, it is unclear whether private pipeline developers can hale states into federal court to respond to condemnation suits, thus, frustrating attempts to use the delegated eminent domain power.

The U.S. Court of Appeals for the Third Circuit recently dealt a heavy blow to natural gas pipeline development with its decision in *In re PennEast Pipeline Co.*,<sup>10</sup> granting environmentalists and states an unexpected bulwark against the NGA in the form of Eleventh Amendment sovereign immunity.<sup>11</sup> The decision in *PennEast Pipeline* frustrates one of the integral purposes of the NGA in order to safeguard states' Eleventh Amendment sovereign immunity. The *PennEast Pipeline* decision undoubtedly creates new hurdles for pipeline developers. However, the decision also upholds established precedent recognizing the foundational nature of sovereign immunity to the United States' constitutional system, without entirely

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6. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

7. See *In re PennEast Pipeline Co.*, 938 F.3d 96, 103–04 (3d Cir. 2019) (iterating states are generally immune from suit by private parties in federal court).

8. See U.S. CONST. amend. XI (“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.”). The federal government is able to hale states into federal court because, “[a]s part of ‘the ‘plan of the [Constitutional] convention[,]’ the States consented to suit by the federal government in federal court.” See *PennEast Pipeline*, 938 F.3d 96 at 103 (second and third alterations in original) (quoting *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779–82 (1991)).

9. See *PennEast Pipeline*, 938 F.3d at 103 (discussing states' Eleventh Amendment sovereign immunity); see also *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (“This Court has drawn upon principles of sovereign immunity to construe the Amendment to ‘establish that “an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.”’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984))). Additionally, in *Feeney*, the Supreme Court noted that the Eleventh Amendment bar to suit is not absolute, in that States may consent to suit by private parties in federal court. See *Feeney*, 495 U.S. at 304.

10. 938 F.3d 96 (3d Cir. 2019).

11. See *id.* at 103 (holding district court lacked subject-matter jurisdiction to hear condemnation suits against New Jersey properties because NGA did not delegate federal exemption to Eleventh Amendment sovereign immunity to private parties, such as PennEast).

freezing interstate pipeline construction.<sup>12</sup> If Congress wants to delegate the federal exemption from Eleventh Amendment state sovereign immunity so that pipeline companies can effectuate the condemnation of state land, it should revise the NGA to say with unmistakable clarity its intention to do so.<sup>13</sup>

Starting with a discussion of the history of the NGA, this Casebrief discusses the Third Circuit's decision in *PennEast Pipeline* and the implications of that decision—both practical and constitutional. By discussing several possible interpretations of the NGA that the Third Circuit could have adopted in its analysis, it is evident the court's holding lends some protection to Eleventh Amendment state sovereign immunity whilst leaving open the possibility of Congress revisiting the NGA. If weakening the Eleventh Amendment is necessary for the NGA to serve its full intended purpose, the Third Circuit has demonstrated it will not be the court to do so.<sup>14</sup>

## I. BACKGROUND

Prior to the passage of the NGA, the Supreme Court held on multiple occasions that it was unconstitutional for states to engage in regulation of wholesome rates of gas and electrical energy moving in interstate commerce.<sup>15</sup> Congress originally proposed the NGA to allow the federal government to impose regulations in an area the Constitution prevented states from regulating.<sup>16</sup> According to the Supreme Court, “[t]he Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry.”<sup>17</sup> It is evident from the congressional record at the time of the NGA's introduction that legis-

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12. This point will be expanded on in later Parts of this Casebrief. As explicitly noted by the Third Circuit, pipeline developers can coordinate with the federal government to have an appropriate federal official file the condemnation suits in federal court and then transfer the properties to the pipeline developers. *See id.* at 113. Additionally, the condemnation suits can be filed in state court, where states are not immune from suit. These alternate options are not exhaustive, and each poses its own respective issues.

13. *See id.* at 111 (expressing doubt that Congress can abrogate and delegate exemption to Eleventh Amendment sovereign immunity, and declining to definitively answer that question here). Whether such a delegation would be constitutionally permissible is unclear, though the Third Circuit found the proposition unlikely. *See id.*

14. *See id.* at 113 (“To be sure, such a change would alter how the natural gas industry has operated for some time. But that is what the Eleventh Amendment demands.”).

15. *See Interstate Nat. Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 689 (1947) (detailing history of NGA and legislative discussions prior to statute's enactment).

16. *See id.* at 690 (discussing original intent of Congress for NGA).

