No. _____

In The
Supreme Court of the United States

0.12 ACRES OF LAND, MORE OR LESS,
IN WASHINGTON COUNTY, MARYLAND;
STATE OF MARYLAND, DEPARTMENT
OF NATURAL RESOURCES,

Petitioners,

v.

COLUMBIA GAS TRANSMISSION, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ANTHONY G. BROWN
Attorney General of Maryland

JOSHUA M. SEGAL*
Assistant Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
jsegal@oag.state.md.us
(410) 576-6446

Attorneys for Petitioners

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**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 1289 (2021), the respondent State claimed sovereign immunity from a pipeline company's exercise of federally delegated eminent domain power under the Natural Gas Act, 15 U.S.C. § 717f(h). Ruling for the company, this Court held that "the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees." *PennEast*, 141 S. Ct. at 2259. The parties in that case, however, did not address whether, even assuming such consent, federal jurisdiction over such proceedings—if brought against one State by a citizen of another State—might still be barred by the Eleventh Amendment's statement that "[t]he Judicial power of the United States shall not be construed to extend" to suits "commenced or prosecuted against one of the United States by Citizens of another State."

This case, like *PennEast*, is a Natural Gas Act condemnation action, and it is brought against one State by a citizen of another. The question presented is:

Does the Eleventh Amendment's statement that "[t]he Judicial power of the United States shall not be construed to extend" to suits "commenced or prosecuted against one of the United States by Citizens of another State" bar federal courts from exercising jurisdiction over such suits notwithstanding the defendant State's consent?

PARTIES TO THE PROCEEDINGS

Petitioners are 0.12 Acres of Land, More or Less, in Washington County, Maryland; and the State of Maryland, Department of Natural Resources. They were defendants-appellants below.

Respondent is Columbia Gas Transmission, LLC. It was plaintiff-appellant below.

RELATED PROCEEDINGS

This case arises out of the Fourth Circuit's decision in *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, in Washington County, Maryland* (No. 23-1069), which in turn arises out of the United States District Court for the District of Maryland's decision in *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, in Washington County, Maryland* (No. GLR-19-1444). The district court case was the subject of a previous appeal in the Fourth Circuit, *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, in Washington County, Maryland* (No. 19-2040).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-10a, is unreported. The district court's opinion, App. 36a-48a, is unreported. The court of appeals' order in this case's first appeal, App. 32a-33a, is unreported. The district court's oral ruling at issue in that appeal, App. 13a-29a, is unreported.

JURISDICTION

The court of appeals entered judgment on October 11, 2023. This petition is timely filed on January 9, 2024. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,

> and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Eleventh Amendment to the Constitution provides as follows:

> 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.

STATEMENT

Columbia Gas's Condemnation Action

Under the Natural Gas Act, a company that proposes to construct, operate, and maintain an interstate natural gas pipeline must first obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC"). 15 U.S.C. § 717f(c)(1)(a). On July 19, 2018, FERC granted

Columbia Gas Transmission, LLC ("Columbia Gas") a certificate to undertake the Eastern Panhandle Expansion Project, a 3.37-mile natural gas pipeline running from existing interconnections in Pennsylvania to a local distribution system in West Virginia. C.A. App. 17. The project route impacts 22 tracts of real property. C.A. App. 12. The Maryland Department of Natural Resources ("MDNR" or "the State") is the record title holder of one such tract. C.A. App. 10, 15.

On its face, the certificate authorized Columbia Gas to exercise "the right of eminent domain" to acquire property needed to construct the pipeline if it is unable to acquire the property through negotiation. C.A. App. 12; *see* 15 U.S.C. § 717f(h) (providing that "[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, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, . . . 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"). Columbia Gas negotiated with MDNR to arrive at an acquisition price for an easement, but the Maryland Board of Public Works, which must approve all conveyances of state-owned real property, declined to grant the easement. C.A. App. 11.

Columbia Gas sued MDNR in the United States District Court for the District of Maryland, seeking to take the easement through the exercise of eminent

domain under 15 U.S.C. § 717f(h).[1] It also moved for a preliminary injunction allowing it to make use of the easement immediately. C.A. App. 84. The State opposed preliminary injunctive relief and moved to dismiss the complaint on the basis that its sovereign immunity, although waivable, had not been waived. C.A. App. 103.

