UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DANIEL GOLDSTEIN *et al.*

Plaintiffs,

- against -

GEORGE E. PATAKI *et al.*,

Defendants.

06-CV-5827 (NGG) (RML)

ECF Case

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AARON PILLER *et al.*,

Plaintiffs,

- against -

GEORGE E. PATAKI *et al.*,

Defendants.

07-CV-0152 (NGG) (RML)

ECF Case

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PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE LEVY'S REPORT AND RECOMMENDATION DATED FEBRUARY 23, 2007

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PRELIMINARY STATEMENT

The Magistrate Judge's opinion correctly concluded that Plaintiffs' claims are ripe and that *Younger* abstention does not apply, but nonetheless recommended dismissing Plaintiffs' claims pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). This recommendation was necessarily bold, as the United State Supreme Court has admonished, time and again, that federal courts have a "virtually unflaggling" obligation to adjudicate claims within their jurisdiction, that the *Burford* abstention doctrine therefore presents "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and that "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstance." *New Orleans Public Serv, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358-59 (1989) ("*NOPSI*"); *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 813 (1967); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959); *see also Holmes v. New York City Housing Authority*, 398 F.2d 262, 265-66 (2d Cir. 1968) (holding that cases alleging violations of the civil rights laws are "the least likely candidates for abstention").

The Magistrate Judge's conclusion that such "extraordinary" and "exceptional" circumstances are present here is, we respectfully submit, plainly wrong. Although the *Burford* doctrine is both complicated and confusing, careful analysis of the extensive body of Supreme Court and Second Circuit case law confirms that whether abstention is appropriate depends on a wide variety of important considerations, *none* of which militates in favor of abstention in this case:

- Discretionary Interpretation of State Law: Because Plaintiffs' claims arise exclusively under federal law, there is no chance that this Court will become, as the case law warns, "entangled in a skein of state law."

- Coherent State Policy: The EDPL is entirely *procedural* and reflects no *substantive* state policy – coherent or otherwise – with respect to condemnation. Nor can it be said that this Court should defer to New York's putative "policy" of usurping from the federal courts exclusive jurisdiction over all eminent domain challenges, for any such policy unquestionably would be unconstitutional.

- Degree of Specificity of the State's Scheme: There is nothing particularly or unusually "specific" about the EDPL's judicial review procedure, which merely prescribes in simple terms the basic filing procedure and scope of available review.

- Undue Interference: The issue is not simply whether federal court jurisdiction would *interfere* with a state regulatory scheme, but rather whether such interference would be *undue*, and the Supreme Court and Second Circuit have repeatedly reaffirmed that *Burford* abstention is not required – even in cases where the state has a substantial interest – where, as in this case, the state allegedly has violated the federal constitution.

- Traditional State Concern: Although it is true as a general matter that eminent domain is among countless areas that traditionally are ones of state concern, the Supreme Court has squarely held that eminent domain is *not* an area that is particularly susceptible to *Burford* abstention. *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-96 (1959).

- Adequate Alternative Forum: As evidenced in part by the fact that Defendants are straining so mightily to prevent this case from being heard in federal court, an EDPL § 207 proceeding – in which discovery, damages, declaratory and injunctive relief, attorneys' fees, and the ability to sue all but one of the Defendants are all unavailable – is inadequate.

- Centralized Review Procedure: Unlike in the only two cases in which the Supreme Court has ever upheld *Burford* abstention, the judicial review procedure under the EDPL is not concentrated into a single, specialized court presided over by specific judges who have developed particular expertise in resolving complicated state legal and factual questions.

- Discretionary Relief: The relief Plaintiffs seek, which arises under the federal constitution and a specific grant of jurisdiction pursuant to 28 U.S.C. § 1943, is not discretionary.

The Magistrate Judge did not even acknowledge, much less meaningfully analyze, the majority of these well-established *Burford* considerations. Moreover, his analysis of the

considerations that he did address is plainly incorrect. The Magistrate Judge held that the judicial review procedure under the EDPL is "highly specific" but did not explain how. Report and Recommendation of Magistrate Judge Robert M. Levy dated February 23, 2007 ("Op."), at 35. He gave great weight to the fact that the EDPL judicial review procedure purports to be "exclusive" even though he acknowledged that any such exclusivity would be unconstitutional. Op. at 35-36, 40 n.33. He held that eminent domain is "traditionally a matter of local concern" but failed to acknowledge squarely controlling Supreme Court authority rejecting the relevance of that observation for *Burford* purposes. Op. at 36. And he committed plain legal error in explaining how to weigh the various *Burford* considerations based upon a clear misinterpretation of an opinion from a prior case.

In fairness to the Magistrate Judge, he did not have the benefit of fulsome briefing from the parties. Defendants devoted barely two pages to *Burford* out of their 90 total pages of opening briefing. Plaintiffs, for their part, devoted only one page to *Burford* in their 58 pages of opposition papers. Defendants then devoted barely a single page to *Burford* in their 72 pages of reply papers. The basic arguments were made, but no rigorous analysis was provided.

Now that the *Burford* doctrine has been tentatively elevated to dispositive significance, it is of paramount importance that the range of cases and issues be unpacked thoroughly and carefully. When they are, it becomes plain that abstention is not warranted.

FACTS

For a full recitation of the facts, Plaintiffs respectfully refer the Court to their Amended Complaint and to their prior Memorandum of Law in Opposition to Defendants' Motion to Dismiss.

STANDARD OF REVIEW

A Magistrate Judge's determination of a dispositive motion is subject to *de novo* review by the District Judge. *See* 28 U.S.C. § 636(b)(1); *Eersteling v. Niu*, No. 05-CV-530, 2007 WL 465524, at *2 (E.D.N.Y. Feb 8, 2007); *Zises v. Dep't of Soc. Servs. of the Human Res. Admin. of the City of New York*, 112 F.R.D. 223, 225- 226 (E.D.N.Y. 1986); *see also* Fed R. Civ. P. 72. Here, there is no question that Defendants' motion for involuntary dismissal, and the Magistrate Judge's recommendation that the Court abstain under *Burford*, are dispositive. Accordingly, this Court must conduct a *de novo* review of the Magistrate Judge's recommendation that Plaintiffs' claims be dismissed under the *Burford* abstention doctrine.

ARGUMENT

A. The History of *Burford* Abstention Demonstrates That the Doctrine Is Extremely Narrow and Applies Only Under Rare Circumstances That Are Not Presented Here

1. The Supreme Court Case Law

The genesis of the *Burford* abstention doctrine was, of course, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* involved an extraordinarily difficult local land use issue – how to regulate competitive drilling in the oil fields of western Texas – which the Supreme Court characterized as "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." *Id.* at 318 (quotation omitted). The fundamental regulatory problem stemmed from the fact that the oil in underground reservoirs is not stationary; rather, underground pressure levels can be manipulated such that an oil well operator can draw oil not only from under the surface area of its own land, but also from under the surface area of adjacent wells, and even from under the surface of wells locates many miles away. *See id.* at 318-19. Given these

"geologic realities," Texas had a strong interest in regulating oil drilling practices in order to ensure fairness, to prevent waste of valuable resources, and to protect the very significant state tax revenue that was at stake. *Id.* at 319-20; *see also id.* at 324-25 (noting the "great public importance" and "vital interest of the general public" in assuring that the "speculative interests of individual tract owners" will not cause "the irretrievable loss of oil in other parts of the field").

Accordingly, Texas created a regulatory commission that, in addition to establishing production quotas, regulated spacing between wells. *See id.* at 320-22. The general rule establishing minimum spacing requirements was subject to regulatory exception on a case-by-case basis, based on the basic principle that each surface owner was entitled to operate, regardless of spacing issues, the number of wells sufficient to draw all of the oil below its surface area but not more. *See id.* at 322-23. Notwithstanding the "delusive simplicity" of this principle, however, the reality was that deciding as a matter of fact how many wells each operator deserved presented enormous "nonlegal complexities" – especially given that the decision whether to grant any given operator an additional well directly impacted not only that operator, but also the operators of all adjacent and even distant plots. *Id.* at 323-25. The purpose of the regulatory commission was to make each case-by-case exception determination mindful "of the entire conservation program with implications to the whole economy of the state." *Id.* at 324-25.