17. *Fed. Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 513 (1949).

lators had concerns about its drafting, specifically, the potential encroachment on states' regulatory power.<sup>18</sup>

Among other things, the NGA delegates the federal government's Fifth Amendment power of eminent domain to private parties for the construction of natural gas pipelines, so long as the pipeline developer follows necessary condemnation practices.<sup>19</sup> Eminent domain allows for the federal government, and parties delegated that power by Congress, to condemn and take property against the current owner's wishes.<sup>20</sup> The purpose of Section 717f(h) of the NGA is to encourage and facilitate the construction of natural gas pipelines; even though the NGA mainly impacts private parties, its intended purpose is to benefit the public interest.<sup>21</sup> Pipeline companies have since successfully exercised this delegated power against private landowners on a multitude of occasions.<sup>22</sup>

In *PennEast Pipeline*, however, pipeline developers met a novel roadblock, in the form of Eleventh Amendment immunity, when attempting to exercise this delegated power of eminent domain against the State of New Jersey.<sup>23</sup> Typically, to effectuate the taking of property through eminent

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18. See *Interstate Nat. Gas Co.*, 331 U.S. at 690 (discussing powers reserved to states by Congress and "purpose of [the original] restriction").

19. See Natural Gas Act, 15 U.S.C. § 717f(h) (2018); see also Mazzola, *supra* note 4, at 466–68 (detailing process pipeline developers must comply with in order to exercise federal eminent domain power). Developers wishing to exercise the NGA's eminent domain power must satisfy a three-prong test:

1) [T]he party must hold a FERC certificate of public convenience and necessity; 2) the party has not been able to acquire the property rights required to construct, operate, and maintain a FERC-approved pipeline by agreement with the landowners; and 3) the value of the property sought to be condemned must be greater than \$3,000.

Mazzola, *supra* note 4, at 467.

20. See generally Mazzola, *supra* note 4.

21. See *id.* Some of the debates surrounding the original enactment of the NGA suggest that from the outset, there were concerns about ensuring the NGA did not overly encroach on the sovereignty of the states. See William J. Flittie & James L. Armour, *The Natural Gas Act Experience—A Study in Regulatory Aggression and Congressional Failure to Control the Legislative Process*, 19 Sw. L.J. 448, 452–53 (1965). For example, Representative Lea, who originally introduced the bill in the House of Representatives, described the purpose of the NGA as "provid[ing] Federal regulation, in those cases where the State commissions lack authority, under the interstate-commerce law. This bill takes nothing from the State commissions; they retain all the State power they have at the present time." *Id.* at 452 (citing 81 CONG. REC. 6721 (1937)).

22. See, e.g., *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 831 (4th Cir. 2004) (affirming district court holding allowing gas company to exercise eminent domain against eighty-five private landowners to construct interstate gas pipeline); *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 481 (W.D.N.Y. 2011); *In re Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1020 (Pa. Commw. Ct. 2016) (affirming order overruling objections of private landowners whose property was being condemned by gas company for intrastate pipeline construction under eminent domain powers granted by NGA).

23. See *In re PennEast Pipeline Co.*, 938 F.3d 96, 100–01 (3d Cir. 2019) (discussing generally PennEast's condemnation suits against properties owned at least in part by the State of New Jersey).

domain, the government (and delegated parties) must file suit against the property owners to receive condemnation orders.<sup>24</sup> Normally, this is not a problem because private parties and landowners are not immune from suit in federal court by either private parties or the government. States, on the other hand, have the protection of Eleventh Amendment sovereign immunity.<sup>25</sup>

The Supreme Court of the United States has, on occasion, provided guidance on sovereign immunity, including whether Congress can abrogate that immunity.<sup>26</sup> These decisions have never touched on sovereign immunity in the context of the NGA.<sup>27</sup> In *Blatchford v. Native Village of Noatak & Circle Village*,<sup>28</sup> the Supreme Court discussed the requisite test for congressional abrogation of Eleventh Amendment sovereign immunity when several Native villages filed suit in federal court against an Alaska state official.<sup>29</sup> In summary, the Supreme Court stated “[w]e have repeatedly said that this power to abrogate can only be exercised by a clear legislative statement.”<sup>30</sup> The Third Circuit in *PennEast Pipeline* relied heavily on *Blatchford* as evidence of the Supreme Court’s “deep doubt about the ‘delegation’ theory itself.”<sup>31</sup>

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24. See § 717f(h).

25. See U.S. CONST. amend. XI.

26. See, e.g., *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 (1991) (discussing congressional abrogation of Eleventh Amendment sovereign immunity in context of federal lawsuit by Indian tribe against Alaska state official); see also *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989).

27. *PennEast Pipeline*, 938 F.3d at 106 (“[T]he Supreme Court and federal Courts of Appeals have not addressed the precise issue that we have here—whether condemnation actions under the NGA are barred by Eleventh Amendment immunity . . .”).

28. 501 U.S. 775 (1991) (holding that statute at issue was not an unmistakably clear abrogation of Eleventh Amendment sovereign immunity).

29. See *id.* at 777. In *Blatchford*, Alaska enacted a revenue-sharing statute that provided payments to Native village governments. *Id.* Soon after, the state’s attorney general advised the commissioner that the program should be enlarged to apply more broadly. *Id.* As a result, funding for the program had to be increased to match the larger scope, and the Native village governments that the statute was originally designed for failed to receive the original amount of funding promised to them. *Id.* Alaska Native villages initiated the *Blatchford* litigation, suing the commissioner, a state official, seeking the remainder of funding originally promised under the revenue statute. *Id.* The U.S. Court of Appeals for the Ninth Circuit reversed the district court’s initial dismissal, holding there was no violation of the Eleventh Amendment because 28 U.S.C. § 1362 constituted a congressional abrogation of sovereign immunity. *Id.* at 778.