On August 22, 2019, the district court denied the preliminary injunction and dismissed the complaint. App. 13a-29a. As relevant here, the court concluded that Columbia Gas was unlikely to succeed on the merits because "the Natural Gas Act does not abrogate state sovereign immunity or delegate the United States' state sovereign [immunity] exemption to permit Columbia to sue the State of Maryland for an order of condemnation without Maryland's consent." App. 14a. Having found that Columbia Gas "cannot succeed on the merits" for these jurisdictional reasons, the court dismissed the case sua sponte and denied the State's motion as moot. App. 29a. Columbia Gas appealed. C.A. App. 240.

This Court's Decision in *PennEast*

In parallel, a similar case proceeded through the Third Circuit. *See In re PennEast Pipeline Co.*, 938 F.3d

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[1] The complaint invoked the federal courts' jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (regulation of commerce). As required in condemnation actions, *see* Fed R. Civ. P. 71.1(c)(1), the complaint also named the parcel at issue as a defendant.

96 (3d Cir. 2019). That litigation resulted in the Third Circuit holding that the Natural Gas Act did not abrogate state sovereign immunity, *id.* at 99, and "does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity," *id.* at 112-13. The pipeline company petitioned for certiorari, which this Court granted on February 3, 2021. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 1289 (2021).

On June 29, 2021, this Court decided *PennEast* in the company's favor, concluding that "the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest." *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251 (2021). The Court held that "[a]lthough nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution." *Id*. at 2251-52. The Court further held that "the Natural Gas Act delegates the federal eminent domain power to private parties," such that "those parties can initiate condemnation proceedings, including against state-owned property." *Id.* at 2252.

As to sovereign immunity, the Court reasoned that the "plan of the Convention"—meaning "the structure of the original Constitution itself"—"includes certain waivers of sovereign immunity to which all States implicitly consented at the founding." *Id.* at 2258 (quoting *Alden v. Maine*, 527 U.S. 706, 728, 755-56 (1999)). The Court concluded that condemnation actions were

included among those waivers of immunity, as "the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees." *PennEast*, 141 S. Ct. at 2259. "PennEast's condemnation action to give effect to the federal eminent domain power," the Court concluded, "falls comfortably within the class of suits to which States consented under the plan of the Convention." *Id.*

The principal dissent, authored by Justice Barrett and joined by Justices Thomas, Gorsuch, and Kavanaugh, argued that States had not in fact consented to eminent domain suits in "the plan of the Convention." *Id.* at 2265 (Barrett, J., dissenting). But in a separate dissent, Justice Gorsuch, joined by Justice Thomas, addressed whether—even assuming the States had consented—the Eleventh Amendment's text independently bars federal court jurisdiction over eminent domain suits against States by diverse plaintiffs. *See id.* at 2263-65 (Gorsuch, J., dissenting); 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."). "This case," Justice Gorsuch observed, "appears to present the rare scenario that comes within the Eleventh Amendment's text," as it was a federal-court suit commenced against a State by a citizen of another State. *PennEast*, 141 S. Ct. at 2265 (Gorsuch, J., dissenting) (internal quotation marks omitted). Although the Court did not

analyze the question whether the Eleventh Amendment might bar jurisdiction regardless of the State's consent, Justice Gorsuch viewed this as "understandabl[e]," for "the parties have not addressed it themselves and there is no mandatory sequencing of jurisdictional issues." *Id.* (internal quotation marks omitted). He further noted that "[t]he lower courts . . . have an obligation to consider this issue on remand before proceeding to the merits." *Id.* (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94-95 (1998)).[2]

The majority, in turn, noted Justice Gorsuch's argument "that even if the States consented in the plan of the Convention to the proceedings below, the Eleventh Amendment nonetheless divests federal courts of subject-matter jurisdiction over a suit filed against a State by a diverse plaintiff." *PennEast*, 141 S. Ct. at 2262. Responding to that argument, the Court noted that "under our precedents that no party asks us to reconsider here, we have understood the Eleventh Amendment to confer 'a personal privilege which [a State] may waive at pleasure.'" *Id.* (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (alteration in

