

In Re PennEast Pipeline Co.: The Third Circuit Provides Opportunity to States Hoping to Ban Pipeline Construction

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I. OVERVIEW

In the Fall of 2015, PennEast Pipeline Company (PennEast) applied for a certificate of public convenience and necessity (Certificate) from the Federal Energy Regulatory Commission (FERC).¹ PennEast proposed to build a 116-mile pipeline that would run from Luzerne County, Pennsylvania to Mercer County, New Jersey.² After receiving its Certificate from FERC in 2018, PennEast filed complaints in the U.S. District Court for the District of New Jersey, asking for orders of condemnation for 131 properties along the pipeline route.³ The State of New Jersey (State or New Jersey) has a possessory interest in two of the 131 properties, and an interest in forty-two of the 131 properties .⁴

The district court ordered the owners of the 131 properties to show cause regarding why the condemnation orders should not be granted.⁵ New Jersey filed a brief invoking its Eleventh Amendment immunity, arguing that while the federal government delegated its power of eminent domain to PennEast, it did not delegate its ability to sue a state in federal

1. *In re PennEast Pipeline Co.*, 938 F.3d 96, 100 (3d Cir. 2019).

2. *Id.*

3. *Id.* at 100-01.

4. *Id.* New Jersey has a possessory interest in two of the 131 properties, and a non-possessory interest in the remaining forty properties.

5. *Id.*

court.⁶ As such, New Jersey argued that PennEast had no legal right to sue the state to condemn state-owned property.⁷ Additionally, New Jersey argued that PennEast had not attempted to negotiate with each landowner prior to initiating the condemnation proceedings and thus had not met the requirements of the Natural Gas Act (NGA).⁸

The district court first noted that PennEast had satisfied the three requirements laid out by the NGA, and was thus entitled to use the federal government's eminent domain power.⁹ The NGA requires that: (1) any pipeline company seeking to exercise the federal government's power of eminent domain first obtain a valid certificate of public convenience and necessity from FERC; (2) the company be unable to reach agreements with the necessary landowners; and (3) the value of any property the company hopes to condemn exceed \$3,000.¹⁰ PennEast met the first requirement when it obtained its Certificate in 2018.¹¹ Next, the district court determined that PennEast had been unable to come to agreements with the owners of the affected properties.¹² In determining this, the district court implied that PennEast was not required to negotiate with all property owners.¹³ Finally, the district court found that the NGA's property value requirement had been met because PennEast had offered amounts greater than \$3,000 for each property.¹⁴ Upon determining that PennEast had met the three requirements set by the NGA, the district court granted the orders of condemnation PennEast sought.¹⁵

In granting PennEast's request for orders of condemnation, the district court held that New Jersey's assertion of Eleventh Amendment immunity was inapplicable because PennEast had been granted with the federal government's power of eminent domain and thus "stands in the shoes of the sovereign."¹⁶ The district court noted that the design of the NGA allows "any holder of a certificate of public convenience and

6. *Id.* at 101-02.

7. *Id.* at 102.

8. *Id.* at 101.

9. *Id.*

10. *Id.* at 102.

11. *Id.* at 100; *see also In re PennEast Pipeline Co.*, 2018 WL 6584893, at *1, *3 (D. N.J. Dec. 14, 2018), *vacated* 938 F.3d 96 (hereinafter *Lower Court Opinion*).

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

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 101 (quoting *Lower Court Opinion* at 12).

necessity” to condemn property, even if that property is state-owned.¹⁷ This design, the district court reasoned, allows for companies with a valid Certificate to sue a state to condemn land necessary for the construction of a pipeline.¹⁸

Following the filing of the district court’s opinion in December of 2018, New Jersey asked the district court to reconsider its denial of the State’s claim of sovereign immunity, arguing that “the United States lacks the constitutional authority to delegate to private entities like PennEast the capacity to sue a State.”¹⁹ The district court denied the State’s motion, concluding that the NGA provides an exception to state sovereign immunity.²⁰

New Jersey then appealed the district court’s decision to the U.S. Court of Appeals for the Third Circuit, arguing that the district court erred in finding that state sovereign immunity was not applicable.²¹ In its opinion, filed on September 10, 2019, the Third Circuit vacated the district court’s decision.²² The court *held* that the power of eminent domain and the ability of the federal government to sue states in federal court are two separate powers that must be considered separately, and that Congress did not delegate the federal government’s ability to sue in the NGA. *In re PennEast Pipeline Co.*, 938 F.3d 96 (3d Cir. 2019).