In addition to the "nonlegal complexities" discussed above, there was a long and sordid history of tension between the federal courts on the one hand, and Texas legislators, regulators, and state court judges on the other hand, with respect to the proper interpretation of the governing state statutes and regulations. The federal courts had on more than one occasion "flatly disagreed" with the position taken by state courts with respect to state law that was "at the heart of the control program." *Id.* at 327-28. Not only did the Texas Legislature routinely

consider and enact state legislation designed to remedy incorrect interpretation of state law by federal courts, but in one infamous episode the Governor actually found it necessary to *declare martial law* in response to a federal court decision. *See id.* at 327-30.

In *Burford*, the plaintiffs' core claims were purely state law claims filed in federal court through diversity jurisdiction. *See id.* at 317, 331. Although the plaintiffs had pled a federal due process claim, the due process issues had been "fairly well settled from the beginning" of the regulatory program, and the litigation therefore was focused on the state law issues. *Id.* at 317, 328; *see also NOPSI*, 491 U.S. at 361 (describing the due process claim in *Burford* as "of minimal federal importance"). For this reason, and in order to avoid resurrecting "[t]he whole cycle of federal-state conflict," the Supreme Court opted to "leave these problems of Texas law to the State court" because they "so clearly involve[d] basic problems of Texas policy." 319 U.S. at 332; *see also id.* at 334 ("Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts.").

In addition to the profoundly important, factually and legally complex, and essentially local nature of the regulatory issue presented, and in addition to the special history of federal court misinterpretation and misapplication of the core state law questions presented, the Court in *Burford* also noted the fact that Texas provided litigants with an eminently adequate state court forum in which to present challenges to commission orders. *See id.* at 325-26 (discussing Texas's "thorough judicial review" procedure, which afforded litigants the opportunity for full "trial *de novo* before the court," and which gave the court "fully as much power as the Commission to determine particular cases" – so much so that the courts and the commission were nothing short of "working partners" in the adjudication of cases).

The next *Burford* case arose eight years later in *Alabama Pub. Serv. Comm. v. Southern Ry. Co.*, 341 U.S. 341 (1951), which involved a challenge to a decision by state regulators forbidding a railroad from discontinuing unprofitable passenger train service on an interstate route within Alabama. *See id.* at 342-43. In holding that *Burford* abstention was appropriate, the Court focused both on the unique importance of the regulatory issue and on the fact that it was local in character. *See id.* at 345, 346, 347, 349 (observing that states have "primary authority over intrastate transportation," that "intrastate railroad service is 'primarily the concern of the state,'" and that the issue presented was an "essentially local problem" turning on "predominantly local factors"). The Court also focused on the fact that, although a federal Due Process Clause claim had been pled, the case was primarily a diversity action seeking a declaration that the regulators had violated state law in determining that there was an overriding "public necessity" to maintain service on the intrastate routes at issue. *See id.* at 343, 347. And, just as in *Burford*, the Court observed that Alabama provided a particularly thorough judicial review procedure, which entitled litigants to an "independent judgment as to both law and facts." *Id.* at 348.

The Supreme Court next re-examined its *Burford* abstention doctrine another eight years later in *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959). *Allegheny* involved a state law challenge to a property condemnation, brought in federal court through diversity jurisdiction, in which the plaintiffs claimed that the taking of their land violated state law public use principles. Observing that abstention "is an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it," one that is appropriate "only in the exceptional circumstances" where forcing a party to litigate in state court "would clearly serve an important countervailing interest," the Supreme Court reversed as an

abuse of discretion the lower court's refusal to hear the case. *Id.* at 188.

With respect to *Burford* abstention, the *Allegheny* Court found that "adjudication of the issues in this case by the District Court would present no hazard of disrupting federal-state relations" because the case presented no complicated issues of state law; rather, "[t]he only question for decision [was] the purely factual question whether the County expropriated the respondents' land for private rather than public use." *Id.* at 189-90. And, although the Court recognized that a decision favorable to the plaintiffs would in some sense "interfere" with a state regulatory scheme, the Court held that such alleged "interference" did not militate in favor of abstention because the condemnation was equally vulnerable to attack through an identical state court proceeding. *See id.* at 190-91. As the Court observed, "[c]ertainly considerations of comity are satisfied if the District Court acts toward the pending state damage proceeding in the same manner as would a state court." *Id.* at 191.

Of particular relevance here, the Court in *Allegheny* specifically addressed and expressly rejected the argument that *Burford* abstention is especially appropriate in an eminent domain case:

> [T]he fact that a case concerns a State's power of eminent domain no more justified abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is not more mystically involved with "sovereign prerogative" than [the] host of other governmental activities carried on by the State and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law. Furthermore, the federal courts have been adjudicating cases involving issues of state eminent domain law for many years, without any suggestion that there was entailed a hazard of friction in federal-state relations.

Id. at 191-92; *see also id.* at 192-96 (discussing approvingly the extensive history of federal court

adjudication of eminent domain cases, and concluding that "[i]t is now settled practice for Federal District Courts to decide state condemnation proceedings").

On the same day it decided *Allegheny*, the Supreme Court also decided *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), which involved a condemnation proceeding that the defendant landowner removed to federal court on the basis of diversity jurisdiction. The issue in *Thibodaux* was whether the defendant had the legal power, under state law, to condemn property at all. *See id.* at 30. This core state law question was entirely unsettled, as the statute at issue appeared to permit the exercise of eminent domain, but an opinion letter by the Louisiana Attorney General suggested otherwise, and no state court had ever addressed the question. *See id.* The lower court stayed (but did not dismiss) the federal action, directing the plaintiff to commence a declaratory judgment action in state court regarding the scope of the statute in question, and the Supreme Court affirmed. *See id.* at 30-31.

Although subsequent courts have occasionally characterized *Thibodaux* as a *Burford* abstention case, it really was not. To the contrary, the Court's decision to stay its hand in *Thibodaux* had nothing to do with the existence of any uniquely complex or extraordinarily important state regulatory policy (which had been the focus in *Burford*), but rather turned exclusively on the Court's reticence to usurp a state's sovereign prerogative to interpret its own law and resolve disputed legal issues relating thereto. Indeed, *Thibodaux* repeatedly invoked *Pullman* abstention – under which federal courts afford state courts the first opportunity to resolve disputes regarding the interpretation of state statutes – but never cited *Burford* at all. *See id.* at 27-28. As Justice Stewart explained in his concurring opinion, *Thibodaux* was "totally unlike [*Allegheny*] except for the coincidence that both cases involve[d] eminent domain proceedings," because in *Allegheny*, "controlling state law [wa]s clear." *Id.* at 31 (Stewart, J.,

concurring); *see also Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 725-26 (1996) (stating that *Thibodaux* "rest[ed] only loosely on the *Burford* rationale").

The Court next addressed *Burford* four years later in *McNeese v. Board of Educ. for Comm. Unit Sch. Dist. 187*, 373 U.S. 668 (1963), a desegregation case brought under the federal Equal Protection Clause. The Supreme Court declined to abstain under *Burford* because there was "no underlying issue of state law controlling the litigation." *Id.* at 673-74. The right alleged was "plainly federal in origin" and was not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.* at 674. Because the sole issue was the federal constitutional issue, it was "immaterial whether respondents' conduct is legal or illegal as a matter of state law." *Id. Burford* abstention was therefore inappropriate.

The Court expanded on this theme in *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1967). Perhaps best know for establishing so-called "*Colorado River* abstention," the Court in *Colorado River* also considered – and rejected – the invitation to abstain on *Burford* grounds. The case involved a fairly complex statutory issue: the effect of the federal McCarran Amendment upon the jurisdiction of federal courts under 28 U.S.C. § 1345 over suits for determination of water rights brought by the United States on its own behalf and as trustee for Indian tribes. In response to the argument by the defendant water district that abstention was appropriate, the Court cited *Allegheny* for the proposition that abstention doctrine presents "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it" and that "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstance." 424 U.S. at 813. The Court then went on to consider and reject the invitation to apply each of the three distinct types of abstention that then existed: *Pullman* abstention, *Younger* abstention, and *Burford* abstention.