[2] After this Court's decision in *PennEast*, the company elected not to proceed with its pipeline and accordingly withdrew its eminent domain claims. *See* Susan Phillips, *PennEast Cancels Pipeline Project—Months After Winning Its Case at the U.S. Supreme Court*, State Impact Pennsylvania (Sept. 27, 2021), https://stateimpact.npr.org/pennsylvania/2021/09/27/penneast-cancels-pipeline-project-months-after-winning-its-case-at-the-u-s-supreme-court/. Accordingly, the lower courts in *PennEast* have had, and will have, no further opportunity to consider the matter.

original)); *see PennEast*, 141 S. Ct. at 2262 (noting the Court's prior holding that, "[w]hen 'a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action'" (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985))). The majority opinion did not take issue with Justice Gorsuch's statement regarding lower courts' obligation to consider this issue on remand.

Proceedings Below Following *PennEast*

In the wake of the Court's *PennEast* decision, the parties to this case briefed Columbia Gas's appeal in the Fourth Circuit, which returned the case to the district court. App. 32a-34a. On remand, the State renewed its motion to dismiss, arguing (consistent with the view expressed by Justices Gorsuch and Thomas) that despite *PennEast*'s holding that the States had consented to eminent domain suits, the Eleventh Amendment's text barred the district court from exercising jurisdiction. App. 45a.

The district court denied the motion to dismiss. App. 36a-48a. It interpreted *PennEast* as holding that a federal government delegatee has eminent domain power to bring condemnation actions against state-owned property so that Columbia Gas, as a holder of a FERC certificate of public convenience and necessity, had the power to do so against the property owned by the State. App. 46a. The court declined to "determine whether the Supreme Court's holding applies only to structural immunity rather than textual immunity"

because the *PennEast* majority "did not make such a distinction." App. 47a. In the court's view, a holding that it lacked subject matter jurisdiction would "divorc[e] the eminent domain power from the power to bring condemnation actions" and thus would impermissibly diminish the federal government's eminent domain authority. App. 46a-47a (quoting *PennEast*, 141 S. Ct. at 2260). As for whether this Court might reconsider its cases addressing waivability, the district court interpreted the central holding of *PennEast* as "an express rejection of MDNR's arguments." App. 47a.[3]

The Fourth Circuit affirmed on interlocutory appeal.[4] App. 1a-10a. Though noting the arguments that Justice Gorsuch had advanced in dissent, the court of appeals emphasized that the majority opinion had stated that the Court has "understood the Eleventh Amendment to confer a personal privilege which a State may waive at pleasure," so that "[w]hen a State waives its immunity and consents to suit in federal

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[3] On February 3, 2023, the State moved in the district court for a stay of proceedings pending appeal, arguing that the Eleventh Amendment issue should be resolved before adjudication of Columbia Gas's request for an order of condemnation, the only relief sought. *See Madison v. Virginia*, 474 F.3d 118, 129 (4th Cir. 2006). The district court granted the stay on September 6, 2023, and it remains in effect.

[4] The basis for the interlocutory appeal was that the district court had denied a claim of immunity from suit, which is immediately appealable under the collateral order doctrine. *See Puerto Rico Aqueduct Sewer Auth. v. Metcalf Eddy*, 506 U.S. 139, 144-45 (1993).

court, the Eleventh Amendment does not bar the action." App. 8a (quoting *PennEast*, 141 S. Ct. at 2262; emphasis omitted); *see* App. 9a (stating that "the *PennEast* majority addressed that issue head-on and explicitly rejected it"). "[E]xisting Supreme Court precedents," the court continued, "hold that the Eleventh Amendment confers on states a waivable privilege." App. 8a. The court of appeals further explained that "[u]nless and until the Supreme Court affirmatively scraps those precedents, we are constrained to apply them." App. 9a-10a.

