



## New Jersey Loses Challenge to PennEast Pipeline Land Grab

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Upholding a law that has been the key to the development of natural gas pipelines for 80 years, the U.S. Supreme Court served defeat Tuesday to New Jersey in its challenge of a 116-mile natural gas pipeline project that would link Garden State processing operations to Pennsylvania's resource-rich hills.

PennEast applied to the Federal Energy Regulatory Commission to build the project in 2015. Though the commission known as FERC certified it to take land along the planned route under the Natural Gas Act's eminent domain powers, New Jersey refused to turn the land over, leading PennEast to pursue condemnation actions pertaining to 42 of the 49 sites.

New Jersey argues companies like PennEast are barred under the 11th Amendment from condemning property through eminent domain if a state holds any type of interest in that property. The state lost in district court, but the Third Circuit reversed — a decision the three-judge panel conceded “may disrupt how the natural gas industry” has operated for the past 80 years.

Represented by Kirkland Ellis attorney Paul Clement, PennEast petitioned the U.S. Supreme Court for a reversal. New Jersey argued in response that the land at issue holds “recreational, conservation, and/or agricultural uses.” It also claimed the company failed to try to negotiate the land taking and instead went straight to federal court.

During Supreme Court oral arguments in April, the justices turned again and again to how the Founding Fathers would understand the role private companies have in executing a taking of land.

Writing for the court's 5-4 majority Tuesday, Chief Justice John Roberts found that the federal government can constitutionally pass the authority to condemn state-owned land to companies like PennEast.

“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,” Roberts wrote. “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.”

But in continuing this term's trend of liberal and conservative justices joining atypical lineups, Justice Amy Coney Barrett joined with Justices Clarence Thomas, Elena Kagan and Neil Gorsuch in a dissent condemning the wide breadth the majority gave to the controversial energy law.

"Congress passed the Natural Gas Act in reliance on its power to regulate interstate commerce, and we have repeatedly held that the Commerce Clause does not permit Congress to strip the states of their sovereign immunity. Recognizing that barrier, the court insists that eminent domain is a special case," Barrett wrote.

The dissenting justices rejected the majority's finding that New Jersey cannot assert sovereign immunity because states surrendered to private condemnation cases all the way back at the 1787 Constitutional Convention.

"This argument has no textual, structural, or historical support," Barrett wrote. "Because there is no reason to treat private condemnation suits differently from any other cause of action created pursuant to the Commerce Clause, I respectfully dissent."

Anthony Cox, chair of the PennEast Board of Managers, applauded the majority's decision, noting the ruling keeps intact more than seven decades of legal authority under the 1938 Natural Gas Act.

"This decision is about more than just the PennEast project; it protects consumers who rely on infrastructure projects – found to be in the public benefit after thorough scientific and environmental reviews – from being denied access to much-needed energy by narrow state political interests," Cox said in a statement, suggesting the decision could allow for swift fixes for energy crisis in other states like California and Texas despite state pushback.

New Jersey Attorney General Gurbir Grewal, a Democrat, took to Twitter to express disappointment with the state's loss.

"I'm proud to continue standing up for our residents & championing environmental protection," he tweeted. "I urge the feds to take another look at this harmful proposal."

Tom Gilbert, campaign director for New Jersey Conservation Foundation and ReThink Energy NJ, similarly condemned the reversal of the Third Circuit's ruling in the state's favor. His group was among the organizations that joined the state in the dispute.

"The PennEast pipeline would threaten the health and safety of our communities, seize private land and taxpayer-preserved open space, and harm our drinking water, natural and historic resources," he said in a statement.

Jennifer Danis, senior fellow at Columbia Law School's Sabin Center for Climate Change Law, represented Gilbert's group at the high court and was similarly dismayed by the decision.

"This result was achieved because it was the gas industry on the line," she said, arguing the lack of precedent cited by the majority suggests the interest was in preserving the nation's energy economy and not legal principles.

But she also noted most disputes linked to gas pipelines aren't usually gummed up by immunity disputes, but rather challenges to the FERC permits which allow of a project to be built. To that

end she pointed to the D.C. Circuit's recent decision on the St. Louis-based Spire Pipeline permit as evidence of the ongoing challenges pipeline companies and the commission might face.

"Recent precedent in *Spire* would tend to indicate the project and the agency's decision making is subject to heavy criticism," she added, noting that despite being up and running, the appeals court vacated the pipeline's permit and sent it back to FERC to be reauthorized.

Danis also noted the unusual makeup of the two sides in Tuesday's decision, calling it "a strange constellation of justices."

"I don't think this case ever broke down on liberal or conservative lines, it was interesting for that reason," she said.

Ilya Shapiro, vice president of the libertarian Cato Institute, was similarly uneasy about the high court's decision. The think tank struggled with the case's unique matchup of private versus state authority.

"I'm still not sure who's right," Shapiro said in an email. He too pointed to the strange bedfellows in the court's majority and minority, but still praised the justices for not being "junior legislators" by rolling back the Natural Gas Act.

"Even important legal questions about balancing federal and state power, and the scope of property rights, don't necessarily break down on political lines," he said.

As for the future of the PennEast pipeline, New Jersey's attorney general is hopeful the D.C. Circuit's *Spire* decision, and another pending appeal by the state challenging the permit, will grind it to a halt.

"We still have other, ongoing legal challenges to this proposed pipeline, which is unnecessary and would be destructive to New Jersey lands," Grewal said in a statement. "I am proud to continue this fight on behalf of our residents, and I urge the federal government to take another look at this harmful proposal."