With respect to *Burford* abstention, the Court, for the first time, identified two individual strands of the *Burford* doctrine: (1) "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; and (2) where, although "the state question itself" is not "determinative of state policy," the "exercise of federal review of the question" would "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* at 814. The Court found that the first strand did not apply because the only state law questions presented in the case "appear[ed] to be settled." *Id.* at 815. And the Court found that the second strand did not apply because "[n]o questions bearing on state policy [were] presented for decision," nor would "decision of the state claims impair efforts to implement state policy as in *Burford*." *Id.*

Notably, the Court recognized that the federal claims, which related to the establishment of water rights, could "conflict with similar rights based on state law." *Id.* at 815-16. The Court expressly held, however, that "the mere potential for conflict in the results of adjudications does not, without more, warrant staying exercise of federal jurisdiction." *Id.* at 816. This is so because the question is not simply whether federal and state law might conflict, but rather whether the conflict would "impair impermissibly the State's effort to effect its policy respecting allocation of state waters" – a question that the Court answered in the negative. *Id.*

The Court next addressed the *Burford* abstention doctrine in *NOPSI*, 491 U.S. 350 (1989). The question in *NOPSI* was whether the district court had erred in abstaining from hearing an action by an electricity producer claiming that an order issued by a state ratemaking authority was preempted by the Federal Power Act. The Supreme Court concluded that the district court had abused its discretion by abstaining. The Court began by reaffirming that federal

courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," emphasizing that "[t]he one or the other would be treason to the Constitution." *Id.* at 358 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)); *see also id.* at 359 (describing federal courts' obligation to adjudicate claims within their jurisdiction as "virtually unflaggling"). The Court then reaffirmed the two-stranded *Burford* formulation it had adopted in *Colorado River*:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Id. at 361 (quoting *Colorado River*, 424 U.S. at 814).

Just as in *McNeese*, the *NOPSI* Court quickly concluded that the first *Burford* strand did not apply because the case involved no state law claim, nor would the federal claim be "entangled in a skein of state law." *Id.*

With respect to the second *Burford* strand, the Court admonished that *Burford* is not implicated simply because a federal claim seeks to invalidate a "complex state regulatory system":

> While *Burford* is concerned with protecting complex state administrative processes from *undue* federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a "potential for conflict" with state regulatory law or policy.

Id. at 362 (emphasis added).

Finally, the Court addressed *Burford* abstention most recently in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), which involved a state court action by the

California Insurance Commissioner to settle the rights of a defunct insurer by pursuing that insurer's state law contract and tort claims against Allstate. Allstate removed the action to federal court on diversity grounds, but the district court remanded the case back to state court on the ground that *Burford* abstention was appropriate because adjudication of the case could interfere with the Commissioner's resolution of the defunct insurer's insolvency. The question presented to the Supreme Court was whether *Burford* abstention can apply in a common law action for damages. In determining that the answer to that question is no, the Court repeatedly emphasized how narrow the *Burford* abstention doctrine is, at one point stating there is only "a narrow range of circumstances in which *Burford* can justify the dismissal of a federal action," and at another point stating that proper *Burford* analysis "only rarely favors abstention" because *Burford* presents "an extraordinary and narrow exception." *Id.* at 726, 728. Based on these principles, the Court concluded that the district court had abused its discretion in remanding the case back to state court. The Court held that *Burford* abstention applies only to claims that are inherently subject to a federal court's discretion – such as an equitable claim for an injunction – and is "completely inapplicable in damages actions" such as the common law contract and tort claims that the Commissioner sought to pursue. *Id.* at 728-31.

From these Supreme Court cases, several clear principles emerge:

- *Burford* abstention is an extremely narrow doctrine that presents an extraordinary exception to the general rule that a federal court has a constitutional duty to adjudicate claims where its jurisdiction is properly invoked (*see Allegheny*, *Colorado River*, and *NOPSI*);

- Indeed, the Supreme Court has abstained on *Burford* grounds only twice in its history, and not a single time in the past 56 years;

- Any suggestion that *Burford* abstention is especially appropriate in eminent domain cases is flatly false (*see Allegheny*);

- *Burford* abstention is inappropriate where, as in the case at bar, the plaintiffs present federal claims that are not "entangled in a skein of state law" (*see McNeese*);

- Where, as in the case at bar, there are no "difficult questions of state law" to be resolved, *Burford* abstention is appropriate only if exercising jurisdiction would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" (*see Colorado River* and *NOPSI*);

- The "mere potential for conflict" does not, in itself, warrant abstention. Rather, there must be a specific finding that exercising jurisdiction would "impermissibly impair" a "coherent [state] policy" (*see Colorado River* and *NOPSI*);

- *Burford* abstention is never appropriate where the state's judicial review procedure does not afford robust procedural rights and remedies; and

- *Burford* is never inappropriate in a case seeking relief that is not discretionary, such as in a common law action for money damages (*see Quackenbush*).

2. The Second Circuit Case Law

Thorough scrutiny of the Second Circuit's *Burford* case law is equally important, and equally telling, for two reasons. First, only a small minority of the cases have found abstention appropriate, and none in contexts even remotely similar to this case. Second, although some Second Circuit cases have pointed to a three-factor *Burford* test, a close reading of those cases – especially when juxtaposed with the Supreme Court case law that controls them – reveals that there really are at least a half-dozen distinct factors that inform *Burford* analysis, all of which militate against abstention in this case.

One of the first *Burford* cases in the Second Circuit was *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968). In *Holmes*, prospective tenants of the New York City Housing Authority ("NYCHA") challenged the manner in which NYCHA processed their housing applications as violating their federal due process rights under 42 U.SC. § 1983.

As a threshold matter, the *Holmes* court explained that, in action brought under

section 1983, a federal court's power "to abstain from hearing and deciding the merits of claims properly brought before it is a closely restricted one which may be invoked only in a narrowly limited set of special circumstances." 398 F.2d at 265 (citations omitted). "As a consequence it is now widely recognized that cases involving vital questions of civil rights are the least likely candidates for abstention." *Id.* at 266 (internal quotation marks and citations omitted).

The court then rejected NYCHA's argument that the district court should have deferred to the state courts "in order to avoid possible disruption of complex administrative processes." *Id.*

> We fail to see how federal intervention in the present case will result in any substantial way in the disruption of a complex regulatory scheme of the State of New York, or in interference from the outside with problems of uniquely local concern. [NYCHA] clearly does direct and control a complex administrative process, much of which is concerned with the establishment of standards and policies for the admission of tenants, a function which Congress has recognized that localities are in a much better position than the Federal Government to perform. But the complaint in this action wages only a very limited attack on that process, and in no sense does it seek to interpose the federal judiciary as the arbiter of purely local matters. Rather the plaintiffs assert a narrow group of constitutional rights based on overriding federal policies, and ask federal involvement only to the limited extent necessary to assure that state administrative procedures comply with federal standards of due process. This fundamental concept hardly can be said to be entangled in a skein of state law that must be untangled before the federal case can proceed. Nor do we see here any danger that a federal decision would work a disruption of an entire legislative scheme of regulation.

Id. at 266 (citations omitted). The Second Circuit distinguished *Burford* and *Alabama* because in those cases, "the federal courts were asked to resolve problems calling for the comprehension and analysis of basic matters of state policy, which were complicated by non-legal considerations of a predominantly local nature, and which made abstention particularly appropriate. In contrast to the present case which presents only issues of federal constitutional law, *Burford* and *Alabama* involved situations to which the federal court can make small contribution." *Id.* at 267 (internal

quotation marks and citations omitted).

Since the decision in *Holmes*, and consistent with the exceptional nature of *Burford* abstention, the Second Circuit has refused to apply *Burford* in dozens of cases. For example, in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"), the Second Circuit affirmed Judge Weinstein's refusal to abstain on *Burford* grounds – notwithstanding the fact that the case concerned allegations that the defendant electric utility company had engaged in fraud in rate proceedings before a local regulatory commission – because the plaintiff's claims arose under federal law:

> First, since the district judge dismissed without prejudice Suffolk's state law claims before trial, the action which was tried herein involved only federal claims. As the Supreme Court has noted, "the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention." *Colorado River*, 424 U.S. at 815 n. 21 (citing *Burford*, 319 U.S. at 318 n.5). The fact that here only a federal claim was present raises the level of justification even more. *See Holmes v. New York City Housing Auth.*, 398 F.2d 262, 267 (2d Cir.1968); *cf. Izzo v. Borough of River Edge*, 843 F.2d 765, 769 (3d Cir.1988) ("If only state law applies, *Burford* abstention carries more weight than when federal interests require evaluation as well.").