II. BACKGROUND

A. Eminent Domain

The federal government’s power of eminent domain allows it to take private land for public purposes if it provides just compensation to the landowners.²³ The U.S. Supreme Court has defined “public purpose” broadly.²⁴ For example, the Supreme Court has held that economic development can qualify as a valid public purpose for Fifth Amendment takings.²⁵ As part of its eminent domain power, the federal government can

17. *Id.*

18. *Id.*

19. *Id.* at 102.

20. *Id.*

21. *Id.*

22. *Id.* at 113.

23. U.S. CONST. amend. V.

24. See *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (“[O]ur public use jurisprudence has . . . afford[ed] legislatures broad latitude in determining what public needs justify the use of the takings power.”).

25. *Id.* at 485.

also delegate the power to take land for a public purpose to private entities.²⁶ The federal government delegated this power in 1938, when Congress enacted the Natural Gas Act to regulate the transportation and sale of natural gas.²⁷ The NGA declared that all pipelines in the business of transporting and selling natural gas are considered “affected with a public interest.”²⁸ As such, Congress allows pipeline companies to use eminent domain to acquire land that they cannot otherwise acquire by contract or negotiation.²⁹

The NGA thus gives FERC authority to delegate the federal government’s power of eminent domain to natural gas pipelines.³⁰ Any company hoping to construct a natural gas pipeline must obtain a Certificate from FERC prior to negotiating easements with landowners along the pipeline route or initiating condemnation proceedings in court.³¹ Additionally, U.S. district courts have jurisdiction over these condemnation proceedings when the property in question exceeds \$3,000 in value.³²

While it is well-established that pipeline companies may exercise the federal government’s power of eminent domain to obtain easements over private land along the pipeline route, the process by which a pipeline company may gain access to *state-owned* land along the pipeline route is a debated topic.³³

B. *State Sovereign Immunity*

The Eleventh Amendment of the United States Constitution prohibits private parties from suing a State in federal court.³⁴ The federal government can, however, sue states because the states consented to suit by the federal government when they ratified the Constitution.³⁵ State

26. See, e.g., *In re PennEast Pipeline*, 938 F.3d at 100.

27. 15 U.S.C. § 717(a) (2018).

28. *Id.*

29. 15 U.S.C. § 717f(h) (2018).

30. *Id.*

31. *Id.* (stating that any easement that cannot be obtained through negotiation may be obtained through the district court in the district in which the land is situated or in state court).

32. *Id.*

33. See, e.g., *In re PennEast Pipeline Co.*, 938 F.3d 96, 104 (3d Cir. 2019) (“Focusing on Congress’s intent to enable gas companies to build interstate gas pipelines, PennEast fails to adequately grapple with the constitutional impediment to allowing a private business to condemn State land: namely, Eleventh Amendment immunity.”).

34. U.S. CONST. amend. XI.

35. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

sovereign immunity bars suits by private parties “only in the absence of consent,” and many states have consented to a variety of suits.³⁶ Unlike the federal government’s power of eminent domain, the circumstances under which Congress may abrogate state sovereign immunity are much more limited.³⁷ The Supreme Court has repeatedly held that the “power to abrogate [state sovereign immunity] can only be exercised by a clear legislative statement.”³⁸ Additionally, the Supreme Court has held that Congress lacks the authority to abrogate state sovereign immunity pursuant to the Commerce Clause.³⁹ To be more specific, the Supreme Court has recognized that Congress may only abrogate state sovereign immunity when it acts pursuant its enumerated powers, particularly those granted in Section Five of the Fourteenth Amendment.⁴⁰

For example, in *Blatchford v. Native Village of Noatak & Circle Village*, the Supreme Court held that the Eleventh Amendment barred Native American petitioners from filing suit against a state official for violating a revenue-sharing statute of the state.⁴¹ The petitioners brought the suit pursuant to 28 U.S.C. § 1362, which declares that “district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”⁴² The Supreme Court stated that § 1362 “does not reflect an unmistakably clear intent to abrogate immunity” as required by *Dellmuth v. Muth*.⁴³ Despite acknowledging that Congress can possibly delegate the federal government’s exemption from state sovereign immunity by making its intentions unmistakably clear, the Supreme Court considered an abrogation of this type to be a “strange notion.”⁴⁴ As such, the Supreme

36. *Id.*

37. *See Dellmuth v. Muth* 491 U.S. 223, 227-28 (1989); *see also* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59 (1996).

38. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 (1991); *see also Dellmuth*, 491 U.S. at 227-28.

39. *See Seminole Tribe of Fla.*, 517 U.S. at 59.

40. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *see* U.S. CONST. amend. XIV, § 5; *U.S. v. Georgia*, 546 U.S. 151, 158-59 (2006) (Congress is granted the power to enforce the Fourteenth Amendment of the Constitution of the United States, and toward that end, may “abrogate state sovereign immunity by authorizing private suits for damages against the States . . . for conduct that actually violates the Fourteenth Amendment.”) (emphasis in original).

41. *Blatchford*, 501 U.S. at 782.

42. 28 U.S.C. § 1362.

43. *Blatchford*, 501 U.S. at 786; *Dellmuth*, 491 U.S. at 227-28 (internal quotation marks omitted).

44. *Blatchford*, 501 U.S. at 785-86.

Court makes it clear that the set of circumstances under which Congress may abrogate state sovereign immunity are incredibly narrow.⁴⁵

C. *Potential Exceptions to Eleventh Amendment Immunity*

Some federal appellate courts have recognized a very narrow set of exceptions to the non-delegability of the federal government's exemption from state sovereign immunity.⁴⁶ For example, the U.S. Court of Appeals for the Fourth Circuit has recognized that Eleventh Amendment immunity does not apply in False Claims Act (FCA) suits.⁴⁷ These are suits brought by or on behalf of the United States against individuals or entities that submit false claims to the federal government.⁴⁸ In *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, the Fourth Circuit held that the United States is the real party in interest in FCA suits, even where it permits a separate party, known as a *qui tam* relator, "to pursue the action on its behalf."⁴⁹ Based on this holding, the Fourth Circuit declared that a state cannot assert Eleventh Amendment immunity in a *qui tam* suit because the United States may sue a state in federal court.⁵⁰

Other circuit courts, however, have found the Fourth Circuit's conclusion flawed.⁵¹ For example, in *United States ex rel. Foulds v. Texas Tech University*, the Fifth Circuit held that the Eleventh Amendment barred a *qui tam* relator from bringing an FCA suit against a state because Congress, in the language of the False Claims Act, did not clearly express its intent to abrogate state sovereign immunity.⁵² Similarly, the Ninth Circuit held that the Eleventh Amendment barred a *qui tam* relator from "assert[ing] the government's interests against the State of Alaska" based on the Supreme Court's holding in *Blatchford*.⁵³

While there is no consensus on whether the Eleventh Amendment bars FCA claims brought by *qui tam* relators, the courts seem to agree that if a private party is empowered to bring a suit against a state, it could only

45. See, e.g., *id.*; see also *Dellmuth* 491 U.S. at 227-28.

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

47. *Id.*

48. *Id.* at 48.

49. *Id.* at 50.

50. *Id.*

51. See, e.g., *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 284 (5th Cir. 1999).

52. *Id.* at 294.

53. *Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011); see *Blatchford v. Native Village*, 501 U.S. 775, 779 (1991).

possibly do so with considerable guidance by the federal government.⁵⁴ Either the federal government must play a significant role in the FCA suit,⁵⁵ or Congress must make explicit in the language of the FCA its intent to abrogate state sovereign immunity.⁵⁶

III. COURT'S DECISION

In the noted case, the Court of Appeals for the Third Circuit reversed the district court's finding that the NGA qualified as a valid abrogation of state sovereign immunity.⁵⁷ The court noted that the federal government's power of eminent domain and its power to override state sovereign immunity "are separate and distinct," and thus should be analyzed separately.⁵⁸ While the court ultimately held that PennEast's condemnation suit against New Jersey should have been barred by New Jersey's state sovereign immunity, the court established that it had jurisdiction to hear this appeal in order to review the denial of New Jersey's claim of Eleventh Amendment immunity.⁵⁹