REASONS FOR GRANTING THE PETITION

This case falls squarely within the Eleventh Amendment's text. By suing in federal district court, Columbia Gas invoked "the Judicial power of the United States"; its condemnation action is one "in law," *Kohl v. United States*, 91 U.S. 367, 376 (1876); it was "commenced . . . against one of the United States," *see* C.A. App. 8 (naming as defendant "[t]he State of Maryland, Department of Natural Resources"); and it was brought by a "Citizen[] of another State," *see* C.A. App. 7 (identifying the plaintiff as "a Delaware limited liability company"). This Court should grant review to decide the question the parties did not present in *PennEast*: whether the Eleventh Amendment, which provides that federal jurisdiction "shall not be construed to extend" to cases (such as this one) that its text describes, precludes federal courts from exercising

jurisdiction over such cases even if the defendant State has consented to suit.

I. The Court of Appeals' Decision Is Wrong, and the Case Is Important.

A. The Eleventh Amendment's Text Precludes Federal Courts from Exercising Jurisdiction over Cases Falling Within the Amendment's Terms, Even Where the State Consents.

In the past, this Court has broadly stated that States' sovereign immunity can be waived, and that a State's waiver or consent eliminates any obstacle to a federal court's exercise of jurisdiction. *See*, *e.g.*, *Penn-East*, 141 S. Ct. at 2262. Nonetheless, faithful application of the Eleventh Amendment precludes federal courts' exercise of jurisdiction over cases, such as this one, that fall within the amendment's text. Regardless of whether the structural (i.e., common law) immunity that predates the Constitution can be waived or abrogated, that immunity is distinct from the express textual immunity created later by the Eleventh Amendment. That textual immunity applies to a distinct set of cases "in law or equity" brought against a State: those brought in federal court by a citizen of another State, or by a citizen or subject of a foreign State. And the Eleventh Amendment declares, categorically, that the federal judicial power "shall not be construed to extend to" such cases. Notwithstanding this Court's prior statements, Petitioners submit that, in this defined set of cases, the textual immunity conferred by

the Eleventh Amendment constitutes a strict limit on federal subject matter jurisdiction and cannot be waived.

1. Although this Court "sometimes refer[s] to the States' immunity from suit as 'Eleventh Amendment immunity,' " it has acknowledged that this terminology is only a "convenient shorthand" and "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713. Rather, this common law, structural immunity predates and separately exists "[b]ehind the words" of both Article III and the Eleventh Amendment. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934); *see Hans v. Louisiana*, 134 U.S. 1, 16 (1890) (observing that at the time of the Constitutional Convention, "the suability of a State without its consent was a thing unknown to the law"); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1494 (2019) ("[A]t the time of the founding, it was well settled that States were immune under both the common law and the law of nations."); *Alden*, 527 U.S at 713 ("States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.").

Text-based immunity, by contrast, is rooted in the Eleventh Amendment itself. As this Court has recounted, the amendment was a byproduct of the decision in *Chisholm v. Georgia* that Article III authorized citizens of one State to sue another State because its grant of jurisdiction over controversies "between a State and Citizens of another State" and "between a

State, or the Citizens thereof, and foreign States, Citizens, or Subjects" did not distinguish between cases in which a State was a plaintiff and cases in which a State was a defendant. 2 U.S. (2 Dall.) 419, 450-51 (1793) (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 466-69 (Cushing, J.); *id.* at 476-78 (Jay, C.J.); *see Alden*, 527 U.S. at 720 (noting that the *Chisholm* decision "fell upon the country with a profound shock" (quoting 1 Charles Warren, The Supreme Court in United States History 96 (rev. ed. 1926))). The Eleventh Amendment responded to *Chisholm* by expressly defining an immunity applicable to a defined set of cases, including suits against one State by citizens of another:

> 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.

U.S. Const. amend. XI. Couched in this manner as a limitation on "[t]he Judicial power of the United States," the amendment was designed to "address the specific provisions of [Article III] that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *Alden*, 527 U.S. at 723; *see also id.* at 718 (explaining that "the state conventions which addressed the issue of sovereign immunity in their formal ratification documents . . . made clear that they . . . understood the Constitution as drafted to preserve the States' immunity from private suits").