907 F.2d at 1308-09. Indeed, the Second Circuit cited with approval the strict rule in the Ninth Circuit that "the absence of a state law claim precludes application of the *Burford* doctrine." *Id.* at 1308 n.8 (citing *United States v. Adair*, 723 F.2d 1394, 1402 n.5 (9th Cir. 1984)). The Court then summarized the basis for its refusal to abstain under *Burford* as follows:

> [W]e conclude that the "complex of considerations" present herein does not justify abstention. Because the obligation of the federal courts to adjudicate claims within their jurisdiction is virtually unflagging, resort to *Burford* abstention must not become an automatic response to the presence of an intricate state administrative scheme; proper application of the doctrine requires that a more searching inquiry be made. In this case, other than the *sine qua non* of an intricate state administrative scheme, inquiry reveals no other factor supportive of abstention. . . . In sum, we believe that to abstain under these circumstances would, contrary to the Supreme Court's repeated direction, make abstention too much the rule and too little the exception.

Id. at 1309 (internal quotations and citations omitted).[1]

In the wake of *Holmes* and *LILCO*, the Second Circuit has routinely declined invitations to apply *Burford* expansively and uncritically, reaffirming time and again that the extraordinary act of abstention is not appropriate merely because an important and complicated state regulatory scheme is implicated. *See, e.g., Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46 (2d Cir. 1994) (reversing abstention under *Burford* because "we fail to see how the exercise of federal jurisdiction would impact upon matters of substantial state concern by either deciding a difficult state-law question or disrupting state efforts to establish an important state policy" simply because the action for conversion touched upon liquidation proceedings before the New York State Banking Commission); *Williams v. Lambert*, 46 F.3d 1275 (2d Cir. 1995) (reversing abstention under *Burford* because "the only claim in federal court is one for a declaratory judgment under the federal Constitution" and the "district court was not asked to adjudicate any facts or to fashion public policy in a way that would unduly interfere with the efficient operation of an elaborate state regulatory scheme"); *Wilbur v. Harris*, 53 F.3d 542 (2d Cir. 1995) (reversing abstention under *Burford* because "abstaining from addressing [plaintiff's] constitutional claim would not avoid needless disruption of state efforts to establish coherent policy in an area of comprehensive state regulation" notwithstanding the existence of "a comprehensive state administrative scheme"); *Tribune Co. v. Abiola*, 66 F.3d 12 (2d Cir. 1995) (same as *LILCO*).

In another significant case, *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2d Cir. 1995), the Second Circuit reversed a district court's abstention

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[1] The Court further noted that the unavailability of attorneys' fees and treble damages in an action before the state commission militated against the application of the *Burford* doctrine. *See id.* at 1309.

order in an action challenging, on First Amendment grounds, the defendant's refusal to award plaintiff a family planning contract. The Court found that the state scheme at issue – statutes and regulations requiring counties to follow elaborate procedures when modifying multi-year comprehensive plans for the provision of social services – was "not sufficiently complex to weigh in favor of abstention." *Id.* at 127. Although state law was directly at issue, there was no reason to conclude that state law "requir[ed] interpretation by a state agency or experts in the field." *Id.* And although the Court acknowledged the state's strong interest "in the integrity of its procedures for awarding municipal contracts," the Court held that this "was not enough to justify abstention." *Id.*

One of the Second Circuit's more recent and thorough treatments of *Burford* – *Dittmer v. County of Suffolk*, 146 F.3d 113 (2d Cir. 1998) – is particularly instructive. The plaintiffs in *Dittmer* filed an action in federal court challenging the constitutionality of the Long Island Pine Barrens Protection Act, pursuant to which a state regulatory commission had designated plaintiffs' properties as part of a "core preservation" area. In considering abstention under *Burford*, the district court examined three factors: "the degree of specificity of the state regulatory scheme, the necessity of discretionary interpretation of state statutes, and whether the subject matter of the litigation is traditionally one of state concern." *Dittmer v. County of Suffolk*, 975 F. Supp 440, 443 (E.D.N.Y. 1997). The district court focused on the complexity of the state's environmental scheme, its manifest public importance, and "the difficulty the State has had in developing a coherent policy for managing the Area." *Id.* The district court opted to abstain in deference to the "extensive history" of state efforts to develop a land use policy in the area and the "intensely local nature of the problem." *Id.* at 444.

The Second Circuit reversed, emphasizing that the narrow *Burford* doctrine does not apply every time a state adopts complex scheme to address a crucial and intensely local problem:

> *Burford* is concerned with protecting complex state administrative processes from *undue* federal interference, [but] it does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *New Orleans Pub. Serv.*, 491 U.S. at 362 (emphasis added) (internal quotation marks omitted). Federal court involvement in *Burford* was undue or inappropriate because the plaintiffs sought federal review (on largely state law claims) as a means to avoid an order issued pursuant to a constitutionally sound administrative scheme. As the Court has explained, "[t]he constitutional challenge [in *Burford*] was of minimal federal importance, involving solely the question of whether the commission had properly *applied* Texas' complex oil and gas conservation regulations." *New Orleans Pub. Serv.*, 491 U.S. at 360 (emphasis added). The danger which *Burford* abstention avoids – creating an opportunity to overturn a prior state court or agency determination by seeking federal court review, thereby disrupting a state administrative apparatus – is simply not present in this case.
>
> Here, plaintiffs raise only federal claims in a challenge to the constitutionality of the statute and its implementing regulations. They do not offer a collateral attack on a final determination made by the Commission or seek to influence a state administrative proceeding; indeed, plaintiffs have yet to invoke any administrative process under the Act. They present a direct facial attack on the constitutionality of a state statute, "a controversy federal courts are particularly suited to adjudicate." *Alliance of American Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir. 1988) (*Burford* abstention not warranted in a challenge to the constitutionality of a state insurance statute). While plaintiffs could bring this challenge in state court, *Burford* can not be read to require or even to recommend a state court forum for these claims.

146 F.3d at 117.

Notwithstanding the ad hoc, multi-factored approach that has developed in the Supreme Court and Second Circuit case law, courts often cite the Second Circuit's opinion in *Bethpage Lutheran Service, Inc. v. Weicker*, 965 F.2d 1239 (2d Cir. 1992), for the proposition that there are only three factors that inform whether to abstain under *Burford*: (1) the degree of specificity of the state regulatory scheme; (2) the necessity of discretionary interpretation of state

statutes; and (3) whether the subject matter of the litigation is traditionally one of state concern. *See, e.g.*, Op. at 35. This attempt to distill the many well-established and wide-ranging *Burford* considerations into a compact three-part test is overly simplistic, for the Court in *Bethpage* took pains to emphasize that "[e]very abstention case is to be decided upon its particular facts and not with recourse to some mechanical checklist." 965 F.2d at 1245. Indeed, the opinion in *Bethpage* is clear that, in addition to the three factors listed above, the Court looked to at least three others: (4) whether the plaintiff had an adequate alternative state remedy, *see id.* at 1244; (5) whether the state had created a "*centralized* system of judicial review" that enables state courts "acquire a *specialized knowledge of the regulations and industry*," *id.* at 1245 (emphasis added); and (6) the degree to which interference with the state scheme – which, in and of itself, does not warrant abstention, *see NOPSI*, 491 U.S. at 362 – would, under the circumstances, be *undue*. *See* 965 F.3d at 1247.

As the remainder of this brief demonstrates, applying the many varying *Burford* factors to the facts of this case makes clear that abstention is not warranted.

B. The Magistrate Judge's Analysis of the Factors Informing the *Burford* Inquiry Constitutes Plain Legal Error

As a threshold matter, it cannot seriously be questioned that the Magistrate Judge erred in formulating the legal standard that he applied to the facts of this case. On page 35 of the Opinion, the court recounted the three factors that some Second Circuit cases have suggested primarily inform whether to abstain under *Burford*: (1) the degree of specificity of the regulatory scheme, (2) the necessity of discretionary interpretation of state statutes, and (3) whether the subject matter of the litigation is traditionally one of state concern (the so-called "*Bethpage* factors"). The Magistrate Judge then held that *Burford* is triggered where "the first and *either* of

the second or third" of these *Bethpage* factors applies. Op. at 35 (emphasis in original). That plainly is false.

The Magistrate Judge's fundamental legal error stemmed from his confusion of the *Bethpage* factors identified above with the three *completely different* factors he identified in his prior opinion in *Feiwus v. Genpar, Inc.*, 43 F. Supp. 2d 289, 295 (E.D.N.Y. 1999) (adopting Magistrate Judge Levy's Report and Recommendation). In *Feiwus*, the Magistrate Judge distilled the Supreme Court's *Burford* jurisprudence into three basic issues: (1) whether "the state provides an adequate forum for adjudicating the plaintiff's claims"; (2) whether the case law "presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; and (3) whether federal review would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Feiwus*, 43 F. Supp. 2d at 294-95 (the "*Feiwus* factors").[2] He then went on to hold that *Burford* abstention is appropriate where the case "implicates the first and either of the second or third factors" – meaning, in other words, where the plaintiff has an adequate state forum, and where either one of the two distinct *Burford* strands (as formulated in *Colorado River*) is implicated. *Id.* at 295. That legal analysis unquestionably was correct.