The court next discussed the fundamental role that state sovereign immunity plays in the federalist structure of our system of government.⁶⁰ The court noted that the idea of state sovereign immunity existed before the ratification of the Eleventh Amendment, and that a state's immunity from suit "neither derives from, nor is limited by, the terms of the Eleventh Amendment."⁶¹ The Eleventh Amendment, then, merely recognized this immunity that states already possessed.⁶² This long recognized and fundamental immunity, the court states, prohibits private parties from subjecting states to suit in federal court "unless they have consented to suit, either expressly or in the 'plan of the convention.'"⁶³ The court recognized that as a result of the 'plan of the convention,' states have consented to suit by the federal government in federal court, meaning that the federal government "enjoys an exemption from the power of the States

54. See, e.g., *United States ex rel. Milam*, 961 F.3d at 48-49.

55. *Id.*

56. *Jachetta*, 653 F.3d at 908.

57. *In re PennEast Pipeline Co.*, 938 F.3d 96, 99 (3d Cir. 2019).

58. *Id.* at 100.

59. *Id.* at 103.

60. *Id.*

61. *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

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

63. *Id.* (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)) (internal quotation marks omitted).

to fend off suit by virtue of their sovereign immunity.”⁶⁴ The court also noted that this exemption enjoyed by the federal government is one that “private parties do not generally have.”⁶⁵

The court, while recognizing that this exemption generally only applies to the federal government, next examined whether the federal government may delegate this exemption to private parties.⁶⁶ New Jersey argued that its sovereign immunity barred PennEast from bringing these condemnation suits in federal court,⁶⁷ and that the federal government may not delegate its exemption from state sovereign immunity to private parties.⁶⁸ Further, New Jersey insisted that even if the federal government could delegate this exemption, “the NGA is not a clear and unequivocal delegation of that exemption.”⁶⁹ In opposition, PennEast asserted that by delegating the federal government’s power of eminent domain, the NGA must have intended to delegate the federal government’s exemption from state sovereign immunity.⁷⁰

The court began its analysis by reiterating the importance of separating the federal government’s exemption from state sovereign immunity from its power to condemn property for its own use.⁷¹ In highlighting this distinction, the court noted that the federal government’s ability to condemn state-owned land in federal court is not a result of its eminent domain power, but rather this ability is due to the fact that the federal government “enjoys a special exemption from the Eleventh Amendment.”⁷² The court clarified that “a private party is not endowed with all the rights of the United States by virtue of a delegation of the government’s power of eminent domain.”⁷³

Next, the court discussed PennEast’s flawed argument that Congress “must have meant for pipeline construction to go forward, regardless of the Eleventh Amendment.”⁷⁴ The court explained that there are limitations

64. *Id.* at 103-04; see *Blatchford*, 501 U.S. at 779-82; see *Alden*, 527 U.S. at 755.

65. *In re PennEast Pipeline*, 938 F.3d at 104; see *Alden*, 527 U.S. at 755.

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

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (reasoning that “concluding otherwise would frustrate the fundamental purpose of the NGA to facilitate interstate pipelines”).

71. *Id.*

72. *Id.* (citing *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange City*, 327 F.R.D. 131, 140 (E.D. Tex. 2017)).

73. *Id.*

74. *Id.*

on the ability of Congress to abrogate state sovereign immunity.⁷⁵ One limitation, particularly relevant here, is that Congress may not abrogate state sovereign immunity under the Commerce Clause.⁷⁶ As Congress enacted the NGA pursuant to the Commerce Clause, “the [Natural Gas Act] cannot be a valid congressional abrogation of state sovereign immunity.”⁷⁷

The court then expressed its doubt about the ability of Congress to delegate the federal government’s exemption from Eleventh Amendment immunity under any circumstances.⁷⁸ The court provided multiple reasons that contribute to its doubt regarding the delegability of this exemption. First, the court noted that previous case law has not endorsed the idea that Congress may abrogate state sovereign immunity.⁷⁹ The court highlighted the opinion in *Blatchford*, in which the Supreme Court expressed its skepticism regarding the delegability of the exemption from state sovereign immunity.⁸⁰ The court also highlighted opinions of other appellate courts in which the courts reject arguments that the federal government is able to delegate this exemption to private parties.⁸¹

The second reason the court gave for doubting the delegability of the exemption from state sovereign immunity is the lack of accountability of private parties.⁸² “[T]here are meaningful differences between suits brought by the United States, an accountable sovereign, and suits by private citizens.”⁸³ Private parties do not share the federal government’s obligation to “take Care that the Laws be faithfully executed.”⁸⁴ A private party’s incentives to protect and maintain the rights of those whose land it seeks to condemn are different from the incentives of the federal government.⁸⁵ In the eminent domain context, the court notes, the federal government’s “accountab[ility] to the populace” has significance.⁸⁶

75. *Id.* at 105.

