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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1069

COLUMBIA GAS TRANSMISSION, LLC,

Plaintiff – Appellee,

v.

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

Defendant – Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. George L. Russell, III, District Judge. (1:19-cv-01444-GLR)

Submitted: August 10, 2023 Decided: October 11, 2023

Before AGEE, WYNN, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Anthony G. Brown, Attorney General, John B. Howard, Jr., Special Assistant Attorney General, Joshua M. Segal, Special Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellants. Stephen R. McAllister, Kansas City, Missouri, Michael E. Harriss, DENTONS US LLP, St. Louis, Missouri; David M. Fedder, CARMODY MACDONALD PC, St. Louis, Missouri, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Acting with federally authorized eminent domain power, Columbia Gas Transmission ("Columbia Gas"), a Delaware pipeline company, brought a condemnation action against land owned by the State of Maryland. Maryland moved to dismiss, asserting Eleventh Amendment immunity. Relying on the Supreme Court's recent decision in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), the district court held that the Eleventh Amendment did not afford the State immunity from suit and thus denied the motion. Maryland then filed this interlocutory appeal. Seeing no error, we affirm.

In 2018, the Federal Energy Regulatory Commission granted Columbia Gas a certificate of public convenience and necessity authorizing the construction of a natural gas pipeline from Fulton County,

Pennsylvania, to Morgan County, West Virginia. As approved, the pipeline would run through a tract of land in Washington County, Maryland, owned by the Maryland Department of Natural Resources ("MDNR"). Columbia Gas sought to acquire the necessary easement and successfully negotiated a proposed easement agreement with MDNR. But the Maryland Board of Public Works, which had to sign-off on the agreement, would not approve the conveyance. As a result, Columbia Gas filed a complaint in condemnation against the subject land and MDNR (collectively, "Maryland" or the "State") in Maryland federal district court, seeking to exercise the federal eminent domain power under 15 U.S.C. § 717f(h).[1]

Maryland moved to dismiss the action based on sovereign immunity. In particular, Maryland argued that because it had not consented to suits for condemnation by private parties and because Congress had not otherwise abrogated state sovereign immunity for such suits, the district court lacked jurisdiction over the action under the Eleventh Amendment. The district court agreed and dismissed the suit.

Columbia Gas appealed the district court's dismissal, but before this Court could hear the appeal, the Supreme Court decided *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244. In that case, PennEast

[1] Under § 717f(h), when a certificate holder "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 . . . , it may acquire the same by the exercise of the right of eminent domain."

Pipeline, another Delaware pipeline company, sought to condemn various tracts of New Jersey-owned land under § 717f(h). *Id.* at 2253. Like Maryland here, New Jersey moved to dismiss PennEast's complaints based on sovereign immunity. *Id.* The Supreme Court rejected New Jersey's immunity defense, holding that states do not enjoy sovereign immunity from condemnation actions brought by private parties properly authorized to exercise the federal government's eminent domain power:

> Although 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. That power carries with it the ability to condemn property in court. Because the Natural Gas Act delegates the federal eminent domain power to private parties, those parties can initiate condemnation proceedings, including against state-owned property.

Id. at 2251–52; *see also id.* at 2259 ("[T]he States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees.").

In light of *PennEast*, we vacated the district court's dismissal and remanded for further proceedings.

On remand, Maryland again moved to dismiss, maintaining that, notwithstanding the states' consent in the plan of the Convention to the exercise of the federal eminent domain power, the later-enacted Eleventh Amendment independently stripped

the district court of jurisdiction over the action. That was so, Maryland posited, because Columbia Gas was a citizen of another state such that its federal action against Maryland triggered the Eleventh Amendment's textual, and nonwaivable, jurisdictional bar. *See* U.S. Const. amend. XI (stating that "[t]he Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State").

According to Maryland, *PennEast* did not resolve this separate Eleventh Amendment issue, so it was proper for the district court to address it in the first instance on remand.

To support this assertion, Maryland relied extensively on Justice Gorsuch's dissent in *PennEast*. Joined only by Justice Thomas, Justice Gorsuch drew a distinction between what he called "structural immunity"—the sovereign immunity that "derives from the structure of the Constitution"; "applies in both federal tribunals and in state tribunals," regardless of the plaintiff's citizenship; and is waivable by the state —and "Eleventh Amendment immunity"—a separate form of immunity that "derives from the text of the Eleventh Amendment"; "eliminates" *federal* jurisdiction over "suits filed against states, in law or equity, by diverse plaintiffs"; and "admits of no waivers, abrogations, or exceptions." *PennEast*, 141 S. Ct. at 2264–65 (Gorsuch, J., dissenting) (citations omitted). In Justice Gorsuch's view, *PennEast* presented " 'the rare scenario' that comes within the Eleventh Amendment's text":

PennEast, a citizen of *Delaware*, sued *New Jersey* in *federal* court. *Id.* at 2265. And for that reason, Justice Gorsuch concluded, the federal courts lacked subject-matter jurisdiction to "entertain this suit." *Id.* Nonetheless, Justice Gorsuch reasoned that the *PennEast* majority "understandably[] d[id] not address that issue . . . because the parties [did] not address[] it themselves and there is no mandatory sequencing of jurisdictional issues." *Id.* (cleaned up). Justice Gorsuch then closed by noting that "[t]he lowers courts . . . ha[d] an obligation to consider this issue on remand before proceeding to the merits." *Id.*

Maryland also pointed to a statement made by the *PennEast* majority in response to Justice Gorsuch's dissent: "[U]nder 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.* at 2262 (cleaned up). In Maryland's view, the phrase "under our precedents that no party asks us to reconsider here" demonstrated that the majority merely accepted the premise that waivers of sovereign immunity in the plan of the Convention also defeat the Eleventh Amendment's jurisdictional bar, thereby leaving the issue an open question. Moreover, Maryland suggested that this phrase signaled the Court's openness to reconsidering its Eleventh Amendment jurisprudence given that the majority could have spoken in more forceful terms to *conclusively* foreclose any reading of the Eleventh Amendment that was inconsistent with its precedents.