In his opinion in *this* case, however, Judge Levy plainly erred by conflating his three *Feiwus* factors with the *Bethpage* factors. While it unquestionably is true that abstention is appropriate when the first and either the second or third *Feiwus* factors are present, it is equally clear that the same is *not* true for the markedly different *Bethpage* factors.

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[2] In other words, the Magistrate Judge's legal analysis in *Feiwus* simply acknowledged the two strands of *Burford* as described in *Colorado River* – which he characterized as the "second factor" and the "third factor" in his formulation in *Feiwus* – and added as the "first factor" what he called the "condition precedent" that plaintiffs must have an adequate state forum for abstention to be appropriate. *See id.*

This fundamental legal error pervaded – and doomed – the entire analysis in the Report and Recommendation because it led the court to ignore many of the most crucial issues presented – *e.g.*, whether resolution of a purely federal constitutional claims can ever be seen as unduly interfering in state law or administrative processes, whether the resolution of Plaintiffs' claims required the discretionary interpretation of state statutes containing broad terms that require specific expertise, and whether the absence of a single centralized system of judicial review militates against abstention. The Magistrate Judge's fundamental legal error also infected the court's analysis of the factors it did examine, *e.g.*, whether Plaintiffs have an adequate available remedy in state court, whether the EDPL is the type of complex substantive state law scheme that implicates *Burford*, and whether eminent domain is *per se* a matter of traditional local concern for *Burford* purposes.

C. This Case Presents No "Difficult Questions of State Law"

As Defendants and the Report and Recommendation acknowledge, this case does not even arguably implicate the first strand of the *Burford* doctrine because no "difficult questions of state law" are presented. To the contrary, this case turns entirely on federal questions: whether the condemnation of Plaintiffs' property violates the federal Public Use Clause, Due Process Clause, and/or Equal Protection Clause.[3]

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[3] To be sure, Plaintiffs have pled a supplemental claim under EDPL § 207. *See* Amended Cplt. ¶ 171 *et seq*. However, this putative "state law" claim merely asserts that Defendants' use of eminent domain violates the *federal* Constitution because it will serve no public use. *See id.* ¶¶ 176, 177. No underlying state claim is pled. (Although Plaintiffs initially included a state procedural claim, *see id.* ¶ 178, that claim was withdrawn during the motion practice before the Magistrate Judge. *See* Plaintiffs' Opp. to Defendants' Motion to Dismiss Plaintiffs' EDPL § 207 Claims, at 14 n.5.) Indeed, Defendants previously argued that Plaintiffs' supplemental claim is so "entirely duplicative" of the federal constitutional claims that it should be stricken as redundant pursuant to Rule 12(f). *See* ESDC Motion to Dismiss at 8, 13.

Of course, a finding that no "difficult questions of state law" are presented militates strongly against *Burford* abstention. As discussed in greater detail above, one of the most important facts animating the holding in *Burford* itself was that the core claims in that case were state law diversity claims, and that there had been a long history of disagreement and tension – indeed, outright hostility – between federal and state authorities with respect to the proper interpretation of governing state law. *See* 319 U.S. at 317, 327-31; *see also Alabama*, 341 U.S. at 343, 347 (abstaining in case arising primarily as a diversity action seeking a declaration that regulators violated state law); *Berman Enterprises, Inc. v. Jorling*, 3 F.3d 602, 608 (2d Cir. 1993) (abstaining where central dispute concerned the nature and extent of power provided to the Commissioner of the New York Department of Environmental Protection's power under "a complex, even bewildering, system for regulating such matters as oil and sewage pollution" under state law); *Smith v. Metropolitan Property and Liability Ins. Co.*, 629 F.2d 757, 760-61 (2d Cir. 1980) (abstention appropriate in diversity case where "no edification whatever is available . . . from the Connecticut courts," concerning the validity of an exclusionary clause in an automobile insurance policy under state law); *but see In re Joint Eastern and Southern District Asbestos Litigation*, 78 F.3d 764, 776 (2d Cir. 1996) (unsettled or difficult issues of state law alone "is an insufficient ground for federal abstention" under *Burford*).

Where, as here, the central (or only) claims arise under federal law, the Supreme Court has *never* affirmed a decision to abstain on *Burford* grounds. *See McNeese*, 373 U.S. 668 (no abstention where claims arose under the federal Equal Protection Clause); *Colorado River*, 424 U.S. 800 (no abstention where claims arose under 28 U.S.C. § 1345); *NOPSI*, 491 U.S. 350 (no abstention where claims arose under Federal Power Act).

Moreover, the Second Circuit has repeatedly emphasized that "the presence of a federal basis for jurisdiction" and the "fact that . . . only a federal claim" is presented substantially raises the level of justification required before a court may invoke *Burford*. *LILCO*, 907 F.2d 1295, 1308 (2d Cir. 1990) (citing *Holmes*, 398 F.2d at 267 and *Izzo*, 843 F.2d at 769 ("If only state law applies, *Burford* abstention carries more weight than when federal interests require evaluation as well."). Indeed, as noted by the court in *LILCO*, "the Ninth Circuit has held that the absence of a state law claim *precludes* application of the *Burford* doctrine." 907 F.2d at 1308 n.8. (emphasis added) (citing *United States v. Adair*, 723 F.2d 1394, 1402 n.5 (9th Cir. 1984) (when "all claims raised in the federal suit have their genesis in federal law . . . we find no occasion to apply *Burford* abstention")).

D. No "Coherent [State] Policy"Is Threatened

Although the Report and Recommendation did not expressly consider whether hearing Plaintiffs' federal claims would interfere at all (much less *unduly* interfere) with any New York "coherent policy," it can be read to suggest that New York's EDPL itself constitutes a "coherent policy" for *Burford* purposes. *See* Op. at 35-36. That is wrong for several reasons.

To begin with, the EDPL does not reflect any *substantive* policy of the State of New York with respect to eminent domain. As its title aptly reflects, the EDPL is entirely *procedural*. It provides that whenever the State's power of eminent domain is exercised, there shall be proper notice (§ 202), an opportunity to be heard (§§ 201, 203), an adequate record of the reasons for the use of eminent domain (§ 204), and an opportunity for judicial review (§ 207). The EDPL says absolutely nothing, however, about any underlying substantive policy that concerns the State's goals or objectives in using its power of eminent domain. No case in the Second Circuit or the Supreme Court has *ever* held that the mere existence of a specified review

procedure can, standing alone, constitute a "coherent policy with respect to a matter of substantial public concern" sufficient to trigger the second *Burford* strand. *See, e.g.*, *Bethpage*, 965 F.2d at 1243 (abstaining where federal review would interfere substantially with state law that contained eighteen regulatory sections governing the determination of medicaid reimbursement rates and the inclusion of particular costs); *Levy v. Lewis*, 635 F.2d 960, 965 (2d Cir. 1980) (abstaining where federal review would interfere unduly with New York's complex state law system for regulating and liquidating domestic insurance companies involving the adjustment of thousands of claims against the insurer by policyholders and those who claim under them, as well as claims by present employees, past employees, and general creditors).

To be sure, in *Burford* itself, the Court did observe that Texas had established a system for concentrated and uniform review of oil well spacing decisions by the regulatory commission. *See* 319 U.S. at 325-27. Importantly, however, the case did not ultimately turn on the existence of this singularly unique review procedure; to the contrary, as discussed in Section A(1), *supra*, the Court's decision to abstain was based on the desire not to interfere with the State's underlying *substantive* policy – ensuring that each oil operator was permitted to draw all of the oil from beneath the surface area of its tract but not more, a substantive policy that was both uniquely complicated and of extraordinary public importance – coupled with the fact that the legal questions presented arose under state law, not federal law, and the fact that there had been a long history of conflict between federal courts and state authorities regarding the interpretation of state law.