76. *Id.*; *see also* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59 (1996).

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

78. *Id.*

79. *Id.*

80. *Id.* (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 783 (1991)).

81. *Id.* at 106 (citing *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999); *Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011)).

82. *Id.* at 107.

83. *Id.*

84. *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 755 (1999)); *see also* U.S. CONST. art. II, § 3.

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

86. *Id.*

The third reason the court gave for rejecting PennEast's argument is that "accepting PennEast's delegation theory would dramatically undermine the careful limits the Supreme Court has placed on the abrogation [of state sovereign immunity]."⁸⁷ The court reiterated that "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing considerable strain on the principles of federalism that inform Eleventh Amendment doctrine."⁸⁸ Because the concept of state sovereign immunity is fundamental to the federalist design, the court stated that for Congress to abrogate state sovereign immunity, its intent to do so must be "unmistakably clear in the language of the statute."⁸⁹ The court pointed out that "Congress may abrogate state sovereign immunity only pursuant to a valid exercise of federal power," and further explained that Congress may not "abrogate sovereign immunity under its Commerce Clause powers."⁹⁰ As the court previously stated, the NGA was enacted pursuant to the Commerce Clause.⁹¹ The Third Circuit thus rejected PennEast's argument that the Natural Gas Act was a valid abrogation of state sovereign immunity.⁹² Specifically, the court states that the only time Congress may abrogate state sovereign immunity is "when it acts pursuant to § 5 of the Fourteenth Amendment."⁹³

The court then analyzed PennEast's final two arguments.⁹⁴ PennEast analogized its condemnation suit against New Jersey to a *qui tam* suit filed under the False Claims Act.⁹⁵ The court highlighted that the Circuits are split regarding whether *qui tam* suits are barred by the Eleventh Amendment.⁹⁶ Assuming, however, that *qui tam* suits are not barred by the Eleventh Amendment, the court found key differences between a *qui tam* suit, in which the relator sues on behalf of and with the consent of the federal government, and the condemnation suit filed by PennEast against

87. *Id.* at 108.

88. *Id.* at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 271 (1989)).

89. *Id.* (quoting *Dellmuth*, 491 U.S. at 228).

90. *Id.* at 108 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59 (1996)).

91. *Id.* at 105.

92. *Id.*

93. *Id.* at 108 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

94. *Id.* at 108-09.

95. *Id.* at 109.

96. *Id.*

New Jersey.⁹⁷ Next, the court addressed PennEast’s argument that state sovereign immunity does not apply to condemnation suits because they are *in rem* proceedings.⁹⁸ However, the court rejected this argument and stated that “the Supreme Court has consistently recognized that sovereigns can assert their immunity in *in rem* proceedings in which they own property.”⁹⁹

The Court concluded its opinion by once again expressing its skepticism regarding the delegability of the federal government’s exemption from state sovereign immunity.¹⁰⁰ The Court noted that while it was hesitant to accept that Congress can abrogate state sovereign immunity, it did not need to determine the circumstances under which such abrogation is allowed because the NGA did not unmistakably indicate the intent of Congress to abrogate sovereign immunity.¹⁰¹ The court stated that it could not accept congressional silence as an attempt to “upend a fundamental aspect of our constitutional design.”¹⁰² The Court found each of PennEast’s arguments unpersuasive and held that the “NGA does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.”¹⁰³

IV. ANALYSIS

Prior to the noted case, the issue of whether the NGA delegated the federal government’s ability to condemn state-owned land in court to private parties had not been decided in a federal court of appeals.¹⁰⁴ While untouched by a federal court of appeals, the issue had previously been raised in district court.¹⁰⁵ In 2017, the U.S. District Court for the Eastern District of Texas similarly held that the NGA is not a valid delegation of the federal government’s exemption from Eleventh Amendment immunity.¹⁰⁶ Despite the fact that this case was the first to address the

97. *Id.* (“PennEast filed suit in its own name; PennEast will gain title to the land; there is no special statutory mechanism for the federal government to intervene in NGA condemnation actions; and PennEast maintains sole control over the suits.”)

