

OIL AND GAS

## Supreme Court questions pipeline's land grab

Niina H. Farah, E&E News reporter • Published: Thursday, April 29, 2021



Supreme Court justices heard oral arguments yesterday in a high-profile case with potential implications for a private company's ability to use eminent domain rights to seize state-owned land for pipeline construction. Francis Chung/E&E News

The Supreme Court yesterday appeared sympathetic to New Jersey's arguments that it should be able to block a pipeline company's access to state-owned land but questioned the ripple effects of a ruling in the Garden State's favor on the natural gas industry.

During virtual oral argument in *PennEast Pipeline Co. LLC v. New Jersey*, some of the court's conservative justices pushed back on arguments by the developer of a \$1 billion natural gas pipeline that it had the authority to sue the state against its will to seize 42 parcels of land for the project.

At issue in the case is a 2019 ruling by the 3rd U.S. Circuit Court of Appeals that said the Natural Gas Act (NGA), which allows the government to delegate its eminent domain power to private companies, does not authorize pipeline builders to haul states to federal court to sue for access to their land.

"I don't see any historical support for the proposition that a state could be sued by a private party ... standing in the stead of the federal government's eminent domain power," said Justice Amy Coney Barrett.

The ruling halted work on PennEast's 116-mile pipeline, which would carry natural gas from Pennsylvania to customers in New Jersey.

PennEast's condemnation proceeding violated New Jersey's "sovereign immunity" under the 11th Amendment of the Constitution, which protects states from being sued against their will by private companies in federal court, the 3rd Circuit found.

Both the pipeline developer and the Biden administration warned of broader repercussions to the natural gas industry if the 3rd Circuit's decision stands.

They say their position is consistent with historical readings of the Constitution and NGA.

Short of action by Congress to amend NGA, PennEast could not continue construction "in its current configuration" if the company loses its Supreme Court case, said Paul Clement, a partner at the firm Kirkland & Ellis LLP.

Justice Samuel Alito challenged Clement's assertion that states had known in the early days of the nation's history that they were subject to condemnation actions by private properties for federally approved projects.

"Would it not be entirely reasonable for a state to think that we are giving up immunity by the U.S., but we don't think we are necessarily giving up sovereign immunity with respect to delegee?" Alito asked.

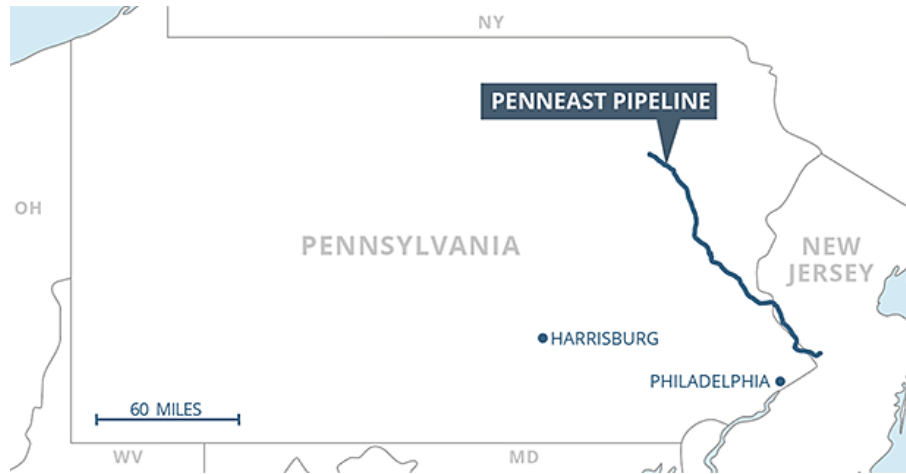
But Justice Stephen Breyer appeared swayed by the argument that the 3rd Circuit's ruling undermines the intent of NGA to be used to condemn state land. He noted that the federal government would not have been able to

build interstate natural gas pipelines in the mid-20th century without that authority.

When asked by Breyer about the broader implications of the case on the nation's current pipeline network, Deputy Solicitor General Edwin Kneeder of the Justice Department pointed to possible concerns over projects with time-limited easements, which he said states may choose to terminate in light of the 3rd Circuit ruling.