2. Although structural immunity prevents States from being haled into court by private parties, *see*, *e.g.*, *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 258 (2011), it is not a categorical limitation on judicial power. So, as *PennEast* recognized, that immunity can be waived—for instance, by States' consent to certain suits "inherent in the plan of the Convention." 141 S. Ct. at 2262. And Congress can abrogate that immunity under the Enforcement Clause of Section 5 of the Fourteenth Amendment. *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 36 (2012); *but cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress cannot abrogate sovereign immunity under its Article I powers).

Textual immunity differs from structural immunity. It applies to cases that come within the Eleventh Amendment's terms—namely, "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." U.S. Const. amend. XI. And although this Court has previously indicated otherwise, the Eleventh Amendment's textual immunity is an absolute limit on federal subject matter jurisdiction: The Amendment categorically prohibits such jurisdiction by providing that the federal judicial power "shall not be construed to extend to" such cases. *Id.* In other words, while structural immunity predates the Constitution and is subject to no categorical jurisdictional bar, the Eleventh Amendment expressly demarcates the reach of federal courts'

power by excluding certain categories of cases from their jurisdiction.

That the Eleventh Amendment's text limits federal judicial power means that the resulting immunity cannot be validly waived, by consent or otherwise, in cases that fall within the amendment's terms. This Court has made clear that other constitutional limitations on federal judicial power are not waivable. *See*, *e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 398 (1975) ("While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States."). There is no reason why this limit on federal jurisdiction should be different. The Eleventh Amendment accordingly operates as an absolute and nonwaivable limitation on the otherwise-applicable federal judicial power.

This interpretation is consistent not only with the text of the Eleventh Amendment, but with that of Article III as well. Article III provides that "[t]he judicial Power shall extend to," among other things, "all Cases, in Law and Equity . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens, or Subjects." U.S. Const. art. III, § 2, cl. 1. The Eleventh Amendment, adopted eight years later, uses strikingly similar language in mandating that the jurisdiction conferred by Article III "shall not be construed to extend to" certain cases, namely, "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." U.S. Const. amend. XI. Reading these provisions in

tandem—the judicial power "shall extend to" certain cases but, as of eight years later, "shall not be construed to extend to" a subset of those cases—confirms that the Eleventh Amendment's textual immunity operates as an unalterable limit on federal court jurisdiction. Parties cannot validly waive that jurisdictional limitation any more than they can waive any other respect in which Article III limits the grant of jurisdiction to federal courts. *See* William Baude & Steven E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609, 625 (2021) (reasoning that the Amendment "restricts '[t]he Judicial power of the United States'—a reference to subject matter jurisdiction, not personal jurisdiction" and "creates a categorical rule limiting the federal courts' power to adjudicate certain cases, even if the parties were ready and willing to appear").

B. This Court Has Never Squarely Confronted the State's Textual Argument That a State's Consent Cannot Defeat the Eleventh Amendment's Jurisdictional Bar.

This Court has often stated, in broad terms, that sovereign immunity is waivable, and reversing the Fourth Circuit's decision accordingly would entail cutting back on some of those statements. Certiorari is still warranted, however, because the Court has never squarely confronted the argument presented here: that regardless of whether structural sovereign immunity can be waived, the Eleventh Amendment bars federal

courts from exercising jurisdiction over cases that its text describes.

This argument, in fact, is consistent with this Court's earliest Eleventh Amendment decisions. Just three years after the amendment's ratification, the Court confirmed its function as a strict bar on federal court jurisdiction. In *Hollingsworth v. Virginia*, the Court held that the Eleventh Amendment not only had abolished federal jurisdiction over suits within its terms, but had done so even in pending cases. 3 U.S. (3 Dall.) 378, 382 (1798) (stating that, "the amendment being constitutionally adopted, there could not be exercised any federal jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state").[5] The Court's decision in *Cohens v. Virginia*, 19 U.S. 264 (1821), similarly treated the Eleventh Amendment as a limitation on federal judicial power. *See id.* at 412 (holding that a case falling outside the amendment's terms was "governed entirely by the [C]onstitution as originally framed," in which "the judicial power was extended to all cases arising under the [C]onstitution or laws of the United States").