In sum, therefore, Maryland argued that because Columbia Gas's condemnation action against it fell squarely within the Eleventh Amendment's text and because *PennEast* purportedly left open the question whether waivers of sovereign immunity in the plan of the Convention also defeated the Eleventh Amendment's jurisdictional bar, the district court could and should dismiss the case for lack of jurisdiction.

The district court disagreed. To accept Maryland's arguments, the court explained, would be to "ignore the essential holding in *PennEast*," J.A. 240, which is that "Federal Government delegatees have federal eminent domain power to 'initiate condemnation proceedings, including against state-owned property,'" J.A. 238 (quoting *PennEast*, 141 S. Ct. at 2252). Therefore, the court denied Maryland's motion to dismiss.

Maryland timely noted an interlocutory appeal, over which we exercise jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine. *See Lee-Thomas v. Prince George's Cnty. Pub. Schs.*, 666 F.3d 244, 247 (4th Cir. 2012).

On appeal, Maryland raises the same arguments that it raised below. On de novo review, *see Adams v. Ferguson*, 884 F.3d 219, 224 (4th Cir. 2018), we easily conclude that the district court was right to reject them, and we do the same now.

At bottom, Maryland's arguments mirror Justice Gorsuch's dissent in *PennEast.* But Justice Gorsuch's dissent is just that—a dissent. It did not reflect the view of a majority of the justices (indeed, it reflected

the view of just two), and so it does not constitute binding authority on this Court.

The *PennEast* majority opinion, on the other hand, *does* constitute such binding authority. And its holding on this issue was clear:

> As a final point, [Justice Gorsuch's dissent] offers a different theory—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. But 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. *When a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.* Such consent may, as here, be inherent in the constitutional plan.

PennEast, 141 S. Ct. at 2262 (emphasis added) (cleaned up).

As the above passage plainly demonstrates, existing Supreme Court precedents hold that the Eleventh Amendment confers on states a waivable privilege; "the Eleventh Amendment does not bar" an action to which a state has consented; and "[s]uch consent may, as [in the context of the federal eminent domain power], be inherent in the constitutional plan." *Id.* (cleaned up). Thus, far from leaving "unresolved" the

Eleventh Amendment-immunity issue that Maryland now raises, the *PennEast* majority addressed that issue head-on and explicitly rejected it, as the district court here correctly found.

In our view, that is the end of the matter. Maryland "consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees" like Columbia Gas. *Id.* at 2259. The later-enacted Eleventh Amendment, the Supreme Court has long held, did not reinstate that immunity.[2]

Maryland is, of course, free to petition the Supreme Court to revisit and even overturn its Eleventh Amendment precedents—indeed, the State appears keen to do just that. But unless and until the Supreme

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[2] Although not material to our decision, we note our deep skepticism that the *PennEast* majority's use of the phrase "under our precedents that no party asks us to reconsider here," 141 S. Ct. at 2262, "signaled its openness to reconsidering its cases on [Eleventh Amendment] waivability," Opening Br. 13. In our view, the Court was merely observing that no party urged the Eleventh Amendment reading advanced by Justice Gorsuch in dissent. We fail to see how such an observation translates into the Court's casting doubt on two centuries' worth of precedents. If anything, the Court *confirmed* those precedents. And in fact, it has since done so again. *See Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2468 (2022) ("The Federal Government's eminent domain power is complete, such that no State may frustrate its exercise by claiming immunity to forestall the transfer of property."). But even if Maryland were right that the Court in *PennEast* expressed a willingness to rethink its Eleventh Amendment jurisprudence, we would reach the same result that we reach today as we remain bound by *existing* Supreme Court case law, which decidedly forecloses Maryland's immunity claim here.

Court affirmatively scraps those precedents, we are constrained to apply them, a fact that even Maryland acknowledges. *See* Opening Br. 15 n.4 ("Of course, this Court is not free to overrule or disregard decisions of the Supreme Court, and Maryland recognizes that some of its arguments here may ultimately be better suited for Supreme Court review."). And under those precedents, the Eleventh Amendment does not shield Maryland from Columbia Gas's federally authorized condemnation action. Accordingly, we affirm the district court's denial of Maryland's renewed motion to dismiss.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this Court and argument would not aid in the decisional process.

AFFIRMED

FILED: October 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1069
(1:19-cv-01444-GLR)

COLUMBIA GAS TRANSMISSION, LLC

Plaintiff - Appellee

v.

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

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

COLUMBIA GAS TRANSMISSION, LLC, Plaintiff, vs. 0.12 ACRES OF LAND, More or Less, in Washington County, Maryland, State of Maryland, Department of Natural Resources, Defendants.	CIVIL NO.: 1:19-cv-01444-GLR

August 21, 2019
Courtroom 7A
Baltimore, Maryland

MOTION FOR PRELIMINARY INJUNCTION – VOLUME II

BEFORE: THE HONORABLE GEORGE LEVI RUSSELL, III

For the Plaintiff:

David M. Fedder, Esquire
Arnold M. Weiner, Esquire

For the Defendant:

Adam D. Snyder, Esquire
John B. Howard, Jr., Esquire

Proceedings recorded by mechanical stenography, transcript produced by computer.

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Patricia G. Mitchell, RMR, CRR
Federal Official Court Reporter
101 W. Lombard Street, 4th Floor
Baltimore, Maryland 21201

[2] PROCEEDINGS

(2:51 p.m.)

THE COURT: Good afternoon, everyone. You can go ahead and have a seat. Madam Deputy, do you want to call the case for me.

THE CLERK: Yes, Your Honor. The matter now before this Court is Civil Docket Number GLR-19-1444, Columbia Gas Transmission versus .12 Acres of Land. Counsel for the Plaintiff is Arnold Weiner and David Fedder. Counsel for the Defendant is Adam Snyder and John Howard, Jr.

This matter comes before the Court for a continued preliminary injunction hearing.

THE COURT: I want to thank everyone for coming to this hearing. As indicated at the previous hearing, this Court received argument, received additional authority from the parties, considered other additional arguments as well in this matter and indicated to the parties that it intended on issuing an oral opinion for the purposes of the preliminary injunctive

relief that is being sought by Columbia Gas through its motion for an order of condemnation in this case.