Indeed, to the extent that the existence of a uniform review procedure was at all relevant in *Burford*, it was relevant precisely because the Court found that Texas's judicial review procedure eliminated the possibility of conflicting interpretations of state law, even by

and among the various state courts, by concentrating review of commission decisions in a *single court* in a *single county*. *See id.* at 325-26; *see also Alabama*, 341 U.S. at 348 (state procedure provided for concentrated judicial review in a single court in a county). The Texas Supreme Court had expressly found that this singular and exclusive venue provision was crucial to prevent the "interminable confusion" that would ensue if each commission decision could be challenged in any of "the various courts and counties of the state." 319 U.S. at 326-27 (quoting *Texas Steel Co. v. Fort Worth and D.C. Ry. Co.*, 120 Tex. 597, 604 (Tex. 1931)). The United States Supreme Court agreed with the Texas Supreme Court that this concentrated review procedure was therefore necessary to enable the reviewing state court to "acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands of this field," and that "[t]he very 'confusion' which the Texas legislature and Supreme Court feared might result from review by many state courts" had resulted from the many documented instances in which federal courts had misinterpreted or misapplied Texas law in reviewing commission determinations. *Id.* at 327-28.

This important policy consideration is entirely absent in this case for two reasons. First, unlike the judicial review scheme in *Burford* and *Alabama*, the EDPL does not concentrate review of eminent domain determinations in a single court in a single county. Rather, *all four* of the Departments of the State's Appellate Division are empowered to review eminent domain determinations. *See* EDPL § 207(A). Therefore, unlike in *Burford*, no one court is acquiring any "specialized knowledge" regarding eminent domain issues, and no aspect of the EDPL serves to limit the possibility of disagreement among the various Departments with respect to the interpretation of state law. Second, and more fundamentally, the Plaintiffs' claims in this case arise under federal law, not state law. Because there is no substantive state law to be interpreted

in this case, the whole passage in *Burford* dealing with the need for a single state court to avoid conflicting interpretations of state law is entirely irrelevant. Accordingly, *Burford* does not support the strained proposition that the existence of a specified review procedure can constitute a "coherent policy with respect to a matter of substantial public concern" sufficient to trigger the second *Burford* strand.

The Magistrate Judge also erred by suggesting that it is in any way relevant to the *Burford* analysis that the EDPL purports to set forth an "exclusive procedure" for the exercise of eminent domain. *See* Op. at 35-36. To the extent that the Magistrate Judge was referring to the EDPL's exclusive procedure for *arriving* at condemnation determinations – including the procedures governing notice, public hearings, and publication of a final determinations – it suffices to observe that federal court adjudication of Plaintiffs' claims will not even arguably interfere with or upset those procedures, which all parties agree have been followed. Insofar as the Magistrate Judge was referring to the EDPL's purportedly "exclusive" *judicial review* procedure, more than a century of Supreme Court case law makes unmistakably clear that a state lacks the constitutional authority to dictate the scope of a federal court's jurisdiction even over state law claims, let alone federal claims. *See, e.g.*, *Marshall v. Marshall*, 126 S. Ct. 1735, 1749 (2006) (holding that federal jurisdiction "is determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a state statute"); *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 286 (1872) ("Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation."); *Superior Beverage Co. v. Schieffelin*, 448 F.3d 910, 917 (6th Cir. 2006) (reversing district court's decision to abstain under *Burford*, despite

the existence of a state statute purporting to vest exclusive jurisdiction in the state courts, because "a state may not deprive a federal court of jurisdiction merely by declaring in a statute that it holds exclusive jurisdiction").

But this is precisely the result recommended by the Magistrate Judge. By interpreting the EDPL as a declaration of New York State's purported desire to deprive the federal courts *entirely* of any jurisdiction to determine the legality of any decision to wield the power of eminent domain, and by bending to that alleged desire under the guise of abstaining under *Burford*, the Magistrate Judge has recommended a result that permits the New York Legislature to unilaterally eliminate the power of federal courts to hear an entire class of federal constitutional questions. The rationale of the Report and Recommendation thus turns the Supremacy Clause on its head. The promotion of federal-state comity certainly cannot justify such a result.

Because EDPL § 207(B) plainly would be unconstitutional if it were read to strip federal courts of their power to hear state or federal law challenges to eminent domain decisions, the statute's putative "exclusive" jurisdiction language hardly supports the notion that *Burford* abstention is warranted.

Nor do either of the cases cited by the Magistrate Judge support the proposition that "respect" for the state's supposed desire to "centraliz[e] its eminent domain laws" militates in favor of abstention. Op. at 36. The Third Circuit's unpublished (and non-precedential) order in *Rucci v. Cranberry Township*, 130 Fed. Appx. 572 (3rd Cir. May 11, 2005), is entirely inapposite because the plaintiffs in that case presented "purely state law challenges," and the Court was presented with no federal claims at all.

Insofar as *Coles v. City of Philadelphia*, 145 F. Supp. 2d 646 (E.D. Pa. 2001), held that abstention under *Burford* is required whenever a federal court is faced with a constitutional challenge to the use of eminent domain and a state statute provides "a complete and exclusive procedure and law to govern all condemnations of property for public purposes" – it simply is wrongly decided.

In *Coles,* the court's entire explication of the law concerning *Burford* abstention was the following two sentences: "*Burford* abstention . . . is appropriate where a difficult question of state law is presented which involves important state policies or administrative concerns." 145 F. Supp. 2d at 651 (citing *Heritage Farms, Inc. v. Solsbury Township*, 671 F.2d 743, 746 (3d Cir. 1982)). Under *Burford*, "a federal court may abstain to avoid disrupting efforts of a state to establish a coherent policy with respect to a matter of substantial public concern." *Id.* (internal quotation marks and citations omitted). That's it. The court in *Coles* then followed its notably thin statement of the law by applying it to the plaintiffs' claims.

First, the court held that there are "significant state policies and administrative concerns underlying a state's eminent domain proceedings." *Id.* at 652. The court cited *Thibodaux* for this proposition, but completely ignored the Supreme Court's controlling opinion in *Allegheny.*

Second, the court observed that Pennsylvania law provides a "complete and exclusive procedure to govern all condemnations of property for public purposes and the assessment of damages therefor," which "fully protects the rights of the property owner and guarantees to him the constitutional safeguards to which he is entitled, including appropriate appellate review." *Id.* The court then held that it would exercise its discretion and "abstain under *Burford* to avoid disrupting the efforts of the Commonwealth of Pennsylvania to establish

a coherent policy with respect to a matter of substantial public concern." *Id.* (internal quotation marks and quotations omitted).

Finally, the court boldly proclaimed in a footnote that its holding was in accord "with those of many of the other federal courts which have been confronted with these *identical* issues." *Id.* at 652 n.3 (emphasis supplied). This proclamation is false. Not a single case cited in footnote 3 in *Coles* involved a federal court abstaining under *Burford* from hearing a Public Use clause challenge to a physical taking.[4]

It is no small irony that the lone Third Circuit case relied on by the district court in *Coles – Heritage Farms*, 671 F.2d 743 (3rd Cir. 1982) – actually *reversed* a district court for abstaining under *Burford*. The Third Circuit reversed because the Pennsylvania Municipal Planning Code, which "embodies Pennsylvania's policies and general rules concerning municipal land development," does "not involve the type of uniform and elaborate statewide regulation as was adopted by the Sate of Texas to govern the drilling of oil wells in *Burford*." Id. at 747. The Third Circuit found that there was "no danger that federal court decision in this case will disrupt Pennsylvania's policies or plans with respect to land use" because it was not the "policies embodied in the Municipal Planning Code [that were] being attacked" but rather the "application

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[4] The court cited *Frempong-Atuahene v. Redevelopment Auth. of the City of Philadelphia*, No. 98-0285, 1999 WL 167726, at *3 (E.D. Pa. Mar. 25, 1999), and *Eddystone Equipment and Rental Corp. v. Redevelopment Authority of the County of Delaware*, No. 87-8246, 1998 WL 52082, at *1 (E.D. Pa. May 17, 1998), in support of this proclamation. In *Frempong-Atuahene*, the court dismissed an action on ripeness grounds, relying on *Eddystone*. In *Eddystone*, the court dismissed the action as unripe, relying erroneously on *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-94 (1985) – which has no applicability to challenges to physical takings under the Public Use Clause. As set forth in footnote 3 in *Coles*, the *Eddystone* court, in turn, cited a number of cases for the proposition that "federal courts presented with actions of this kind have almost uniformly dismissed them." Again, however, none of the cases referenced actually involved a court abstaining under *Burford* in circumstances like those presented in this case or in *Coles*.

of those policies" by individuals who are charged with having "used their governmental offices to further an illegal conspiracy to destroy plaintiffs' constitutional rights." *Id.* at 747-48. Given the Circuit's express and emphatic conclusion that "*Burford* abstention has no place in this case," id. at 748, *Coles*' reliance on *Heritage Farms* is bizarre.