98. *Id.* at 110.

99. *Id.*

100. *Id.* at 111.

101. *Id.*

102. *Id.* at 112.

103. *Id.* at 112-13.

104. *See id.* at 106.

105. *See generally*, Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cnty., 327 F.R.D. 131 (E.D. Tex. 2017).

106. *Id.* at 143.

applicability of state sovereign immunity in the context of the NGA, it was not appealed.¹⁰⁷

Approximately two weeks before the Third Circuit published its decision in *PennEast*, the U.S. District Court for the District of Maryland also held that the Eleventh Amendment barred the pipeline company, Columbia Gas Transmission (Columbia), from “su[ing] the State of Maryland for an order of condemnation without Maryland’s consent.”¹⁰⁸ Columbia has appealed the district court’s decision, a move that could force the Fourth Circuit to either follow the Third Circuit’s lead, or create a new circuit split.¹⁰⁹

PennEast unsuccessfully petitioned for rehearing en banc and subsequently requested that the Supreme Court of the United States grant a writ of certiorari.¹¹⁰ The writ of certiorari was granted, and the court instructed the parties to address an additional question: “Did the Court of Appeals properly exercise jurisdiction over this case?”¹¹¹ The United States, as *amicus curiae*, asserted that the issue of whether the government can delegate the eminent domain power could only be addressed in direct review of the grant of a Certificate, and that the Court should read the NGA in line with the Federal Power Act, which the Court has held “preclude[s] all litigation of ‘issues inhering in the controversy’ outside of the direct-review scheme, including whether the licensee is authorized to take State-owned property.”¹¹² Both *PennEast* and New Jersey asserted in their briefs

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

108. Transcript of Oral Opinion, *Columbia Gas Transmission, LLC v. 00.12 Acres of Land*, No. 1:19-cv-01444-GLR (D. Md. 2019), <https://www.law.nyu.edu/sites/default/files/md-columbiagas-proceedings-transcript.pdf> [<https://perma.cc/6LR7-5G8G?type=image>].

109. ERIC N. HOLMES, CONG. RESEARCH SERV., LSB10359, THIS LAND IS YOUR LAND? EMINENT DOMAIN UNDER THE NATURAL GAS ACT AND STATE SOVEREIGN IMMUNITY (2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10359> [<https://perma.cc/LGP7-5ZW2?type=image>].

110. See Order Denying Rehearing, *In re PennEast Pipeline Co.*, 938 F.3d 96 (3d Cir. 2019) (No. 19-1191), <https://www.njlawblog.com/wp-includes/ms-files.php?file=2019/11/Order-Rehearing-Denied-11.5.19.pdf> [<https://perma.cc/NLZ8-KYCG?type=image>]; see also Petition for Writ of Certiorari at 1, *PennEast Pipeline Co., v. State of New Jersey* (U.S. Feb. 18, 2019) (No. 19-1039).

111. Docket Entry Granting Certiorari, *PennEast Pipeline Co. v. New Jersey* (U.S. Feb. 10, 2021) (No. 19-1039), available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1039.html> [<https://perma.cc/5W7D-NRAP?type=image>].

112. Brief for United States as *amicus curiae* at 9, 11-19, *PennEast Pipeline Co. v. New Jersey* (U.S. Mar. 8, 2021) (No. 19-1039), available at https://www.supremecourt.gov/DocketPDF/19/19-1039/171249/20210308193306999_19-1039tsacUnitedStates.pdf [<https://perma.cc/2EjT-2TRK?type=image>]; see also *City of Tacoma v. Taxpayers*, 357 U.S. 320, 336, 341 (1958) (holding that where appeal of Federal Power Commission’s findings and order is final, taxpayers’

that the courts below did have jurisdiction.¹¹³ Oral argument was heard on April 28, 2021.¹¹⁴