At the outset, I will state prior to reviewing the basis of the opinion that although the Natural Gas Act certainly does grant Columbia Gas Transmission, LLC the power of eminent domain to condemn land, the Court finds for reasons that will be stated later that the Natural Gas Act does not [3] abrogate state sovereign immunity or delegate the United States' state sovereign exemption to permit Columbia to sue the State of Maryland for an order of condemnation without Maryland's consent. Thus, Columbia has not established three – which will be outlined in detail below – three of the four mandatory requirements for obtaining preliminary injunctive relief, most notably, a likelihood of success on the merits simply because the Eleventh Amendment precludes the State from being sued by Columbia as a private party, given this Court's opinion of the current case law.

By way of background, this action arises from a condemnation dispute over a tract of land owned by the defendant, the State of Maryland Department of Natural Resources, in the path of a natural gas pipeline project planned by Columbia. Columbia is indeed a natural gas company within the meaning of the Natural Gas Act, and as the owner and operator of one of the largest underground natural gas storage and transmission systems in North America, Columbia transports approximately 3 billion cubic feet of natural gas per day.

On July 19, 2019, the Federal Energy Regulatory Commission granted Columbia a certificate of public convenience and necessity certificate pursuant to Section 7 of the Natural Gas Act. The certificate itself approves the construction and operation of approximately 3.37 miles of [4] 8-inch diameter natural gas pipeline, extending from existing 20-inch and 24-inch pipelines in Fulton County, Pennsylvania to a site in Morgan County, West Virginia. Between Pennsylvania and West Virginia, the pipeline will cross Washington County, Maryland and travel under the Potomac River.

The project route includes .12 acres of land owned by the Maryland Department of Natural Resources for which Columbia needs a right-of-way easement and other necessary property interests. The easement will allow a portion of approximately 4,200 or 4,300 horizontal – will allow a portion of an approximately 4,300-foot horizontal directional drill to pass between – beneath the tract and at approximately 175 feet below the surface and beneath the Potomac River at a depth of approximately 114 feet. The tract is an integral part of the project route approved by the certificate as necessary for construction, maintenance, operation, alteration, testing, replacement and repair of the project.

Columbia agreed to pay the Maryland Department of Natural Resources $5,000, an amount more than the easement's appraised value, to drill through the tract. However, the State Board of Public Works rejected the Maryland Department of Natural Resources' agreement with Columbia, denying conveyance of the

easement, and subsequent negotiations [5] between Columbia and the State failed.

As a result, Columbia has not commenced the project. Columbia has a contractually committed service deadline of November 1, 2020, and Columbia's certificate expires on July 19, 2020. Columbia therefore undertook to condemn the easement by authority of the certificate and pursuant to Section 717f(h) of the Natural Gas Act.

Out of the 22 tracts that the project route impacts, Columbia has negotiated voluntary acquisition of easements through 18 privately-owned tracts. In addition to the tract, Columbia has yet to secure easements through three other tracts owned by the National Park Service.

On May 16, 2019, Columbia sued Maryland Department of Natural Resources, filing its Complaint in Condemnation and a Motion for an Order of Condemnation and for Preliminary Injunction and a Memorandum in Support. Columbia seeks an order of condemnation for the easement, the ascertainment and award of just compensation, and damages properly attributable to Columbia's acquisition of the easement, and finally an order granting Columbia immediate access to and use of the easement pursuant to that order of condemnation.

On June 17, 2019, Maryland Department of Natural Resources filed its opposition, and on June 8, 2019, Columbia filed its reply.

A preliminary injunction is an extraordinary remedy [6] involving the exercise of far-reaching power which is to be applied only in limited circumstances which clearly demand it. The purpose of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of the lawsuit, ultimately to preserve the Court's ability to render meaningful judgment on the merits. An application of the following factors is used to determine whether a preliminary injunction is warranted: The likelihood of success on the merits, whether the movement will face irreparable harm in the absence of preliminary relief, whether the balance of the equities favors preliminary relief, and whether an injunction is in the public interest.

In this case Columbia must meet all four of these requirements to prevail on the motion for preliminary injunction. When the balancing the hardships does not tilt decidedly in favor of the plaintiff, the plaintiff must demonstrate a strong showing of likelihood of success or a substantial likelihood of success by clear and convincing evidence to obtain relief. The Court will analyze, in turn, each of the four *Winter* factors in this case that Columbia must establish.

Now before the district court can exercise its equitable power in granting a preliminary injunction and a condemnation action by a natural gas company, the Court must first determine whether the company has a substantive right to [7] condemn the property under the Natural Gas Act. Here there appears to be no dispute that a substantive right exists. Indeed, first it is a

matter of public record that Columbia holds a certificate of public convenience and necessity issued by the federal government that actually approves the project. The certificate is valid and does not expire until July 19, 2020.

Second, the easement Columbia is seeking is necessary to the project. The easement is part of a FERC-approved project route and specifically necessary for the operation of the project that will pass beneath the tract.

Third, Columbia has been unable to acquire the easement by agreement as shown by the offer for $5,000 for the easement which was denied by the Maryland Department of Natural Resources. A formal denial of that conveyance was made by the board. And finally, the unsuccessful negotiations with the Board or Maryland Department of Natural Resources after the denial of the conveyance. Therefore, Columbia certainly has a substantive right, but that doesn't end the analysis here.

Maryland Department of Natural Resources argues that sovereign immunity, that bars Columbia's suit notwithstanding Columbia's alleged substantive right. This is a jurisdictional issue for this Court which can be raised sua sponte and indeed can be raised, should be raised by the Court [8] sua sponte when such an issue arises. Neither the United States Supreme Court, the U.S. Court of Appeals for the Fourth Circuit, nor this Court has confronted an issue like this. Upon consideration of the statute and the case law in this

case, the natural gas companies do not appear to have the authority under the Natural Gas Act or the Constitution to overcome the state sovereign immunity. As a result, Columbia cannot and is not likely to succeed on the merits of the condemnation action.

Columbia does not have a likelihood of success on the merits because the Maryland Department of Natural Resources' Eleventh Amendment immunity bars suits against states in federal court. A state's immunity from suit is a fundamental aspect of the sovereignty which the state enjoyed before the ratification of the Constitution and which they retain today.