That same irony is only heightened when one considers that the court in *Coles* relied on *Thibodaux* – a Supreme Court case involving unsettled *Louisiana* state law regarding the power to condemn property – for the proposition that eminent domain proceedings implicate significant state policies. Yet *Coles* completely ignored *Allegheny* – a Supreme Court case from *Pennsylvania* (its own home state) holding squarely that it was perfectly appropriate for a federal district court in Pennsylvania to adjudicate whether a taking violated public use requirements under state law.[5]

For each of these reasons, *Coles* is sorely misguided and should not be followed.

E. The "Degree of Specificity" of the EDPL Does Not Support Abstention

In concluding that the "degree of specificity" factor weighs in favor of abstention, the Magistrate Judge said no more than that the EDPL "sets forth a highly specific and comprehensive mechanism for condemnees to challenge" the use of eminent domain. Op. at 35. It is far from apparent, however, which aspects of the EDPL judicial review procedure the court was referring to. There is nothing unusually complicated about the EDPL judicial review procedure spelled out in section 207, which does no more than describe in simple terms the basic filing procedure and the scope of available review. *See Minnich v. Gargano*, No. 00-CV-7481,

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[5] It bears emphasis that the state court avenue for judicial review of eminent domain determinations in Pennsylvania is far more extensive than in New York. *See Pennsylvania Department of Transportation v. Montgomery Township*, 655 A.2d 1086, 1088 (Comm. Court of Pa. 1995) (explaining statutory procedure for conducting discovery and taking evidence).

2001 WL 46989, at *5 (S.D.N.Y. Jan. 18, 2001) (refusing to apply *Burford* abstention to a condemnation proceeding and holding that the "degree of specificity" factor "cuts in favor of the plaintiffs" because the EDPL is "not unduly complex"), *rev'd on other grounds*, 261 F.3d 288 (2d Cir. 2001).

More fundamentally, the presence of a highly complex and specific scheme, absent more, cannot justify abstention under *Burford*. *See LILCO*, 907 F.2d at 1309 ("In this case, other than the *sine qua non* of an intricate state administrative scheme, inquiry reveals no other factor supportive of abstention. . . . In sum, we believe that to abstain under these circumstances would, contrary to the Supreme Court's repeated direction, make abstention too much the rule and too little the exception") (internal quotations and citations omitted). As the Second Circuit explained in *Hachamovitch v. DeBuono*, 159 F.3d 687 (2d Cir. 1998), the "degree of specificity" issue is somewhat of a misnomer, because rather than simply looking at the extent to which the given regulatory scheme is specific, it "focuses more on the extent to which the federal claim requires the federal court to *meddle* in a complex state scheme." *Id.* at 697 (emphasis in original); *see also Dittmer*, 146 F.3d at 117 ("*Burford* is concerned with protecting complex state administrative processes from undue federal interference[;] it does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy.") (citing *NOPSI*, 491 U.S. at 362).

Here, adjudicating Plaintiffs' Public Use Clause claim would not "meddle" with the "values" that would "shape [the] outcome" of a section 207 proceeding. After all, section 207(C)(1) expressly contemplates challenges to condemnation determinations brought under the federal constitution. Indeed, section 207(C)(4) expressly contemplates challenges on the specific ground that no "public use, benefit or purpose will be served by the proposed acquisition."

Given that the New York Legislature expressly invited condemnees to assert federal Public Use Clause claims challenging the use of eminent domain, it cannot be that the mere act of permitting Plaintiffs' to air such claims in a federal – rather than state – forum would impermissibly "meddle" with state affairs.

F. Plaintiffs' Federal Constitutional Rights Outweigh Any State Policy or Interest

Even assuming that adjudicating Plaintiffs' claims could somehow be viewed as having the potential to unduly interfere with a "coherent policy" on the part of New York with respect to eminent domain – which, as discussed above, it would not – *Burford* abstention still would not be warranted. It is axiomatic, after all, that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978) (rejecting argument that *Burford* abstention applied).

As the Second Circuit put it in *Hachamovitch*, "numerous cases have indicated that *Burford* abstention is not required even in cases where the state has a substantial interest if the state's regulations violate the federal constitution." 159 F.3d at 698; *see also Colorado River*, 424 U.S. at 816 ("[T]he mere potential for conflict in the results of adjudications does not, without more, warrant staying the exercise of federal jurisdiction."); *Dittmer*, 146 F.3d at 117 (federal court involvement "in *Burford* was undue or inappropriate because the plaintiffs sought federal review (on largely state law claims)" and "as the Court has explained, '[t]he constitutional challenge [in *Burford*] was of minimal federal importance, involving solely the question of whether the commission had properly applied Texas' complex oil and gas conservation regulations") (quoting *NOPSI*, 491 U.S. at 360); *Alliance of American Insurers v.*

Cuomo, 854 F.2d 591, 601 (2d Cir. 1988) ("The state has no right to an unconstitutional policy, coherent or otherwise."); *LILCO*, 907 F.2d at 1308 (holding that "the presence of a federal basis for jurisdiction" and the "fact that . . . *only* a federal claim" is presented "raises the level of justification [required for invoking *Burford*] even more"); *Minnich*, 2001 WL 46989, at *5 (*Burford* abstention inappropriate because the issues presented "are overriding issues of federal constitutional concern"). Whatever interest the state allegedly has in preserving the sanctity of its eminent domain scheme, that interest plainly is outweighed by Plaintiffs' right to have a federal court hear their fundamental and weighty Public Use, Due Process, and Equal Protection Clause claims.

The Magistrate Judge sidestepped this well-established case law by attempting to draw a distinction between facial and as-applied constitutional claims, holding that *Burford* is inapplicable only in cases where a plaintiff lodges a "direct facial challenge" to the state's regulatory scheme. Op. at 38 n.29. This makes little sense. A facial challenge to the EDPL – one alleging that New York is powerless to enforce its eminent domain procedures *at all* – certainly would do *more* violence to federal-state comity than Plaintiffs' claims in this case, which acknowledge the state's generally broad authority to condemn property, and which merely allege that New York crossed the constitutional line *in this particular case*. And although the Magistrate Judge is correct that the constitutional challenges in *Minnich* and *Dittmer* were described as facial – or, as the district court in *Dittmer* put it, "nominally facial," 975 F. Supp. at 443 – the facial versus as-applied distinction has no significance for *Burford* purposes. *See G. & A. Books, Inc. v. Stern*, 604 F. Supp. 898, 906 (S.D.N.Y. 1985) (declining to abstain under *Burford* in as-applied federal constitutional challenge to ESDC's eminent domain findings under the EDPL "because rather than seeking to interfere with a comprehensive state regulatory scheme

and embroil the federal court in local matters by substituting federal judgment for local processes, here the federal court is being asked to intervene on behalf of an overarching constitutional right"), *aff'd*, 770 F.2d 288 (2d Cir. 1985). Surely there is no basis to conclude that adjudicating the "as- applied" constitutional challenge presented in this case will "meddle" with state affairs any more than the "as-applied" challenge considered in *G. & A. Books*.

G. Eminent Domain Cases Are Not Fertile Ground for *Burford* Abstention

The Magistrate Judge held that *Burford* abstention is warranted in large part because "eminent domain is traditionally a matter of local concern." Op. at 36-38. This holding cannot be reconciled with a United States Supreme Court case squarely on point, which makes unmistakably clear that the unremarkable fact that eminent domain issues impact local concerns does not, in and of itself, justify *Burford* abstention.

The plaintiffs in *Allegheny*, 360 U.S. 185, claimed that the taking of their land was unconstitutional because it served no public use. The Supreme Court directly confronted, and expressly rejected, the argument that *Burford* abstention is especially appropriate in eminent domain cases:

> [T]he fact that a case concerns a State's power of eminent domain no more justified abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is not more mystically involved with "sovereign prerogative" than [the] host of other governmental activities carried on by the State and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law. Furthermore, the federal courts have been adjudicating cases involving issues of state eminent domain law for many years, without any suggestion that there was entailed a hazard of friction in federal-state relations.

Id. at 191-92; *see also id.* at 192-96 (discussing approvingly the extensive history of federal court adjudication of eminent domain cases, and concluding that "[i]t is now settled practice for

Federal District Courts to decide state condemnation proceedings"). *Allegheny* lays to rest any suggestion that *Burford* abstention is warranted because "eminent domain is traditionally a matter of local concern." The Magistrate Judge did not mention it.