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[5] That interpretation is far from anomalous: even with respect to mere statutory curbs on jurisdiction, the Court has made clear that jurisdictional abridgements should be applied without exception. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952) (stating that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law" and must be dismissed for lack of jurisdiction).

This Court's statements regarding the waivability of Eleventh Amendment immunity did not emerge until more than half a century later, in a case that did not address the argument that the State makes here. In *Clark v. Barnard*, citizens of Connecticut and Massachusetts sued the treasurer of Rhode Island in federal court. 108 U.S. at 442. Moving to dismiss on Eleventh Amendment grounds, the treasurer argued that "the suit was in effect brought against a state by citizens of another state." *Id.* at 445, 447. The State itself then intervened, however. *Id.* at 445-46. Noting the Eleventh Amendment argument, this Court stated that it was "relieved . . . from its consideration by the voluntary appearance of the State" because "[t]he immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure." *Id.* at 447. In so holding, the Court did not consider any distinction between "[t]he immunity from suit" afforded by structural sovereign immunity—i.e., the immunity that had existed since before the Constitution's ratification—and the provisions of the Eleventh Amendment itself. *See id.* Indeed, the *Clark* decision did not even include, let alone analyze, the amendment's text. And in subsequent cases, including *PennEast*, the Court has simply followed *Clark*, citing the case for the proposition that state sovereign immunity is waivable. *See*, *e.g.*, *PennEast*, 141 S. Ct. at 2262; *College Sav. Bank v. Florida Prepaid Postsecondary Expense Bd.*, 527 U.S. 666, 675 (1999); *Atascadero*, 473 U.S. at 238; *Missouri v. Fiske*, 290 U.S. 18, 24 (1933).

Although the Court has stated that an interpretation under which "the federal courts are altogether disqualified from hearing certain suits brought against a State" is "neither our tradition nor the accepted construction of the Amendment's text," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (citing *Principality of Monaco*, 292 U.S. at 322-23), the Court has provided little (if any) analysis to support these pronouncements. Indeed, despite the Court's declaration regarding "our tradition" and the text's "accepted construction," *id.*, we have located no case in which the Court has directly confronted and analyzed the textual argument that the State advances here, namely, that the Eleventh Amendment's text bars federal courts from exercising jurisdiction over the cases it describes, regardless of consent.[6] As Justice Brennan observed, the Court has never articulated "a persuasively principled explanation" of why federal courts "have power to entertain suits against consenting States . . . in the

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[6] The Court's statement in *Alden* that "it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment," 527 U.S. at 723, does not foreclose recognition of the text-based immunity urged here. *Alden* made this comment by way of rejecting an argument that the amendment had altogether replaced the sovereign immunity that predated the Constitution with a version limited to suits in federal court, not an argument that the Eleventh Amendment had supplemented the States' preconstitutional sovereign immunity with a nonwaivable textual immunity. *See id.* at 722-23, 730; *see also PennEast*, 141 S. Ct. at 2264 (Gorsuch, J., dissenting) (reasoning that "[i]n addition to pointing us back to the States' structural immunity," the Eleventh Amendment "also provides an ironclad rule for a particular category of diversity suits").

face of the wording of the Amendment." *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 310 (1973) (Brennan, J., dissenting); *cf. Pennsylvania v. Union Gas Co*., 491 U.S. 1, 26 (1989) (Stevens, J., concurring) (noting that the Court's "willingness to allow States to waive their immunity . . . demonstrates that this immunity is not a product of the limitation of judicial power contained in the Eleventh Amendment").