The Eleventh Amendment to the United States Constitution provides that judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted, against one of the United States by the citizens of another state. Notwithstanding the Eleventh Amendment explicit mention of only citizens of another state, the Supreme Court of the United States has construed the Eleventh Amendment as also protecting states from federal court suits brought by its own citizens. Thus, [9] the Eleventh Amendment bars actions by any private citizen against the state.

Additionally, state's immunity extends to agents in state instrumentalities. Although the state retains immunity from suit, this constitutional bar is not absolute and is subject to three exceptions. First, Congress may abrogate the state's Eleventh Amendment immunity when it both unequivocally intends to do so

in acts pursuant to a valid grant of constitutional authority.

Second, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law.

Third, the state remains free to waive its Eleventh Amendment immunity from suit in federal court.

In its opposition, the Maryland Department of Natural Resources argues that the first exception does not apply because Congress has not abrogated the state's immunity from such suit; second exception doesn't apply because this suit is not an action against state officials for alleged violations of law; and the third exception doesn't apply because the state has not consented to such suit.

Columbia argues that Congress delegated the power of eminent domain to natural gas companies, including the federal government exemption from state sovereign immunity. The Court finds the Maryland Department of Natural Resources' argument [10] more persuasive.

Out of due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, the Court indicated the Supreme Court has prescribed a stringent two-part test for determining whether Congress has abrogated the state's sovereign immunity, whether Congress has unequivocally expressed its intent to abrogate the immunity, and whether Congress has acted pursuant to a valid

exercise of power, citing the *Seminal Tribe of Florida* case. Thus, Congress must make its intention unmistakably clear in the language of the statute. To determine whether or not Congress has acted pursuant to a valid exercise of its power, the Court must answer this question: Was the act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?

This Court determines that the only constitutional provision that grants Congress the power to abrogate state sovereign immunity is the Enforcement Clause of Section 5 of the Fourteenth Amendment. No longer does the Supremacy Clause, nor the enumerated powers of Congress, confer authority to abrogate the state's immunity from suit in federal court.

The Fourth Circuit did have occasion to apply the *Seminal Tribe* case last year. In *Allen v. Cooper*, the plaintiffs argue Congress clearly intended to abrogate the [11] North Carolina's Eleventh Amendment immunity in enacting a Copyright Remedy Clarification Act and did so through Article I Patent and Copyright Clause power.

Focusing on the second prong of the *Seminal Tribe* test, the Fourth Circuit held the CRCA did not abrogate North Carolina's sovereign immunity because Congress's ability to enact legislation through its Article I powers has been foreclosed by *Seminal Tribe* and its progeny which makes clear that Congress cannot rely upon its Article I powers to abrogate Eleventh Amendment immunity. Additionally, the Fourth

Circuit explained that the Supreme Court has held that Congress must make it clear it is relying upon the Fourteenth Amendment as a source of its authority within the statute at issue and the statute's legislative history. Neither the circa provision at issue nor the legislative history relied on in Section 5 of the Fourteenth Amendment as the statutory source of authority, rather the legislative history made it readily apparent that it was being enacted pursuant to the Copyright Clause in Article I of the Constitution.

Columbia argues that the Maryland Department of Natural Resources asserting sovereign immunity to prevent the project is a de facto violation of the Supremacy Clause of the United States Constitution. However, neither the Supremacy Clause nor the enumerated powers may authorize abrogation of the state's sovereign immunity. Congress enacted the Natural [12] Gas Act pursuant to the Commerce Clause which is an Article I enumerated power.

The provisions of the Natural Gas Act that grant natural gas companies the power of eminent domain does not state that the companies are being granted its authority pursuant to Section 5 of the Fourteenth Amendment. Thus, Congress did not make its intent unmistakably clear in the statute. Nevertheless, even if 717 stated that the states were not immune from suit, the Supreme Court and the Fourth Circuit have concluded that that language is not enough because the act in question was not passed pursuant to the sole constitutional provision granting Congress the power to abrogate, namely Section 5 of the Fourteenth

Amendment. Congress did not, therefore, unequivocally express its intent to abrogate.

As to delegation, this Court finds and determines for this preliminary injunctive relief that Congress did not delegate the federal government's exemption to state sovereign immunity. Since the ratification of the Constitution, the states' sovereign immunity has been preserved, and the states only consented to suits brought by other states or by the federal government, and to some suits pursuant to subsequent constitutional amendments. The states, however, remained immune to suits brought by private parties and did not consent to suit by anyone whom the United States might select. This [13] is language directly from *Blatchford v. Native Village.*

Thus, as stated in the most recent case of *Sabine Pipe Line, LLC*, a private party does not become a sovereign such that it enjoys all rights held by the United States by virtue of Congress's delegation of eminent domain power.

In *Blatchford*, Alaska native villages brought suit against a state official for money allegedly owed to them under a state revenue-sharing statute. To avoid the difficulty of arguing abrogation, the native villages argued instead that the provision at issue delegated the federal government's sovereign immunity exemption to the natives themselves. The Supreme Court rejected this argument, expressing doubt that the sovereign exemption can be delegated, even if one limits the delegation to persons on whose behalf the

United States itself might sue. The Court went on further to say that even assuming the delegation of an exemption from state sovereign immunity was theoretically possible, there was no reason to believe that Congress ever contemplated such a strange notion.

More recently, as indicated, the District Court for the Eastern District of Texas considered these questions in an almost identical case. Sabine, a natural gas company, sought to renew a right-of-way agreement that it had with a previous landowner over three tracts of land. The landowner over one tract of land was the Texas Parks and Wildlife Department [14] which did not agree to give Sabine the right-of-way. Sabine had a valid certificate of public convenience and necessity that had been issued by the commission, issued in 1964 – I'm sorry, issued in 1964 and sought to exercise eminent domain under the Natural Gas Act to condemn state land, arguing that it was, in fact, a delegee of the federal government.

The district court held that Sabine was conflating two separate rights held by the federal government: the right to exercise eminent domain and the right to sue states in federal court. The Court explained that the federal government may exercise eminent domain over state land, not due to the supreme sovereign's right to condemn state land but because the federal government enjoys a special exemption from the Eleventh Amendment. Thus, the suit was barred by the Texas sovereign immunity.