"In that situation," Kneeder said, "the court's decision could have an impact on existing pipelines."

### Which court?



[+] PennEast pipeline. Claudine Hellmuth/E&E News

The Supreme Court spent little time on DOJ's argument that New Jersey should have first raised its sovereign immunity claim in proceedings before the Federal Energy Regulatory Commission, which approves natural gas pipelines.

The matter would have then moved to the U.S. Court of Appeals for the District of Columbia Circuit, or to a federal appeals court where the project is being built, DOJ said.

"It does seem strange to require a state to initiate litigation in one court to invoke sovereign immunity in another," said Justice Sonia Sotomayor. "How does that make sense?"

Clement argued on behalf of PennEast that sovereign immunity does not apply in this case because the pipeline company brought the condemnation proceeding against property within the state and not against the state itself.

DOJ did not go quite as far, acknowledging under questioning from the justices that condemnation was a suit against the state but under very specific circumstances.

"It's not our position that sovereign immunity doesn't apply at all," said Kneeder.

The DOJ attorney agreed with the suggestion that PennEast was a "limited purpose federal actor."

"A lot of labels are used, but basically the Constitution allows a private property to exercise eminent domain," Kneeder said in response to questioning from Justice Clarence Thomas.

### A bigger role for FERC?

The justices also wrestled with the role of the federal government in condemnation proceedings and asked whether there was a way to more closely involve FERC should PennEast lose the case.

"Why don't you have a federal official join the court and say it is proceeding along with PennEast?" Chief Justice John Roberts asked DOJ.

For FERC to do that, there would have to be an amendment to the statute, said Kneeder.

Clement said FERC is responsible for approving the route of the pipeline and for fielding public comment on project proposals. It can even have a say in when a pipeline developer can go to court for condemnation proceedings, he added.

"All of that is in their control, but FERC isn't sitting over their shoulder in the district court action," he said.

New Jersey State Solicitor Jeremy Feigenbaum said it is unfair for a private company like PennEast to bring the state to court because it does not have to negotiate for property in good faith in the same way that the federal government does. He said PennEast had moved swiftly to take state-held property, even before other issues around the final route of the pipeline were resolved.

The state has argued that the lack of clear and explicit language in NGA meant that the statute did not override New Jersey's 11th Amendment protections.

Feigenbaum added that a ruling for New Jersey had the potential to put natural gas pipelines on the same footing as oil pipelines and transmission lines, which have builders who do not enjoy the same eminent domain authority as natural gas project developers.

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He added that even with the 3rd Circuit decision, New Jersey had continued to approve other natural gas infrastructure, even if it had not wanted PennEast.

"All of the consequences can be remedied by Congress," Feigenbaum said.

## Expectations

Observers of yesterday's proceedings noted the difficulty of predicting outcomes based on Supreme Court oral arguments.

"It's hard to guess at the outcome from the questions here," said Robert McNamara, senior attorney with the Institute for Justice, which filed a "friend of the court" brief on behalf of New Jersey in *PennEast*.

But he noted the justices did not seem to be interested in the jurisdictional arguments raised by DOJ.

"For my money, this case is a win for property rights if it is resolved on the merits, no matter who wins," McNamara wrote in an email.

Matt Littleton, an attorney for the New Jersey Conservation Foundation, said that the justices each came to the argument with different perspectives but did not coalesce around a single line of questioning, making it harder to speculate about the court's position.

The pipeline developer expressed confidence that the Supreme Court would rule in its favor.

"PennEast's position has received support from diverse groups representing labor, the business community and other consumer interests, in addition to bipartisan support across two administrations representing the official position of the U.S. Government," wrote pipeline spokesperson Pat Kornick in an email.

Victoria Kush, counsel of record for the Consumer Energy Alliance, which wrote an amicus brief in support of PennEast, also projected cautious optimism.

"PennEast correctly emphasized that it is an oxymoron for a sovereign immunity defense to be used by a state against a superior sovereign," Kush said in a statement. "It is our hope that the Justices will not disturb the historical delegability of federal eminent domain authority and issue a decision in favor of PennEast."

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