30. *Id.* at 786. In making this point, the Supreme Court relied on its previous holding in *Dellmuth v. Muth*. *Id.* (citing *Dellmuth*, 491 U.S. 223); see also *Dellmuth*, 491 U.S. at 227–28 (“To temper Congress’ acknowledged powers of abrogation with due concern for the Eleventh Amendment’s role as an essential component of our constitutional structure, we have applied a simple but stringent test: ‘Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

31. See *PennEast Pipeline*, 938 F.3d at 106.

The Third Circuit has never decided whether Eleventh Amendment immunity bars eminent domain condemnation suits filed against the states in federal court.<sup>32</sup> Instead, the Third Circuit relied on several other circuit court decisions that offered guidance on similar matters, though none dealt directly with the NGA.<sup>33</sup> Generally, these cases suggest a deeply rooted judicial doubt that Congress can abrogate Eleventh Amendment sovereign immunity at all, and any abrogation must be—at the very least—stated with unmistakable clarity in the language of the statute.<sup>34</sup> According to the Third Circuit, the District Court for the Eastern District of Texas is the only court that has considered delegation of the Eleventh Amendment exemption in the context of the NGA.<sup>35</sup> There, the court dismissed the condemnation suits at issue, holding that the Eleventh Amendment did bar such suits in federal court.<sup>36</sup>

While the NGA anticipates private parties will exercise the federal power of eminent domain, it does not contain explicit language regarding Eleventh Amendment sovereign immunity.<sup>37</sup> States, as residual sovereigns, have consented to suit in federal court by the federal government, but have not consented to suit in federal court by private parties.<sup>38</sup> Therefore, the developers in *PennEast Pipeline* did not know whether they could effectuate eminent domain power against states in federal court.

## II. FACTS

In January 2019, PennEast Pipeline Company LLC (PennEast) took a major step toward completing the contested \$1 billion PennEast interstate pipeline project, anticipated to stretch from northeastern Pennsylvania to an endpoint in New Jersey.<sup>39</sup> PennEast filed complaints in the United

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32. *See id.*

33. *See id.* (discussing relevant circuit court opinions); *see also* United States *ex rel.* Long v. SCS Bus. & Tech. Inst., Inc., 173 F.3d 870, 882 (D.C. Cir. 1999) (stating that to allow a *qui tam* relator to sue one of the states in federal court using the government's exemption to Eleventh Amendment poses the question of delegation doubted in *Blatchford*); United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 294 (5th Cir. 1999) (holding United States lacks power to delegate its exemption from Eleventh Amendment sovereign immunity to private parties).

34. *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989) (“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”).

35. Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cty., Tex., 327 F.R.D. 131, 144 (E.D. Tex. 2017) (holding Eleventh Amendment barred eminent domain suit by private party under NGA against State property interest).

36. *See id.*

37. *See* Natural Gas Act, 15 U.S.C. § 717f(h) (2018) (lacking reference to Eleventh Amendment sovereign immunity).

38. *See PennEast Pipeline*, 938 F.3d at 103 (discussing states’ Eleventh Amendment sovereign immunity); *see also supra* note 9 and accompanying text (discussing *Feeney* opinion and principles of sovereign immunity).

39. *See In re PennEast Pipeline Co.*, Civ. A. No.: 18-1585, 2018 WL 6584893, at \*2 (D.N.J. Dec. 14, 2018), *vacated and remanded* 938 F.3d 96 (3d Cir. 2019).

States District Court for the District of New Jersey, seeking orders of condemnation against 131 properties existing over the proposed route, a good portion of those located on the border of New Jersey and Pennsylvania.<sup>40</sup> PennEast, a private party, filed the condemnation suits using the federal government's Fifth Amendment eminent domain power, explicitly delegated to it by Congress in the NGA.<sup>41</sup> However, instead of using this power solely against other private parties and landowners, PennEast attempted to exercise its delegated eminent domain power against the State of New Jersey, which possessed interests in forty-two of the properties at issue.<sup>42</sup>

The Federal Energy Regulatory Commission (FERC) approved PennEast's proposal for the construction of a 120-mile underground natural gas pipeline that would originate in northeastern Pennsylvania and terminate at Transco's pipeline interconnection in New Jersey.<sup>43</sup> PennEast's website claims that the project "will reduce energy costs and support thousands of jobs with clean-burning, American energy."<sup>44</sup> FERC accepted PennEast's proposal and granted it a certificate for the project, which PennEast used to file complaints in the United States District Court for the District of New Jersey for orders of condemnation of 131 properties along the proposed pipeline route.<sup>45</sup> Of the 131 properties PennEast sought to condemn, 42 belonged to New Jersey.<sup>46</sup> With the exception of 2 properties, New Jersey held non-possessory interests in the majority of these properties, primarily in the form of recreation or conservation easements.<sup>47</sup> Unlike the private landowners of the 89 other properties, New Jersey immediately filed a brief claiming sovereign immunity under the Eleventh Amendment, seeking the dismissal of all complaints for condemnation orders of properties New Jersey held interests in.<sup>48</sup> Additionally, New Jersey claimed that PennEast failed to satisfy a jurisdictional require-

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40. See *PennEast Pipeline*, 938 F.3d at 101 (discussing details of PennEast's original complaints filed in district court).