Conversely, as pointed out by Columbia, the United States District Court for the District of New Jersey held last year that a suit for condemnation of state land was not barred by New Jersey's sovereign immunity because the natural gas company stood in the shoes of the sovereign as a result of being vested with the federal government's eminent domain powers. This particular case does not address *Seminal Tribe, Alden, Blatchford* or *Sabine*, instead simply noting that the Natural Gas Act expressly granted natural gas companies the right of eminent domain. The Court concludes that there are [15] two separate and distinct rights, only one of which eminent domain the federal government can delegate.

In *Chao* the Fourth Circuit discussed a constitutional alternative to a private party, seeking to sue the state and show there were private parties collectively sued the Virginia Department of Transportation under the Fair Labor Standards Act for alleged nonpayment of certain work. The suit was dismissed twice. Because of the dismissal, the Secretary of Labor intervened. The Virginia Department of Transportation raised its sovereign immunity defense, arguing that the suit was essentially a private suit.

The Fourth Circuit held that Virginia's sovereign immunity was not a bar to the federal government suit because the federal government exercised its political responsibility for the suit, which is within the federal government's exemption from sovereign immunity. The Court compared the importance of a case where the federal government decides to take action against

a state on behalf of employees, which the state consented to when ratifying the Constitution, with one in which the individuals take action against the state to which the state did not consent.

Fourth Circuit also noted the Supreme Court's doubts in *Blatchford* as to whether or not the federal court exemption from state sovereign immunity can be delegated to private individuals.

[16] Certainly Columbia reminds the Court that *Sabine* is not binding, but *Sabine* is persuasive especially in light of the Fourth Circuit's conclusion in *Chao* which is binding. If the federal government deems it important to condemn the Maryland Department of Natural Resources' land, it is within the federal government's right to bring such an action. Indeed, based upon the arguments, it appears no dispute with the federal government's power to do such. However, a private party like Columbia Gas does not hold the same political responsibilities or any political responsibilities of the federal government. As the federal government would do the same. Because the Maryland Department of Natural Resources did not consent to the condemnation by private parties under the Natural Gas Act and because Columbia is not constrained by any political responsibility like the federal government would be, the present suit is barred by the Maryland Department of Natural Resources for the purposes of this preliminary injunctive relief. In essence, the Columbia Gas is not likely to succeed on the merits of the case.

As far as the irreparable harm is concerned, there's no question, and I don't believe there's any dispute, that there has been significant losses or will be significant losses if the injunctive relief is not granted in this matter. Indeed there are significant contractually committed services that are issued, there are easements and other forecasted harm [17] which Columbia ends up making, and indeed much of that is not disputed. Some of this is tempered by the fact that Columbia has still not obtained the rights to the National Park Service tracts, but nevertheless, especially if you put that aside, there is a likelihood of irreparable harm had an injunction not been granted.

The balancing of the equities here really tips the scales here. Columbia argues that the balance of the equity is in its favor because, of course, in condemnation cases, the – typically balancing the equity favors the natural gas company. However, in this particular instance, the Maryland Department of Natural Resources counters that the harm to the state's sovereign immunity outweighs any business disruption or cost to Columbia in this case.

Considering these arguments, losing the Eleventh Amendment immunity from suit to which it did not consent would diminish Maryland's sovereignty. This is a significant equity concern, and as a result, the Court concludes that the balance of hardships does not weigh decidedly in Columbia's favor, and as a result, Columbia must make a strong showing of a substantial likelihood of success which I have already indicated that they have not done.

Certainly as far as the public interest is concerned, there is a public interest in having this project. However, there's also a public interest in protection of the [18] state's sovereignty, especially before a final determination on the merits in this action. And as a result, for these aforementioned reasons and for the reasons I previously stated, I'm going to deny the motion for preliminary injunctive relief.

Now Mr. Fedder, Mr. Weiner, at the outset here, I've already made a determination that I do not believe – I think Eleventh Amendment immunity applies. So in concluding that, the issue I have before you is that Columbia Gas, I am prepared at this point in time to dismiss this case on jurisdictional grounds to afford Columbia the ability to be able to take an expedited appeal up to the Fourth Circuit, given the time constraints that we're under here. That way the Fourth Circuit can tell me – tell Judge Russell whether or not he's got it right or whether or not he got it wrong because this is not particularly clear in this circumstance.

So I take it, Mr. Fedder, given the Court's ruling and strong ruling regarding the likelihood of success on the merits in this case, I'm prepared right now for the reasons that I previously stated to dismiss your case based upon jurisdictional grounds on Eleventh Amendment action and based upon the briefing and argument in this case and allow you the opportunity to file, note an immediate appeal to the Fourth Circuit on an expedited basis, given what I've already said about the potential irreparable harm that would be suffered.

[19] MR. FEDDER: Thank you, Your Honor. Given where you are as a legal conclusion on the Eleventh Amendment, its applicability to the facts as stated on the record, I don't think there's any alternative but for the Court to dismiss on that basis. And then as you said, we'll note an appeal.

THE COURT: Absolutely. Of course, the Secretary of the Interior could just file a lawsuit, and we wouldn't be here. But I understand that would be an interesting precedent. So we'll have the Fourth Circuit take a look at what I've determined and written.

So based upon this, I'm going to go ahead and deny the preliminary injunction relief for the reasons that I stated on the record in finding that Columbia Gas cannot succeed on the merits of this case for the reasons that I stated and the reasons in the brief. I'm going to go ahead and dismiss this case sua sponte on a jurisdictional ground.

I'm going to deny the State's motion as moot at this point in time because I exercised my individual authority.

Counsel, is there anything else that needs to be placed on the record before we conclude?

MR. FEDDER: No. Thank you, Your Honor.

THE COURT: I hope you have a safe journey back. Thank you very much for your argument. Welcome to Baltimore. I want to thank the State as well for the arguments. It was an extraordinarily well-argued case,

and I really enjoyed the [20] briefings and the challenge. Thank you.

MR. FEDDER: Thank you, Your Honor.

MR. SNYDER: Thank you.

