



Jul 09, 2021

Categories:

[Publications](#)

Authors:

[Shannon L. Rutherford](#)

SCOTUS: Pipeline's Eminent Domain Trumps Sovereign Immunity Claims

On June 29, 2021, the Supreme Court issued a significant decision for companies that hold a certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission ("FERC") pursuant to Section 717f(h) of the Natural Gas Act ("NGA"). In *PennEast Pipeline Co., LLC v. New Jersey*, the Court held that a certificate of public convenience and necessity issued by the FERC pursuant to Section 717f(h) of the NGA authorizes a private company to condemn all necessary rights-of-way, whether owned by private parties or states.¹ This 5-4 decision with Chief Justice John Roberts writing for the majority reversing the Third Circuit significantly impacts a certificate holder's ability to condemn property in order to construct interstate pipelines.

FERC granted PennEast Pipeline Co. ("PennEast") a certificate of public convenience and necessity, pursuant to 15 U. S. C. § 717f(e), authorizing construction of a 116-mile pipeline from Pennsylvania to New Jersey. PennEast filed complaints in the Federal District Court in New Jersey seeking to exercise its federal eminent domain power under Section 717f(h) of the NGA to obtain rights-of-way along the pipeline route approved by the FERC. PennEast sought to condemn parcels of land in which either New Jersey or the New Jersey Conservation Foundation asserted a property interest. New Jersey moved to dismiss PennEast's complaints on sovereign immunity grounds arguing, among other things, that sovereign immunity bars condemnation actions against a nonconsenting state.²

The District Court denied the motion holding that New Jersey was not immune from PennEast's exercise of eminent domain delegated by the federal government through the NGA and granted PennEast's requests for a condemnation order and preliminary injunctive relief. The Third Circuit, however, vacated the District Court's order granting relief to PennEast with respect to New Jersey's property interest, and concluded that Section 717f(h) of the NGA did not clearly delegate to certificate holders their ability to sue to condemn property held by nonconsenting states.³

The Supreme Court considered several arguments.⁴ The most significant questions the Court considered were the merits of whether sovereign immunity was an available defense for New Jersey to resist PennEast's condemnation proceedings and whether the federal government could delegate its eminent domain authority to private parties.

The Court began with a discussion of the scope of federal eminent domain power and the evolution of that power.⁵ The Court noted that the federal government has long "exercised its eminent domain authority through both its own officers and private delegates[.]" and that the power has evolved to where it is able to "take property interests held by both individuals and States."⁶ Specifically, the Court rejected New Jersey's argument that there is "no constitutional mechanism for Federal Government delegates to exercise the eminent domain power against the States[.]" and stated that "[a]n eminent domain power that is incapable of being exercised amounts to no eminent domain power at all."⁷

Next, the Court recognized there is a long history of delegation. The NGA expressly authorizes private certificate holders to institute condemnation proceedings against private parties and states. The Court stated that states do have immunity and can only be sued in limited circumstances; however, one of the limited circumstances is where the state has implicitly agreed to suit in the "plan of the Convention[.]" (which is shorthand for "the structure of the original Constitution itself"), even if the state does not "consent" to the suit. The Court determined that "the States consented in the plan of the Convention to the exercise of federal eminent domain power, including condemnation proceedings brought by private delegates." Hence, the Court held that the condemnation action does not offend state sovereignty because the states consented at their founding to the exercise of the federal eminent domain power by either public officials or private delegates.⁸

Dissenting, Justice Amy Coney Barrett argued the appropriate analysis started with the Commerce Clause because Congress enacted the NGA by reliance on its power to regulate interstate commerce, and the Court has "repeatedly held that the Commerce Clause does not strip the States of their sovereign immunity."⁹

Justice Neil Gorsuch, joined by Justice Clarence Thomas, while joining Justice Barrett's dissent in full, authored a separate dissent, which is noteworthy because it previews an argument, which New Jersey will no doubt assert on remand. Justice Gorsuch argued that states enjoy two distinct types of federal immunities from suit. The first type of immunity he described as "structural immunity," which is based on the structure of the Constitution and "sounds in personal jurisdiction," so it can be waived.¹⁰ The other type of sovereign immunity, however, derives from the text of the 11th Amendment. According to Justice Gorsuch, it "provides an ironclad rule for a particular category of diversity suits," and the "text means what it says [because] [i]t eliminates federal judicial power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs."¹¹ Justice Gorsuch noted this 11th Amendment immunity may bar PennEast's suit, and that even though the parties may not have explicitly considered the immunity granted by the 11th Amendment, "[t]he lower courts [] have an obligation to consider this issue on remand before proceeding to the merits."¹²

The Court's ruling in *PennEast Pipeline Co.* has a potentially widespread impact on the oil and gas industry by opening the door to private companies holding a certificate of public convenience and necessity from the FERC pursuant to Section 717f(h) of the NGA to condemn property held by a state.

For more information please contact [Shannon Rutherford](#) or any attorney in Frost Brown Todd's [Energy](#) industry team.

¹ *PennEast Pipeline Co., LLC v. New Jersey*, No. 19-1039, 2021 WL 2653262, at *1 (U.S. June 29, 2021).

² *Id.*

³ *Id.* at **1, 6.

⁴ Only the most significant holdings will be discussed in detail. The Court also discussed in brief detail that the NGA's exclusive jurisdiction provision was not triggered because New Jersey did not seek to modify nor set aside the FERC order. *Id.* at *7. Additionally, the Court noted there was no requirement that Congress must speak with "unmistakable clarity" when it empowers a private party to exercise federal eminent domain power. *Id.* at *13.

⁵ *Id.* at *7–9.

⁶ *Id.* at *7.

⁷ *Id.* at *12.

⁸ *Id.* at *10. The Court briefly mentions the 11th Amendment, which it has long understood as a “personal privilege” and may be waived by a consenting state. Here, that consent is “inherent in the constitutional plan.” *Id.* at *13.

⁹ *Id.* at *16 (“[T]he Commerce Clause itself abrogate state sovereign immunity Therefore, Congress cannot enable a private party like PennEast to institute a condemnation action against a nonconsenting State like New Jersey.”).

¹⁰ *Id.* at *14.

¹¹ *Id.* at *15.

¹² *Id.* (noting that the parties did not raise this argument, and so the court understandably does not address this rare circumstance).

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.