41. See *id.* at 99 ("The company obtained federal approval for the project and promptly sued pursuant to the NGA to condemn and gain immediate access to properties along the pipeline route."); see also § 717f(h) (detailing eminent domain power).

42. See *PennEast Pipeline*, 938 F.3d at 101.

43. See *Overview*, PENNEAST PIPELINE, <https://penneastpipeline.com/overview/> [<https://perma.cc/6FKE-NF2Y>] (last visited Mar. 8, 2020) (describing key features of pipeline project from perspective of PennEast Pipeline Company).

44. *Id.*

45. See *PennEast Pipeline*, 938 F.3d at 100–01.

46. See *id.* at 101.

47. See *id.* (discussing property ownership and interests involved). New Jersey has long sought to preserve farmland and open spaces, including through its "Green Acres" program, by which the state purchases land itself or aids local governments in purchasing land for preservation. See *id.* at 101 n.4.

48. See *id.* at 101 (discussing district court suit procedural history).



ment of the NGA by making no attempt to contract with the State regarding its property interests.<sup>49</sup>

The district court rejected New Jersey's Eleventh Amendment immunity claim, finding that Congress had abrogated New Jersey's immunity through the NGA by vesting natural gas companies with eminent domain power.<sup>50</sup> The court additionally found that PennEast had successfully satisfied the three NGA requirements necessary to condemn the properties.<sup>51</sup> Accordingly, the court granted PennEast's orders for condemnation and preliminary injunctive relief.<sup>52</sup> Subsequently, New Jersey moved for reconsideration on the issue of sovereign immunity, which the court denied.<sup>53</sup> New Jersey appealed, moved to stay the district court's decision and halt PennEast from taking immediate possession of the properties, and moved to expedite the Third Circuit's review of the appeal.<sup>54</sup> The Third Circuit granted the motion in part, temporarily freezing the construction of the pipeline and issuing the following decision.<sup>55</sup>

Instead of deciding whether Congress could delegate the federal exemption from Eleventh Amendment sovereign immunity, the Third Circuit interpreted the NGA as conferring only one of two powers necessary to seize state properties through eminent domain. The court stated the first identified power required is the Fifth Amendment's eminent domain capability, which the NGA explicitly grants to natural gas companies.<sup>56</sup> Second, the court identified the federal government's exemption from Eleventh Amendment sovereign immunity as a separate, distinct, and necessary power.<sup>57</sup> Without that second identified power—the federal exemption from Eleventh Amendment immunity—private parties such as PennEast cannot hale sovereign states into federal court.<sup>58</sup> The Third Circuit interpreted the NGA as delegating only the power of eminent domain to natural gas companies.<sup>59</sup> Therefore, although PennEast seemingly had

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49. *See id.*

50. *In re PennEast Pipeline Co.*, Civ. A. No.: 18-1585, 2018 WL 6584893, at \*1 (D.N.J. Dec. 14, 2018) (holding that NGA delegated PennEast the power of eminent domain, including exemption to Eleventh Amendment needed to effectuate taking of property), *vacated and remanded* 938 F.3d 96 (3d Cir. 2019).

51. *Id.* at 101–02; *see also* Mazzola, *supra* note 4, at 468 (discussing NGA requirements for eminent domain).

52. *PennEast Pipeline*, 938 F.3d at 102.

53. *Id.*

54. *Id.* at 102–03 (discussing state's actions following district court holding).

55. *Id.*

56. *See* Natural Gas Act, 15 U.S.C. § 717f(h) (2018). For a discussion of the showing a private party must make to exercise eminent domain power, *see supra* note 19.

57. *See PennEast Pipeline*, 938 F.3d at 104 (explaining how federal government's "ability to condemn State land" stems from two separate, but essential, powers).

58. *Id.*

59. *See id.* at 111 ("But we need not definitively resolve that question today because, even accepting the 'strange notion' that the federal government can dele-

the power to condemn state properties using the delegated federal eminent domain power, it could not effectuate the takings of state properties in federal court because states are immune from suit by private parties in federal court.<sup>60</sup>

### III. NARRATIVE ANALYSIS

Upon review, the Third Circuit agreed with New Jersey, stating the district court lacked subject-matter jurisdiction to decide PennEast's condemnation suits against state property interests.<sup>61</sup> The Third Circuit identified that it had jurisdiction to review both the sovereign immunity question and the question of injunctive relief.<sup>62</sup> The court then walked through New Jersey's primary argument—that it was immune from suit in federal court by private parties such as PennEast.<sup>63</sup> New Jersey argued it was immune because, although it had done so with respect to the federal government, it had not relinquished sovereign immunity with respect to private parties.<sup>64</sup> Furthermore, New Jersey believed any delegation of the sovereign immunity power by the NGA lacked clarity, thus, making it ineffective.<sup>65</sup>