THE CLERK: All rise. This Honorable Court now stands adjourned.

(Proceedings concluded at 3:22 p.m.)

I, Patricia G. Mitchell, RMR, CRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

Dated this 23rd day of August 2019.

/s/ Patricia G. Mitchell
Patricia G. Mitchell
Official Court Reporter

FILED: September 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2040
(1:19-cv-01444-GLR)

COLUMBIA GAS TRANSMISSION, LLC

Plaintiff - Appellant

v.

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

Defendant - Appellee

ORDER

The court defers consideration of the motion for summary disposition pending review of the appeal on the merits.

For the Court – By Direction

/s/ Patricia S. Connor, Clerk

FILED: May 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2040
(1:19-cv-01444-GLR)

COLUMBIA GAS TRANSMISSION, LLC,

Plaintiff - Appellant,

v.

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

Defendant - Appellee.

ORDER

Columbia Gas Transmission, LLC, appeals the district court's order denying its request for a preliminary injunction and dismissing its condemnation suit for lack of jurisdiction. When the district court entered its order, it did not have the benefit of the Supreme Court's decision in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021) ("The States . . . have no immunity left to waive or abrogate when it comes to condemnation suits by the Federal Government and its delegatees."). Upon review, we deny Columbia Gas'

motion for summary reversal, vacate the district court's order, and remand for further consideration in light of *PennEast*.

Entered at the direction of the panel: Judge Motz, Judge Harris, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: May 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2040
(1:19-cv-01444-GLR)

COLUMBIA GAS TRANSMISSION, LLC

Plaintiff - Appellant

v.

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

Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the district court order entered August 22, 2019, is vacated. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COLUMBIA GAS TRANSMISSION, LLC,	*	
Plaintiff,	*	
v.	*	Civil Action No. GLR-19-1444
0.12 ACRES OF LAND, MORE OR LESS, IN WASHINGTON COUNTY, MARYLAND, et al.,	*	
Defendants.	*	
	***	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant State of Maryland, Department of Natural Resources' ("MDNR") Renewed Motion to Dismiss (ECF No. 63). The Motion is ripe for disposition, and no hearing is necessary. See Local Rule 105.6 (D.Md. 2021). For the reasons set forth below, the Court will deny Defendant's Motion.

I. BACKGROUND[1]

On July 19, 2018, the Federal Energy Regulatory Commission ("FERC") granted Plaintiff Columbia Gas Transmission, LLC ("Columbia Gas") a certificate of

[1] Unless otherwise noted, the Court takes the following facts from Columbia Gas's Complaint (ECF No. 1) and accepts them as true. See Erickson v. Pardus, 551 U.S. 89, 94 (2007).

public convenience and necessity ("the Certificate") to construct and operate a gas pipeline, part of which would run through Washington County, Maryland. (Compl. ¶¶ 7–8, ECF No. 1). "The Natural Gas Act ["NGA"] expressly permits a holder of a Certificate to acquire the necessary land and rights 'by the exercise of the right of eminent domain' if it is unable to reach an agreement with the landowner.'" (Id. ¶ 25 (quoting 15 U.S.C. § 717f(h)). MDNR is the record title holder of the land that Columbia Gas seeks to access in Washington County ("Tract No. 1"). (Id. ¶ 30). Columbia Gas began its easement-acquisition efforts in 2016, and after negotiations, offered MDNR consideration for the easement in the amount of $5,000.00. (Id. ¶¶ 15, 18). Conveyance of the easement required approval by the Maryland Board of Public Works ("BPW"). (Id. ¶ 20). On January 2, 2019, BPW denied Columbia Gas's easement application. (Id.). Thereafter, Columbia Gas sought to condemn the easement by authority of the Certificate and under § 717f(h) of the NGA. (Id.).

On May 16, 2019, Columbia Gas filed its Complaint in Condemnation (ECF No. 1) and a Motion for an Order of Condemnation and for Preliminary Injunction (ECF No. 2). On June 17, 2019, MDNR opposed preliminary injunctive relief (ECF No. 30) and filed a Motion to Dismiss for Lack of Jurisdiction, arguing that its sovereign immunity, although waivable, had not been waived. (Mot. Dismiss at 1, ECF No. 29). Columbia Gas filed its Response on July 8, 2019. (ECF

No. 38). The Court heard oral arguments on August 13, 2019 and August 21, 2019. (ECF Nos. 41, 45).

On August 21, 2019, the Court issued a ruling from the bench denying the preliminary injunction and dismissing the Complaint. (ECF No. 46). The Court explained:

> [A]lthough the Natural Gas Act certainly does grant [Columbia Gas] the power of eminent domain to condemn land . . . the Natural Gas Act does not abrogate state sovereign immunity or delegate the United States' state sovereign exemption to permit Columbia [Gas] to sue the State of Maryland for an order of condemnation without Maryland's consent.

(Aug. 21, 2019 Tr. at 2:22–3:4, ECF No. 47). The Court determined that Columbia Gas failed to establish "three of the four mandatory requirements for obtaining preliminary injunctive relief, most notably, a likelihood of success on the merits simply because the Eleventh Amendment precludes [MDNR] from being sued by Columbia [Gas] as a private party." (Id. at 3:5–9). Thus, the Court dismissed the case and denied MDNR's Motion to Dismiss as moot. (Id. at 19). Columbia Gas appealed on September 20, 2019. (ECF No. 48).

On June 21, 2021, the Supreme Court decided PennEast Pipeline Co. v. New Jersey. 141 S.Ct. 2244 (2021). In PennEast, the 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." Id. at 2251.

Following the PennEast decision, the Fourth Circuit Court of Appeals remanded the case to this Court. (ECF No. 52). The Fourth Circuit further denied Columbia Gas's Motion for Summary Reversal and vacated this Court's August 21, 2019 Order, directing the Court to engage in "further consideration[s] in light of PennEast." (4th Cir. Order at 2, ECF No. 52).

On July 29, 2022, MDNR filed a Renewed Motion to Dismiss for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1). (Def.'s Mot. Dismiss ["Mot."] at 1, ECF No. 63). Columbia Gas filed its Opposition on August 29, 2022, (ECF No. 66), and MDNR filed its Reply on September 26, 2022 (ECF No. 69).

II. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) requires a plaintiff to establish the Court's subject-matter jurisdiction by showing the existence of either a federal question under 28 U.S.C. § 1331 or diversity jurisdiction under 28 U.S.C. § 1332. A plaintiff may establish federal question jurisdiction by asserting a claim that arises from a federal statute or from the U.S. Constitution. Fed.R.Civ.P. 12(b)(1). To show that the claim arises on one of these bases, the federal question must appear "on the face of the plaintiff's properly pleaded complaint." AES Sparrows Point LNG, LLC v. Smith, 470 F.Supp.2d 586, 592 (D.Md. 2007) (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987)). However, when a party challenges subject-matter

jurisdiction, the Court may consider "evidence outside the pleadings" to resolve the challenge. Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

A defendant challenging a complaint under Rule 12(b)(1) may advance a "facial challenge, asserting that the allegations in the complaint are insufficient to establish subject matter jurisdiction, or a factual challenge, asserting 'that the jurisdictional allegations of the complaint [are] not true.' " Hasley v. Ward Mfg., LLC, No. RDB-13-1607, 2014 WL 3368050, at *1 (D.Md. July 8, 2014) (alteration in original) (quoting Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009)). When a defendant raises a facial challenge, the Court affords the plaintiff "the same procedural protection as he would receive under a Rule 12(b)(6) consideration." Kerns, 585 F.3d at 192 (quoting Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982)). As such, the Court takes the facts alleged in the complaint as true and denies the motion if the complaint alleges sufficient facts to invoke subject-matter jurisdiction.

The Court may determine on its own initiative that it lacks subject-matter jurisdiction, regardless of whether a party to the case has raised this claim. Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006); see also Fed.R.Civ.P. 12(h)(3). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Arbaugh, 546 U.S. at 506 (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004)). The Court "ha[s] an independent obligation to determine whether

subject-matter jurisdiction exists, even in the absence of a challenge from any party." Id. at 501, 514. When the Court establishes that it does not have subject-matter jurisdiction, it "must dismiss the complaint in its entirety." Id. at 514.

B. PennEast Pipeline Co. v. New Jersey

In PennEast, Plaintiff PennEast Pipeline Company sought an order for condemnation and a preliminary injunction for immediate access to property owned by the State of New Jersey. See 141 S.Ct. at 2251. The Supreme Court held that the Federal Government constitutionally conferred on pipeline companies the authority to condemn rights-of-way in which States have an interest in the NGA. Id. The Court determined 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. Thus, "the Natural Gas Act delegates the federal eminent domain power to private parties," allowing "those parties [to] initiate condemnation proceedings, including against state-owned property." Id. at 2252. The Court further reasoned that precluding Federal Government delegatees from bringing condemnation proceedings "would violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign." Id. at 2260. Thus, a court may not "divorce the eminent domain power from the power to bring condemnation actions." Id.

In coming this conclusion, the Court emphasized the long history of eminent domain power:

> [T]he Framers . . . sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation. Over the course of the Nation's history, the Federal Government and its delegatees have exercised the eminent domain power to give effect to that vision, connecting our country through turnpikes, bridges, and railroads—and more recently through pipelines, telecommunications infrastructure, and electric transmission facilities. And we have repeatedly upheld these exercises of the federal eminent domain power—whether by the Government or a private corporation, whether through an upfront taking or a direct condemnation proceeding, and whether against private property or state-owned land. The NGA fits well within this tradition.

Id. at 2263.

The Court further addressed New Jersey's argument that despite the established eminent domain power in the NGA, it was immune from suit due to sovereign immunity:

> States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . . Under our precedents, a State may be subject to suit only in limited circumstances. A State may of course consent to suit . . . and Congress may also abrogate state sovereign

> immunity under the Fourteenth Amendment. Furthermore, a State may be sued if it has agreed to suit in the "plan of the Convention," which is shorthand for the structure of the original Constitution itself. The "plan of the convention" includes certain waivers of sovereign immunity to which all States implicitly consented at the founding. We have recognized such waivers in the context of bankruptcy proceedings, suits by other States, and suits by the Federal Government.

Id. at 2258 (cleaned up). The Court found that the third exception to States' immunity applied in this instance–the States had implicitly agreed to condemnation suits when they ratified the Constitution. Id. at 2251–52.

Justice Gorsuch dissented and argued that even if States consented to condemnation proceedings in the plan of the Convention, "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. He posited that "States have two distinct federal-law immunities from suit." Id. at 2264 (Gorsuch, J., dissenting). The first is "structural immunity" which is "derive[d] from the structure of the Constitution" and the ratification of the Convention. Id. Justice Gorsuch agreed with the majority that this immunity is waivable. Id. The second form of state immunity is "textual immunity," also known as Eleventh Amendment immunity, which is "derive[d] from the text of the Eleventh Amendment." Id. The Eleventh Amendment provides 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, or by Citizens or Subjects of any Foreign State." Id. (quoting U.S. Const. amend. XI). Justice Gorsuch argued that the majority failed to answer whether Eleventh Amendment immunity is waivable when a federal suit is commenced against a State by a citizen of another State. Id. at 2264–65. He further argued that the Eleventh Amendment constitutes an "ironclad rule for a particular category of diversity suits" where immunity is not waivable because the Amendment's plain language mandates that federal courts "shall not" hear suits that fall within its parameters. Id. Because the circumstances of PennEast presented "'the rare scenario' that comes within the Eleventh Amendment's text," New Jersey and other states sued by a diverse plaintiff should be immune from suit. Id. at 2265. Justice Gorsuch concluded by stating that "lower courts . . . have an obligation to consider this issue on remand before proceeding to the merits." Id.

The majority opinion briefly addressed Justice Gorsuch's argument. It stated that despite the Eleventh Amendment's language, "States retain their immunity from suit regardless of the citizenship of the plaintiff" and "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms." Id. at 2258 (majority opinion). The Court further reasoned 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. When a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action. Such consent may, as here, be inherent in the constitutional plan.

Id. at 2262 (cleaned up).