The NGA declares that pipelines in the business of “transporting and selling natural gas for ultimate distribution to the public” are in the public interest and can therefore exercise the federal government’s power of eminent domain through FERC’s granting of a Certificate.¹¹⁵ This determination of public interest is made irrespective of states’ interests, and until now, states have had little hope to slow pipeline construction.¹¹⁶ The court’s decision gives new hope to states looking to reduce or ban new pipeline construction due to environmental concerns.¹¹⁷ For example, in the case of PennEast, New Jersey expressed concerns over the lack of complete information FERC possessed relating to the environmental impacts of the pipeline on state-owned land.¹¹⁸ Similarly, New Jersey described its commitment to preserving certain tracts of land throughout the state.¹¹⁹ Specifically, the lands that PennEast sought to condemn included lands that New Jersey “has preserved specifically for recreational, conservation, and agricultural uses.”¹²⁰

To further halt pipeline construction, private landowners along a potential pipeline route may be able to grant non-possessory interests to the state in order to avoid condemnation by a private party.¹²¹ As such, PennEast fears that “landowners will disrupt FERC’s process for reviewing and approving pipeline routes by creating an endless loop of proposed routes, modifications, and transfers to the state of blocking property interests.”¹²² PennEast expressed concern regarding the impact

claims that city lacked capacity to exercise eminent domain in the matter “were impermissible collateral attacks” on that judgment).

113. Brief for Petitioner at 44-48, *PennEast Pipeline Co. v. New Jersey* (U.S. Mar. 1, 2021) (No. 19-1039); Brief for Respondent New Jersey at 40-43, *PennEast Pipeline Co. v. New Jersey*, (U.S. Mar. 31, 2021) (No. 19-1039).

114. *PennEast Pipeline Co. v. New Jersey* (No. 19-1039), <https://www.oyez.org/cases/2020/19-1039> [<https://perma.cc/K7Z8-7XQV?type=image>].

115. 15 U.S.C. § 717(a), f(h) (2018).

116. See 15 U.S.C. § 717(a) (2018); see also Appellee Petition for Rehearing en banc at 1, *In re PennEast Pipeline Co.*, 936 F.3d 96 (3d Cir. 2019) (No. 19-1191) (hereinafter *Petition for Rehearing*), <https://naturalgasnow.org/wp-content/uploads/2019/10/PennEast.pdf>.

117. See *In re PennEast Pipeline Co.*, 938 F.3d 96, 113 (3d Cir. 2019).

118. Appellants’ Merits Brief at 7-8, *In re PennEast Pipeline Co.*, 938 F.3d 96 (3d Cir. 2019) (Nos. 19-1228, 19-1191) (hereinafter *Brief of Appellant*).

119. *Id.* at 5-6.

120. *Id.* at 1.

121. See *Petition for Rehearing* at 16.

122. *Id.*

this decision would have on future pipeline development and its fear that the court's decision would cause "the industry and interstate gas pipelines to grind to a halt."¹²³

In its opinion, the court addressed such potential implications of its decision.¹²⁴ The court acknowledged that its holding presented challenges to the pipeline industry but insisted that it is likely that the federal government can condemn state property and can then transfer the necessary property to a pipeline company.¹²⁵ Even if the federal government does not currently possess this power, that is no "reason to disregard sovereign immunity."¹²⁶

V. CONCLUSION

The holding in the noted case presents both significant challenges to future pipeline projects and presents opportunities to states hoping to limit pipeline construction.¹²⁷ Even without a Supreme Court decision regarding the delegability of the federal government's exemption of state sovereign immunity, the Third Circuit's holding in *In re PennEast Pipeline* will certainly make pipeline development more cumbersome.¹²⁸ Pipeline companies must either ask the federal government to condemn state-owned property and transfer title, or avoid state-owned land altogether.¹²⁹ Of more consequence, however, is the recognition that the importance of state sovereign immunity outweighs the interests of pipeline companies. Regardless of further discussion on the issue, the pipeline industry faces more obstacles now than it did prior to the court's decision in *PennEast*, and states are able to breathe a little easier knowing that pipeline companies cannot drag them into court to condemn state-owned land.¹³⁰

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123. *In re PennEast Pipeline Co.*, 938 F.3d 96, 113 (3d Cir. 2019).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*; *see also Brief of Appellant* at 5-6.

128. *See* 938 F.3d at 113.

129. *See id.*

130. *See id.*

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