Though the Third Circuit declined to definitively answer whether Congress could delegate the same exemption from Eleventh Amendment sovereign immunity, it stated three reasons to seriously doubt PennEast's position.<sup>66</sup> First, the court stressed that relevant case law did not support PennEast's argument that the federal government could delegate its exemption from sovereign immunity.<sup>67</sup> Specifically, the Third Circuit focused on the Supreme Court's decision in *Blatchford*, several decisions by other circuit courts, and a Texas district court case to illustrate that the judiciary has consistently declined to extend the exemption to the Eleventh Amendment.<sup>68</sup>

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gate its exemption from Eleventh Amendment immunity, . . . nothing in the NGA indicates that Congress intended to do so." (citation omitted)).

60. See U.S. CONST. amend. XI.

61. *Id.* at 103.

62. *Id.* ("We exercise plenary review over a claim of sovereign immunity.").

63. *Id.* at 104 (discussing New Jersey's sovereign immunity argument).

64. *Id.* For a discussion of the Eleventh Amendment, see *supra* note 8 and accompanying text.

65. *Id.* at 104.

66. *Id.* at 105–06.

67. *Id.* at 105.

68. See *id.* at 105–07. PennEast argued that *Blatchford* was not analogous because the statute in *Blatchford* was jurisdictional, as opposed to the NGA which confers a substantive power of the federal government on private parties. *Id.* at 105–06. The Third Circuit rejected this argument, stating the Supreme Court's guidance in *Blatchford* applied because it had nothing to do with the jurisdictional nature of the statute and instead concerned "the Court's deep doubt about the 'delegation' theory itself." *Id.* Additionally, the Third Circuit relied heavily on several decisions from other circuit courts that generally prevented the federal government from delegating its Eleventh Amendment sovereign immunity exemp-

Second, the Third Circuit emphasized the “fundamental differences” between the federal government and private developers, thus, weakening any argument that private parties can hale states into federal court pursuant to the federal exemption from Eleventh Amendment immunity.<sup>69</sup> Specifically, those charged with commencing suits in the name of the United States are bound by a constitutional duty that private parties are not.<sup>70</sup> The court emphasized that federal officials are accountable to the public in a way that private parties are not.<sup>71</sup>

Regardless of the overarching question of the constitutionality of delegation, the Third Circuit agreed with New Jersey, stating that at the very least, the NGA did not clearly and unequivocally delegate the federal government’s exemption from Eleventh Amendment sovereign immunity, which allows it to hale states into federal court, to natural gas companies.<sup>72</sup> In order to abrogate states’ sovereign immunity, the Supreme Court has held that Congress must do so with “[u]nmistakable’ clarity.”<sup>73</sup> The NGA contains no explicit language regarding Eleventh Amendment

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tion. *Id.* at 106. However, it is important to note that almost all of these supporting circuit court decisions were decided in the context of *qui tam* suits and did not analyze the NGA. *See id.* (citing to *qui tam* cases supporting Third Circuit’s position doubting delegation of Eleventh Amendment exemption). The only previous court to consider this Eleventh Amendment question in the context of the NGA was a district court in Texas. *See id.* (citing *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cty., Tex.*, 327 F.R.D. 131, 144 (E.D. Tex. 2017)). In *Sabine Pipe Line*, the district court found that the suit in question was barred by Eleventh Amendment sovereign immunity. *Sabine Pipe Line, LLC*, 327 F.R.D. at 144. The district court expressed strong doubts that Congress could abrogate the Eleventh Amendment at all. *Id.* at 142–43 (“The Supreme Court has held that Congress cannot abrogate Eleventh Amendment immunity simply by enacting legislation under its general grant of Article I legislative powers.”).

69. *PennEast Pipeline*, 938 F.3d at 105. The Third Circuit noted that there are “meaningful differences between suits brought by the United States, an accountable sovereign, and suits by private citizens.” *Id.* at 107 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991)) (discussing differences between suits brought by United States and those brought by private parties).

70. *See id.* (“Suits 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[.]”’” (alteration in original) (citation omitted) (quoting *Alden v. Maine*, 527 U.S. 706, 755 (1999))).

71. *See id.*

72. *Id.* at 103–04 (discussing NGA’s silence on Eleventh Amendment sovereign immunity).