With respect to the cases that the Magistrate Judge did cite, none of them supports his erroneous conclusion. As discussed in Section A(1), *Thibodaux*, 360 U.S. 25, found abstention appropriate not because it was an eminent domain case, but rather because the case arose under state law, not federal law, and because the core state law question was entirely unsettled. So too with *Emery Redevelopment Agcy. v. Clear Channel Outdoor*, No. 06-C-01279, 2006 WL 1390561 (N.D. Cal. May 22, 2006). Three of the cases cited by the Magistrate Judge abstained under *Younger* and said nothing whatsoever about *Burford*. *See Mateo v. Phillips*, 361 F. Supp. 2d 328 (S.D.N.Y. 2005); *Broadway 41st Street Realty Corp. v. New York State Urban Development Corp.*, 733 F. Supp. 735 (S.D.N.Y. 1990); *Dash v. Frech*, No. 88-C-5001, 1989 WL 75422 (N.D. Ill. June 20, 1989). One was a ripeness case, not an abstention case, that was dismissed because the state condemnation proceedings were still pending. *See Frempong-Atuahene v. Redevelopment Auth. of the City of Philadelphia*, No. 98-0285, 1999 WL 167726 (E.D. Pa. Mar. 25, 1999). And one was a personal jurisdiction case that had nothing to do with abstention at all. *See Dickie v. City of Tomah*, 782 F. Supp. 370 (N.D. Ill. 1991).

None of these cases supports the proposition, squarely rejected by the Supreme Court in *Allegheny*, that *Burford* abstention applies condemnation cases simply because "eminent domain is traditionally a matter of local concern."

H. EDPL § 207 Does Not Provide An Adequate Alternative Forum

As the Magistrate Judge correctly recognized in *Feiwus*, 43 F. Supp. 2d at 294-95, the availability of an adequate state court forum is a "condition precedent" to *Burford* abstention.

There can be little doubt, however, that the extremely narrow review procedure provided for in EDPL § 207 is not an "adequate" alternative for *Burford* purposes.

Like 42 U.S.C. § 1983 and 28 U.S.C. § 1343, EDPL § 207 allows a person aggrieved by an agency's condemnation determination to sue that agency in the New York State appellate courts for violations of their federal constitutional rights. The similarities end there.

Whereas Plaintiffs in this case sued dozens of Defendants responsible for violating their federal constitutional rights, they can sue only the ESDC in an EDPL § 207 proceeding. There is no right to discovery in an EDPL § 207 proceeding. There is no right to a trial or evidentiary hearing concerning disputed material facts. The narrow appellate court review is restricted to the self-serving record created by the agency accused of misconduct. Compensatory damages are unavailable. Injunctive relief cannot be obtained. Declaratory relief is also unavailable. Punitive damages are prohibited. Plaintiffs must pay for their own attorneys' fees if they prevail.

If this Court abstains under these circumstances, it will effectively repeal, at least for Plaintiffs' purposes, no fewer than six acts of Congress requiring that a federal forum be made available in cases such as this one: 28 U.S.C. § 1343 (providing for federal court jurisdiction to "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States"); 42 U.S.C. § 1983 (providing private right of action to vindicate violations of Constitutional and other federal rights); 42 U.S.C. § 1988 (providing for recovery of attorneys' fees to prevailing plaintiffs under 42 U.S.C. § 1983); 28 U.S.C. § 1331 (providing for federal question jurisdiction); 28 U.S.C. § 2201 (Declaratory Judgment Act); and 28 U.S.C. § 1367 (supplemental jurisdiction).

As the Magistrate Judge aptly observed, "under the EDPL, the [condemning authority] holds nearly all the cards, with any aggrieved party having little right to participate in the initial determination and limited right to judicial relief thereafter." Op. at 39 n.31 (quoting *Buffalo S. R.R. Inc. v. Vill. of Croton-on-Hudson*, 434 F. Supp. 2d 241, 254 (S.D.N.Y. 2006)).

Indeed, the irony of the Report and Recommendation is that, far from holding that EDPL § 207 provides an adequate alternative forum, it holds *precisely the opposite*. The gravamen of the Magistrate Judge's logic is that judicial review under the EDPL is so *inadequate* that nobody in his or her right mind would ever resort to it if federal court is an available forum. *See* Op. at 39 ("No prospective condemnee, given the choice, would opt for narrow, on-the-record (yet constitutionally adequate) review in the Appellate Division if all the benefits of federal review were freely available.").

The Magistrate Judge's concern about "forum shopping" turns well-established *Burford* analysis squarely on its head. No case has *ever* held that the narrowness of state court judicial review cuts in *favor* of *Burford* abstention. Very much to the contrary, the Supreme Court has made clear that *Burford* abstention is appropriate *only* where, unlike here, the state's judicial review procedure provides litigants with a full panoply of procedural rights. *See, e.g.*, *Burford*, 319 U.S. at 325-26 (discussing Texas's "thorough judicial review" procedure, which afforded litigants the opportunity for full "trial de novo before the court").

Indeed, litigants routinely weigh the relative advantages and disadvantages of filing in state versus federal court in countless different contexts, but no case has ever held that the existence of incentives for wise forum selection implicates *Burford*. To take just one of many examples, New York employment discrimination plaintiffs tend to bring their Title VII claims and their state and local Human Rights Law claims in federal court rather than state court

for a variety of reasons, including that discovery tends to be more broad, that time-consuming interlocutory appeals are unavailable, and that the Seventh Amendment's Re-Examination Clause, which limits the extent to which courts are empowered to interfere with facts found by a jury, including damage awards, applies in federal court, but not state court.[6]

So too with police misconduct plaintiffs, who tend to bring their federal section 1983 claims and their state law false arrest and assault and battery claims in federal court for these same reasons. Yet no case has *ever* suggested that federal courts should abstain under *Burford* from hearing employment discrimination or police misconduct claims merely because there are, for better or worse, commonly perceived incentives for plaintiffs to bring those claims in federal court, thus avoiding a detailed state system of administrative and judicial review. To the contrary, the whole point of *Burford* is that where incentives for responsible forum selection *do* exist – because the state forum is substantially less favorable to the plaintiff than the federal forum – abstention is *not* appropriate.[7]

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[6] The implication of the Magistrate Judge's recommendation is that the only thing standing between the *status quo* and wholesale federal court abstention in all employment discrimination cases – even those arising solely under federal law – is an act of the New York Legislature providing that New York courts shall have "exclusive jurisdiction" over employment discrimination claims. If the Magistrate Judge's recommendation is accepted, such a statement by the New York Legislature, combined with the existing highly specific and detailed state law mechanisms for resolution of employment discrimination claims through the state Human Rights Commission, including judicial review, would mean that federal courts would be bound to declare a moratorium on enforcing Title VII in deference to state wishes.

[7] Pages 39-41 of the Report and Recommendation are unclear. They begin with the uncontroversial proposition that it is not relevant for *Burford* purposes whether Plaintiffs are parties to a section 207 proceeding that is currently pending in state court. We agree. We likewise agree that a section 207 proceeding will be available to Plaintiffs if this Court abstains under *Burford*. The rest of the opinion – its discussion of *Didden*, and its suggestion that Plaintiffs somehow "bootstrapp[ed]" their section 207 claims onto their federal claims – makes no sense, especially in light of the entirely correct premise that it does not matter for *Burford* purposes whether (and where) a state law proceeding is pending. Moreover, although we agree

(continued...)

I. Plaintiffs' Constitutional Claims Are Not Discretionary

Finally, *Burford* abstention applies only to claims that are inherently subject to a federal court's "discretion" and is "completely inapplicable in damages actions." *Quackenbush*, 517 U.S. at 728-31. Here, the relief Plaintiffs seek – which includes compensatory and punitive damages under section 1983, attorneys' fees under section 1988, and a declaration that their constitutional rights were violated – is, at least in substantial part, not subject to judicial "discretion." *Burford* abstention is unwarranted for this reason alone.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Magistrate Judge erred in recommending that the Court abstain from hearing Plaintiffs' claims under *Burford*. Defendants' motion to dismiss should be denied.

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[7](...continued)
that this Court has discretion to decline to exercise jurisdiction over Plaintiffs' supplemental section 207 claim if Plaintiffs' federal claims are dismissed under *Burford*, that says nothing at all about whether dismissal of the federal claims under *Burford* is warranted in the first instance.

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