C. Analysis

In its Motion to Dismiss, MDNR primarily relies on Justice Gorsuch's dissent in PennEast. It argues that the Eleventh Amendment's textual immunity may not be waived by the States, and thus, this Court does not have subject matter jurisdiction to hear this case. (Mot. at 7). MDNR further argues that the majority in PennEast "signaled its openness to reconsidering" cases which have held that States may waive the Eleventh Amendment's conferral of privilege. (Id. at 11). The Court did this, according to MDNR, by adding the qualification that "no party asks us to reconsider [those cases] here," rather than conclusively foreclosing Justice Gorsuch's suggestion that textual immunity is not waivable. (Id. at 12 (quoting PennEast, 141 S.Ct. at 2262 (emphasis added))). Thus, MDNR argues that this Court may consider and grant its Renewed Motion to Dismiss because the State is entitled to textual immunity. (Id.). MDNR acknowledges that "[o]f course, this Court is not free to overrule or disregard

decisions of the Supreme Court" and recognizes "that some of its arguments here may ultimately be better suited for Supreme Court review." (Id. at 13 n.5).

Columbia Gas counters that MDNR's Eleventh Amendment argument is foreclosed by PennEast and other Supreme Court precedents. (Pl.'s Resp. Opp'n ["Opp'n"] at 1, ECF No. 66). At bottom, the Court agrees with Colombia Gas and will deny MDNR's Renewed Motion to Dismiss.

This Court interprets the Supreme Court's opinion in PennEast as explicitly holding that Federal Government delegatees have federal eminent domain power to "initiate condemnation proceedings, including against state-owned property." See 141 S.Ct. at 2252. It is undisputed that FERC has granted Columbia Gas a certificate of public convenience and necessity, thus delegating federal eminent domain power to Columbia Gas. (See Compl. ¶¶ 7, 8, 11–13, 25; Mot. at 1–2). Further, MDNR is the record title holder for Tract No. 1. (Mot. at 2). Thus, as a Federal Government delegatee, Columbia Gas has federal eminent domain power to initiate condemnation proceedings against the property owned by MDNR. PennEast, 141 S.Ct. at 2252.

If this Court were to hold that it lacked subject matter jurisdiction to hear this case, it would be "divorc[ing] the eminent domain power from the power to bring condemnation actions." Id. at 2260. The Supreme Court stated that such a ruling "would violate the basic principle that a State may not diminish the eminent

domain authority of the federal sovereign." Id. Thus, the Court has subject matter jurisdiction to hear Colombia Gas's suit for condemnation.

Further, the Court is not persuaded by MDNR's argument that the Supreme Court is open to reconsidering cases holding that Eleventh Amendment immunity is waivable. (Mot. at 6–7); see also PennEast, 141 S.Ct. at 2265 (Gorsuch, J., dissenting). The Supreme Court clearly stated that the Eleventh Amendment confers a waivable privilege, and the consent to waive this privilege "may, as here, be 'inherent in the constitutional plan.'" PennEast, 141 S.Ct. at 2262 (majority opinion) (quoting McKesson Corp. v. Div. Alcoholic Beverages and Tobacco, 496 U.S. 18, 30 (1990)). The Court interprets this statement as an express rejection of the MDNR's arguments. The majority considered Justice Gorsuch's argument that the Eleventh Amendment "divests federal courts of subject-matter jurisdiction over a suit filed against a State by a diverse plaintiff" and reaffirmed that the States waived their Eleventh Amendment immunity at the ratification of the Constitution. Id. Thus, this Court may entertain federal-court condemnation suits commenced against a State by a citizen of another State.

This Court will not attempt to determine whether the Supreme Court's holding applies only to structural immunity rather than textual immunity. The Supreme Court did not make such a distinction, and this Court will "simply apply the[] commands" of the Supreme Court. See Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021). The Court's dictate was clear: a court must not

"divorce the eminent domain power from the power to bring condemnation actions." PennEast, 141 S.Ct. at 2260. Columbia Gas correctly argues that MDNR's textual immunity theory, and the sources that support it, may not "properly suggest to this [Court] what it must do on remand," as that is "exclusively the province of the majority of Supreme Court Justices who have written for the Court." (Opp'n at 9). If this Court were to grant the Motion, it would ignore the essential holding in PennEast by allowing MDNR to separate Columbia Gas' eminent domain power from its condemnation authority. The Supreme Court expressly decided that this is something "[a] State may not do." PennEast, 141 S.Ct. at 2247. Indeed, MDNR acknowledged that "this Court is not free to overrule or disregard decisions of the Supreme Court." (Mot. at 13 n.5). Accordingly, the Court finds that it must adhere to the precedent established in PennEast and deny MDNR's Renewed Motion to Dismiss.

III. CONCLUSION

For the foregoing reasons, the Court will deny Defendant MDNR's Renewed Motion to Dismiss (ECF No. 63). A separate Order follows.

Entered this 16th day of December, 2022.

/s/
George L. Russell, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COLUMBIA GAS TRANSMISSION, LLC,	*	
Plaintiff,	*	
v.	*	Civil Action No. GLR-19-1444
0.12 ACRES OF LAND, MORE OR LESS, IN WASHINGTON COUNTY, MARYLAND, et al.,	*	
	*	
Defendants.	*	
	***	

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 16th day of December, 2022, by the United States District Court for the District of Maryland, hereby:

ORDERED that Defendants' Renewed Motion to Dismiss (ECF No. 63) is DENIED.

/s/
George L. Russell, III
United States District Judge

FILED: February 28, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1069
(1:19-cv-01444-GLR)

COLUMBIA GAS TRANSMISSION, LLC

Plaintiff - Appellee

v.

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

Defendant - Appellant

ORDER

Upon consideration of submissions relative to Columbia Gas Transmission, LLC's motion for summary affirmance, the court defers action on the motion pending completion of briefing and assignment of the case to a panel.

For the Court – By Direction

/s/ Patricia S. Connor, Clerk

FILED: April 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1069
(1:19-cv-01444-GLR)

COLUMBIA GAS TRANSMISSION, LLC

Plaintiff - Appellee

v.

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

Defendant - Appellant

ORDER

Upon consideration of submissions relative to appellee's motion for summary affirmance, the court denies the motion.

For the Court

/s/ Patricia S. Connor, Clerk