73. *See id.* at 107 (explaining that standard for abrogating sovereign immunity of states).

sovereign immunity, nor any direct mention of the abrogation thereof.<sup>74</sup> Accordingly, the Third Circuit held for the state.<sup>75</sup>

#### IV. CRITICAL ANALYSIS

In *PennEast Pipeline*, the Third Circuit defended, and potentially strengthened, Eleventh Amendment state sovereign immunity at the expense of the intent behind the NGA. *PennEast Pipeline* is a strong warning to natural gas companies that, despite the considerable federal powers granted to them, private parties must respect the rights of states as sovereigns.<sup>76</sup> At the heart of its decision, the Third Circuit emphasized that “state sovereign immunity goes to the core of our national government’s constitutional design and therefore must be carefully guarded.”<sup>77</sup>

Although the Third Circuit explicitly recognized that this decision would complicate, and perhaps hinder, the natural gas industry’s operations, the court stated that “[i]nterstate gas pipelines can still proceed.”<sup>78</sup> In effect, the Third Circuit weighed the need for caution regarding the delegation of the federal exemption from Eleventh Amendment sovereign immunity against the possible burden on the purpose of the NGA, and determined that the constitutional interest in protecting Eleventh Amendment sovereign immunity outweighed the possible harms to interstate pipeline construction.

The Third Circuit could have decided this case in one of several possible ways based on how it chose to interpret Section 717f(h) of the NGA.<sup>79</sup> The Third Circuit adopted an interpretation of the NGA that best safeguarded states’ Eleventh Amendment sovereign immunity. However, some commentators have referred to the Third Circuit’s chosen interpre-

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74. See Natural Gas Act, 15 U.S.C. § 717f(h) (2018) (lacking any reference to Eleventh Amendment sovereign immunity); see also *PennEast Pipeline*, 938 F.3d at 111 (stating that NGA shows no unmistakable intention to abrogate Eleventh Amendment).

75. *PennEast Pipeline*, 938 F.3d at 111 (“But we need not definitively resolve that question today because, even accepting the ‘strange notion’ that the federal government can delegate its exemption from Eleventh Amendment immunity . . . nothing in the NGA indicates that Congress intended to do so.”).

76. See Note, *Executive Adjudication of State Law*, 133 HARV. L. REV. 1404, 1412 (2020) (“[T]he Constitution created a system of ‘dual sovereignty’: the federal government was entrusted with a certain set of powers, and the states retained everything else as residual sovereigns.”).

77. *PennEast Pipeline*, 938 F.3d at 108; see also *Executive Adjudication of State Law*, *supra* note 76 (discussing historical importance of residual state sovereignty).

78. *PennEast Pipeline*, 938 F.3d at 113 (expressing consideration for concerns of potential hinderance to the natural gas industry’s operations).

79. See Bernard Bell, *Delegation of Eminent Domain Powers to Private Entities: In Re PennEast Pipeline Co.*, YALE J. REG. BLOG (Sept. 16, 2019), <https://www.yalejreg.com/nc/delegation-of-eminent-domain-powers-to-private-entities-in-re-penneast-pipeline-co/> [<https://perma.cc/FY88-5YA5>]. In this article, Bell offers three possible ways in which the Third Circuit could have interpreted the NGA. *Id.*

tation as the “oddest” choice available.<sup>80</sup> This resolution is the *safest* choice, not the strangest choice.

If the Third Circuit had alternatively interpreted Section 717f(h) of the NGA more narrowly, it would have risked creating a bright-line rule within the Third Circuit for whether the NGA grants natural gas companies the power to condemn state property interests in federal court. While a clear-cut result might appear desirable, the high stakes nature of pipeline construction cases urges caution in adopting such a holding.<sup>81</sup> Additionally, ample precedent demonstrates the Supreme Court’s continued aversion to abrogating Eleventh Amendment state sovereignty.<sup>82</sup>

Interpreting Section 717f(h) of the NGA to grant natural gas companies both the power of eminent domain and the power to hale states into federal court would leave states at the mercy of natural gas companies.<sup>83</sup> The states would be unable to block unwanted pipeline construction and would be helpless in protecting their property interests. Additionally, such a decision would potentially weaken the sovereignty of states by opening space for other private parties to lobby and argue for their own exemptions to Eleventh Amendment sovereign immunity. This concern appeared to play a considerable part in the Third Circuit’s decision, as the court stated PennEast’s theory of Eleventh Amendment delegation “would dramatically undermine the careful limits that the Supreme Court has placed on abrogation.”<sup>84</sup> Moreover, the court asserted that it was “loath to endorse a never-before-recognized doctrine that would produce such a result.”<sup>85</sup>

The stakes of this case were notably high—both in terms of constitutional implications and practical consequences. By holding for the New Jersey, the Third Circuit indefinitely halted a billion-dollar project expected to bring substantial energy benefits to residents of both New Jersey and Pennsylvania within the next decade.<sup>86</sup> Alternatively, had the Third

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80. *See id.* (expressing concern that separating power of eminent domain from power of exemption from Eleventh Amendment is unrealistic because they are not practically divisible).

81. *See id.* (discussing high stakes nature of question presented as reason Supreme Court might be willing to hear case).

82. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 785–88 (1991) (discussing abrogation of Eleventh Amendment sovereign immunity in context other than NGA); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that, under Indian commerce clause, Congress lacked authority to abrogate Eleventh Amendment); Dellmuth v. Muth, 491 U.S. 223, 231 (1989) (stating that in order for Congress to abrogate Eleventh Amendment, it must do so with unmistakable clarity in language of statute).