Under these circumstances, principles of stare decisis (which apply with less force to constitutional questions than to statutory questions, *see*, *e.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962)) do not preclude a grant of certiorari. To the extent that the Court has made statements inconsistent with the State's argument here, those statements have not resulted from full and adversarial presentation of that argument, nor have they been supported by the analysis that normally accompanies this Court's constitutional pronouncements. *See*, *e.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) (considerations relevant to adherence to stare decisis include "whether the decision was well reasoned"). Further, it is difficult to imagine how parties might have relied on this Court's statements regarding federal jurisdiction over suits against a State by non-citizens—statements that do not purport to regulate anyone's primary conduct. *See*, *e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (explaining that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved," and that "the

opposite is true in cases such as the present one involving procedural and evidentiary rules"). And although those statements have not proven to be unworkable, *see Johnson v. United States*, 576 U.S. 591, 605 (2015), they result in the anomaly of the federal courts flouting what appears to be a flat prohibition on their exercise of jurisdiction over certain cases.

C. The Question Presented Is Important.

Because this issue goes to the heart of federal courts' jurisdiction over cases in which States are defendants, it is necessarily important. Federal courts are "courts of limited jurisdiction," capable of exercising "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The delicate balance between federal and state power, moreover, is a pillar of our constitutional system. *See*, *e.g.*, *Alden*, 527 U.S. at 713-15. As to the question presented here, however, "the accepted construction of the Amendment's text," *Coeur d'Alene*, 521 U.S. at 267, flouts both of these principles. It countenances courts' exercise of jurisdiction over a category of cases as to which the Constitution forbids them from exercising jurisdiction and, to make matters worse, does so in a fashion that disrupts the balance between federal and state authority.

Apart from whether the State is correct, moreover, the question presented is important and worthy of this Court's review. As noted, the Court's previous statements regarding the waivability of sovereign

immunity rest on little analysis of the Eleventh Amendment's text, including (1) the relationship between Article III's statement that "the judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" and the Amendment's later statement that "[t]he 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"; and (2) how, if at all, the Amendment's statement that the federal judicial power "shall not be construed to extend" to certain categories of cases is consistent with federal courts' exercise of jurisdiction over those very categories of cases. A grant of certiorari would provide the Court with an opportunity to clarify the relationship between Article III's statement that the federal judicial power "shall extend to" certain categories of cases and the Eleventh Amendment's statement that the same power "shall not be construed to extend to" an apparent subset of those cases. Similarly, granting certiorari would allow the Court to clarify the application of the Amendment's text to the categories of cases that the text describes, thus placing any exercise of jurisdiction on firmer interpretive footing.

II. *PennEast* Does Not Foreclose a Grant of Certiorari to Address the Question Presented.

Although this Court decided *PennEast* in the pipeline company's favor, that decision does not preclude a grant of certiorari to address the question presented here. *PennEast* potentially implicated two separate

questions: First, did New Jersey waive its sovereign immunity by implicitly consenting, in the "plan of the Convention," 141 S. Ct. at 2251, to condemnation actions brought by federally delegated private parties? Second, did that consent mean that the federal courts had jurisdiction over the case, even though it came within the express terms of the Eleventh Amendment's restriction on the federal judicial power? The pipeline company's condemnation suit could proceed in federal court only if the answer to both of those questions was yes.

PennEast squarely resolved the first question. This Court held that "the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest." 141 S. Ct. at 2251. And it reasoned that sovereign immunity did not bar private parties from bringing such condemnation actions against States because "the States consented in the plan of the Convention to the exercise of federal eminent domain power." *Id.* at 2259.

PennEast did not, however, conclusively resolve the second question: whether, "even if the States consented in the plan of the Convention to the proceedings below, the Eleventh Amendment nonetheless divests federal courts of subject matter jurisdiction over a suit filed against a State by a diverse plaintiff." *Id.* at 2262 (Gorsuch, J., dissenting). The Court did observe that its precedents reflected the "underst[anding]" that the Eleventh Amendment confers "a personal privilege which [a State] may waive at pleasure." *Id.* at 2262.