83. *See* Bell, *supra* note 79 (suggesting Eleventh Amendment argument operates as protective cloak for State property interests).

84. *See In re PennEast Pipeline Co.*, 938 F.3d 96, 108 (3d Cir. 2019).

85. *Id.*

86. *See* PENNEAST PIPELINE, *supra* note 43; *see also* David Wochner et al., *Pipeline Projects Face New Questions on Landowner Rights*, KLGATES (Nov. 6, 2019, 2:57 PM), <http://www.klgates.com/files/Publication/1e7e64fd-f505-4baa-85d1-d28d8345>

Circuit held for PennEast, New Jersey would have unwillingly lost forty-two property interests, and been forced to acquiesce to the construction of an unwanted natural gas pipeline that might “damage the environment, displace residents, and pose risks to human health.”<sup>87</sup>

In addition to the practical considerations present in this case, *PennEast Pipeline* posed significant dangers to the sovereignty of the states. To interpret the NGA’s delegation of the federal government’s eminent domain power as also implicitly delegating the federal government’s exemption to Eleventh Amendment sovereign immunity would confuse two distinct powers.<sup>88</sup> This would naturally weaken the strength of the Eleventh Amendment, because an exemption could be implicitly delegated to private parties whenever necessary to effectuate the delegation of any other congressional power. As noted by the Third Circuit in its discussion of *Blatchford* and other district court opinions, “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.”<sup>89</sup>

## V. IMPACT

By defending the integrity and power of states’ Eleventh Amendment sovereign immunity in *PennEast Pipeline*, the Third Circuit inadvertently created a plethora of new incentives for those involved in interstate pipeline construction. Notably, the Third Circuit’s decision might serve as a compelling reason for Congress to revisit the NGA.<sup>90</sup> PennEast has not

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dfd5/Presentation/PublicationAttachment/1f3a6cb7-6260-41bf-bfb3-e43b154c8f56/Pipeline\_Projects\_Face\_New\_Questions\_On\_Landowner\_Rights.pdf [https://perma.cc/N9LQ-4FE4] (“As PennEast pointed out, requiring condemnation proceedings for state-owned land to take place in state court could ‘give States unconstrained veto power over interstate pipelines . . . the precise outcome Congress sought to avoid in enacting the NGA.’” (alteration in original) (citation omitted)).

87. David Hutter, *FERC Approves PennEast Pipeline Petition*, NJBIZ (Jan. 30, 2020, 2:28 PM), <https://njbiz.com/ferc-approves-penneast-pipeline-petition/> [https://perma.cc/48G8-36FN].

88. See *PennEast Pipeline*, 938 F.3d at 100 (“The federal government’s power of eminent domain and its power to hale sovereign States into federal court are separate and distinct. In the NGA, Congress has delegated the former.”).

89. See *id.* at 106 (internal quotation marks omitted) (quoting *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cty., Tex.*, 327 F.R.D. 131, 141 (E.D. Tex. 2017)) (using language of Texas district court case that carefully examined *Blanchford*). The Third Circuit stressed that the delegation of one power of the federal government does not necessarily delegate any other federal powers, regardless of whether those powers might be required in order to exercise the delegated power. *Id.* To think otherwise would be to conflate separate and distinct federal powers. *Id.*

90. See *id.* at 113 (“In any event, even if the federal government needs a different statutory authorization to condemn property for pipelines, that is an issue for Congress, not a reason to disregard sovereign immunity.”); see also *Pipeline Developers Beware: Third Circuit Disallows Eminent Domain Over State Lands Under Natural Gas Act*, DUANE MORRIS (Sept. 25, 2019), <https://www.duanemorris.com/alerts/pipeline-developers-beware-third-circuit-disallows-eminent-domain-state-lands-0919.html> [https://perma.cc/DSR3-8WRU] (“Pipeline companies would be ad-

abandoned the original proposed pipeline route and recently filed a Petition for Writ of Certiorari to the United States Supreme Court.<sup>91</sup> Additionally, FERC recently sided with PennEast's petition, issuing a declaratory order stating that the *PennEast Pipeline* decision threatens to disrupt interstate pipeline construction.<sup>92</sup> If the Supreme Court declines to grant certiorari, PennEast will have no choice but to reroute the pipeline, lobby Congress to change the NGA, or attempt to have a separate federal official file the same condemnation suits against New Jersey.

All of these options present their own issues and will further delay the construction of the pipeline. As the Third Circuit stressed, however, the Eleventh Amendment's direct tie to federalist principles outweighs possible complications for pipeline construction. The *PennEast Pipeline* decision does not entirely freeze interstate pipeline construction within the Third Circuit.<sup>93</sup> Rather, it reminds pipeline developers to respect the rights and powers of the states when contemplating the construction of new pipelines.

*PennEast Pipeline* also created incentives for parties involved in interstate pipeline construction battles, including private landowners, states, environmental groups, and natural gas companies. The most obvious incentive is for natural gas companies to avoid state land when planning pipeline routes.<sup>94</sup> This, in turn, would allow natural gas companies to avoid the issue altogether, but it would also potentially prevent natural gas

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vised to consult legal counsel and to formulate arguments to combat such attempts in order to prevent the Third Circuit's interpretation of the NGA from nullifying the otherwise broad eminent domain power granted to pipeline companies by Congress.”).

91. See Petition for Writ of Certiorari, *PennEast Pipeline Co. v. New Jersey*, No. 19-1039 (U.S. Feb. 20, 2020). Furthermore, the Supreme Court signaled interest in hearing the case by inviting the Solicitor General to file briefs in this case expressing the views of the United States. See *PennEast Pipeline v. New Jersey*, No. 19-1039, 2020 WL 3492643, at \*1 (U.S. June 29, 2020).

92. See Tom Johnson, *FERC Sides With PennEast in Opposing Court Decision That Pipeline Builder Can't Use Eminent Domain To Take Public Land*, STATEIMPACT PA. (Jan. 31, 2020, 10:36 AM), <https://stateimpact.npr.org/pennsylvania/2020/01/31/ferc-sides-with-penneast-in-opposing-court-decision-that-pipeline-builder-cant-use-eminent-domain-to-take-public-land/> [<https://perma.cc/3NQY-7ZAV>].

93. *PennEast Pipeline*, 938 F.3d at 113 (stating PennEast can coordinate with a federal official to file condemnation suits). *Contra Pipeline Developers Beware: Third Circuit Disallows Eminent Domain Over State Lands Under Natural Gas Act*, *supra* note 90 (“The opinion also gives states, and potentially private parties, a new tool with which to obstruct future pipeline projects.”).

94. See David Wochner et al., *supra* note 86 (“In light of these recent developments, pipeline developers may need to consider providing to FERC additional detail about the public benefits their projects provide, and pay increasing attention to the private and public landowners adversely affected by a proposed route.”); *Pipeline Developers Beware: Third Circuit Disallows Eminent Domain Over State Lands Under Natural Gas Act*, *supra* note 90 (“Going forward, pipeline companies may want to consider avoiding the use of eminent domain to acquire state-owned lands when siting pipelines, thereby circumventing the question of state sovereign immunity altogether.”).

companies from pursuing the routes they would otherwise choose for cost or efficiency reasons. It would also likely result in natural gas companies condemning more land owned by private owners than they otherwise would.<sup>95</sup> On the other hand, *PennEast Pipeline* incentivizes states, environmental groups, and private landowners to work together “for the sole purpose of thwarting pipelines.”<sup>96</sup>

The most direct result of *PennEast Pipeline* is that the PennEast pipeline project will be indefinitely postponed until either the Third Circuit’s decision is reversed or an alternate solution is reached.<sup>97</sup> It is unclear whether this decision has the potential to cause PennEast to terminate the project completely. Currently, PennEast has not issued a statement as to the route it will take if the Supreme Court declines to hear the case or if it affirms the Third Circuit’s decision.<sup>98</sup> In its opinion, however, the Third Circuit noted that PennEast could alternatively ask a federal official to file the condemnation suits in its place, and then have the properties transferred after they have been condemned.<sup>99</sup> Yet, the court suggested that such a solution might not be the most feasible or prudent option.<sup>100</sup>

Unless the Supreme Court reverses the Third Circuit’s decision, *PennEast Pipeline* will serve as a significant roadblock to the construction of interstate pipelines. Within the Third Circuit, interstate pipeline developers will be forced to respect states’ property interests and be cognizant of their inability to hale states into federal court to condemn properties. Although interstate pipeline construction within the Third Circuit might face a new complexity, *PennEast Pipeline* reinvigorated the power of Eleventh Amendment sovereign immunity and provided environmentalists and the State of New Jersey with a victory in their battle against an unwanted natural gas pipeline.

Fiona Steele

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95. *Pipeline Developers Beware: Third Circuit Disallows Eminent Domain Over State Lands Under Natural Gas Act*, *supra* note 90.

96. *Id.*

97. *See PennEast Pipeline*, 938 F.3d at 113 (“PennEast warns that our holding today will give States unconstrained veto power over interstate pipelines, causing the industry and interstate gas pipelines to grind to a halt—the precise outcome Congress sought to avoid in enacting the NGA.”).

98. *See PENNEAST PIPELINE*, *supra* note 43.

99. *See PennEast Pipeline*, 938 F.3d at 113 (discussing other options PennEast could take to file the condemnation suits required to effectuate eminent domain).

100. *Id.* (“Whether, from a policy standpoint, that is or is not the best solution to the practical problem PennEast points to is not our call to make. We simply note that there is a work-around.”). Practitioners have similarly noted that this solution is unproven as a realistic solution for pipeline developers. *See* David Wochner et al., *supra* note 86 (“In response, the court suggested that ‘an accountable federal official’ could file the condemnation action in federal court, and subsequently transfer the property to the pipeline company. However, the court’s proposed workaround is untested.” (footnotes omitted)).