It also noted, however, that "no party asks us to reconsider" those precedents. *Id.*; *see also id.* at 2265 (Gorsuch, J., dissenting) (noting that the Court "understandably . . . does not address" whether the plain text of the Eleventh Amendment is a subject matter bar to the action "because the parties have not addressed it themselves and there is no mandatory sequencing of jurisdictional issues" (internal quotation marks omitted)). *PennEast* thus accepted the premise—unchallenged by the parties—that waivers of sovereign immunity also defeat the Eleventh Amendment's jurisdictional bar. But aside from relying on earlier precedents, it did not analyze and decide the underlying question whether the Eleventh Amendment's text bars a federal court from entertaining a diverse plaintiff's action against a state, notwithstanding the state's consent to suit.[7]

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[7] Similarly, that the *PennEast* majority did not distinguish between structural and textual immunity does not mean that *PennEast* conclusively decided that no such distinction exists. Because no party in *PennEast* had raised the textual immunity argument or asked the Court to reconsider its precedents on waivability, *see PennEast*, 141 S. Ct. at 2265 (Gorsuch, J., dissenting); *see also PennEast*, 141 S. Ct. at 2252, there was no reason for the Court to assess the significance of the distinction between structural and textual immunity.

PennEast's statement that a ruling in the State's favor would improperly "divorce the eminent domain power from the power to bring condemnation actions," 141 S. Ct. at 2260, likewise does not rule out a grant of certiorari here. To the extent that this Court declined to separate these powers in *PennEast*, it did so only in the context of the specific arguments presented to it—not the textual argument that the State now advances.

In fact, none of the cases that the *PennEast* majority cited for the proposition that the Eleventh Amendment could be waived by consent analyzed and rejected this argument. *See Clark v. Barnard*, 108 U.S. at 447 (case brought against state officer in his individual capacity, with State later voluntarily intervening); *Lapides v. Board of Regents of Univ. System of Ga.*, 535 U.S. 613, 618-19 (2002) (case brought by non-diverse plaintiff in state court, then removed to federal court); *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 283 (1906) (case held to be "not a suit against a state, within the prohibition of the 11th Amendment"); *Atascadero*, 473 U.S. at 238 (case brought by non-diverse plaintiff); *see also PennEast*, 141 S. Ct. at 2265 n.1 (Gorsuch, J., dissenting) (observing that "[a]ll of the cases [the Court] cites" in connection with waivability "fall outside of the Eleventh Amendment's text").

Having left this textual question unanalyzed, the Court should consider it now. Indeed, Justice Gorsuch observed in *PennEast* that "[t]he lower courts . . . have an obligation to consider this issue on remand before proceeding to the merits." *PennEast*, 141 S. Ct. at 2265 (citing *Steel Co.*, 523 U.S. at 94-95). If anything, the *PennEast* decision makes this case a good vehicle for consideration of the question presented: Because the Court has already decided that the States consented to condemnation actions of this sort in "the plan of the Convention," this case squarely presents the question whether such consent can be given effect in cases falling within the text of the Eleventh Amendment.

III. Other Considerations Do Not Counsel Against Review.

Finally, considerations that might counsel against review in other cases do not counsel against review here. *First*, although there is no circuit split, none is likely to develop. Because of this Court's broad statements (including in *PennEast*) concerning the waivability of sovereign immunity, other courts of appeals are unlikely to depart from the Fourth Circuit's decision in assessing whether immunity can be waived in cases falling within the Eleventh Amendment's text.

Second, and relatedly, denying certiorari is not likely to result in this issue percolating further in the courts of appeals in a fashion that ultimately would aid this Court's review. Should future litigants raise the argument that the State has raised here, it is far more likely that courts of appeals will simply rely on this Court's past statements regarding the waivability of sovereign immunity, as the Fourth Circuit did in this case.

Third, although this is an interlocutory order, review is warranted now. Eleventh Amendment immunity is, this Court has recognized, "an immunity from suit," not just from liability. *See Puerto Rico Aqueduct Sewer Auth.*, 506 U.S. at 144-45. Thus, the Court has explained, "the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Id.* at 146. Much as orders denying sovereign

immunity are immediately appealable under the collateral order doctrine, *see id.* at 144-45, deferring review here would be insufficient to "ensur[e] that the [State's] dignitary interests can be fully vindicated," *id.* at 146.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY G. BROWN
Attorney General of Maryland

JOSHUA M. SEGAL*
Assistant Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
jsegal@oag.state.md.us
(410) 576-6446

Attorneys for Petitioners

**Counsel of Record*