No. _____

In the Supreme Court of the United States

LEONARD W. HOFFMANN, ET AL.
Petitioners,

v.

WBI ENERGY TRANSMISSION, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Natural Gas Act authorizes private companies to condemn land in order to build certain natural-gas infrastructure, but it says nothing about how to determine the amount of just compensation owed for the property taken. 15 U.S.C. § 717f. The Third, Fifth, Sixth, and Eleventh Circuits have all held that compensation awards in private condemnations under the Natural Gas Act must therefore be determined by reference to state law, which often mandates higher compensation than the floor set by the Fifth Amendment. In this case, the Eighth Circuit expressly split with its sister circuits and instead held that the Natural Gas Act permits only the constitutional minimum of compensation required by the Fifth Amendment. The question presented is:

In private condemnations under the Natural Gas Act, should just compensation be determined by reference to state law?

PARTIES TO THE PROCEEDINGS BELOW

This case arises out of a condemnation action filed by Respondent WBI Energy Transmission, LLC, which was the plaintiff in the district court and the appellant in the Eighth Circuit. As an eminent domain proceeding, it was styled as an action against certain real property in North Dakota* and "all unknown owners" of that land. The real parties in interest were the known owners of the land, who were named in the complaint: Leonard W. Hoffman (as Trustee of the Hoffmann Living Trust dated March 8, 2002); Margaret A. Hoffmann (as Trustee of the Hoffmann Living Trust dated March 8, 2002); David L. Hoffmann;** Denae M. Hoffmann; Rocky & Jonilla Farms, LLP; and Randall D. Stevenson, all of whom were defendants in the district court and appellees in the Eighth Circuit.

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* As described in the complaint below, that land was: 189.9 rods, more or less, located in Township 149 North, Range 98 W Section 11: W1/2SE1/4 Section 14: NW1/4NE1/4; 227.8 rods, more or less, located in Township 149 North, Range 98 W Section 11: N1/2SW1/4, W1/2SE1/4; 242.0 rods, more or less, located in Township 149 North, Range 98 W Section 2: SW1/4SE1/4 Section 11: NE1/4; 335.3 rods, more or less, located in Township 150 North, Range 98 W Section 35: W1/2E1/2; 223.8 rods, more or less, located in Township 149 North, Range 98 W Section 28: S1/2N1/2; and 83.6 rods, more or less, located in Township 149 North, Range 98 W Section 14: NW1/4 in McKenzie County, North Dakota.

** David Hoffmann died during the pendency of this case and therefore does not join in this Petition. His interests have passed to his wife, Petitioner Denae Hoffmann, also a defendant and appellee below.

CORPORATE DISCLOSURE STATEMENT

No petitioner issues any stock or has any parent corporation, and no publicly held corporation has any ownership interest in any petitioner.

STATEMENT OF RELATED CASES

WBI Energy Transmission, Inc. v. *189.9 rods, more or less, et al.*, No. 1:18-cv-78 (D.N.D.) (judgment entered July 13, 2021; supplemental judgment as to attorney's fees and costs entered March 5, 2024);

WBI Energy Transmission, Inc. v. *189.9 rods, more or less*, No. 24-1693 (8th Cir.) (judgment entered March 24, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 132 F.4th 1058. The district court's opinion awarding fees and costs in this case, App. 26a, is unreported, as is the district court's opinion ultimately determining the fees and costs awarded. App. 14a.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2025. A timely filed application for an extension of time was granted by Justice Kavanaugh on June 6, 2025, extending the time to file a petition for a writ of certiorari until August 7, 2025. This petition is timely filed on August 7, 2025. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant subsection of the Natural Gas Act, 15 U.S.C. § 717f(h), is reproduced at App. 57a.

STATEMENT

This petition arises out of a condemnation action under the Natural Gas Act. Respondent WBI Energy Transmission is a private natural-gas company operating under the jurisdiction of the Federal Energy Regulatory Commission. App. 28a. It holds a certificate of public convenience and necessity that

allows it to use eminent domain to acquire rights-of-way that enable it to construct, operate, and maintain a natural-gas pipeline. *Ibid.* And it used that authority here to condemn an easement across the McKenzie County ranchland long owned by Petitioners and their families. App. 28a–29a. Roughly three years of litigation ensued, culminating in a ruling denying WBI's motion to exclude Petitioners' expert witnesses[1] and finally a settlement as to the value of the taken property. App. 29a. That settlement, however, specifically reserved the question of fees and costs. App. 29a–30a. Petitioners said these costs should be recoverable because state law governed compensation and North Dakota law authorizes the payment of a property owner's reasonable fees and costs as part of a compensation award. App. 30a. WBI disagreed, arguing that federal law should control and that this Court had held that the federal government need not pay a condemnee's fees and costs when it condemns property itself. App. 32a.

The district court correctly recognized that (unlike other circuits) the Eighth Circuit had never resolved the question of "whether state law or federal law governs the measure of compensation in a condemnation brought by a *private entity* under the Natural Gas Act." App. 30a. It also recognized that cases about the federal government's obligations as a

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[1] The major dispute during the condemnation (not at issue in this petition) was whether petitioners should be allowed to prove the fair market value of the condemned easements by pointing to arm's-length market transactions in which similar easements had been sold. The district court rejected WBI's arguments and ruled that this market evidence was admissible. See D. Ct. Dkt. No. 99 (April 1, 2021).

condemnor did not resolve what obligations a *private* condemnor could be required to meet. Finally, it explained that neither the text of the Natural Gas Act nor of Federal Rule of Civil Procedure 71.1 (which governs procedure in federal condemnations) said anything at all about the measure of compensation.

Against that backdrop, the district court turned to this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), which provides the framework for federal courts to "'fill the interstices of federal legislation'" on issues where "'Congress has not spoken[.]'" App. 33a (quoting *Kimbell Foods*, 440 U.S. at 727). Under *Kimbell Foods*, where a federal statute is silent on an important point, federal courts may either impose a uniform federal rule or else defer to the law of the state in which they sit. Their choice is guided by three considerations:

> (1) whether the federal program, by its very nature, required uniformity; (2) whether the application of state law would frustrate specific objectives of the federal program; and (3) whether the application of uniform federal law would disrupt existing commercial relationships predicated on state law.

App. 34a (citing *Kimbell Foods*, 440 U.S. at 728–29). In applying these factors, the district court looked to three out-of-circuit appellate decisions holding that state law should govern in these circumstances: *Georgia Power Co.* v. *138.30 Acres of Land*, 617 F.2d 1112

(5th. Cir. 1980) (en banc), *Columbia Gas Transmission Corp.* v. *Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992), and *Tennessee Gas Pipeline Co.* v. *Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019). App. 35a–40a.

The district court began with the presumption that state law should control in the absence of legislative instruction otherwise or a significant conflict between state and federal law. App. 40a. And it found that each of the *Kimbell Food* factors favored state law rather than rebutting that presumption.

First, it found no need for a uniform national rule because the federal government itself was not a party. App. 41a. Instead, this case was a private dispute between private parties operating in North Dakota. *Ibid.* This was all the more true because it was a case about property, which is traditionally an area of state concern—particularly in North Dakota, where "it is in the blood of . . . landowners to be protective of their real estate." App. 42a.

Second, it found no way in which applying state law would "frustrate" the federal policies underlying the Natural Gas Act. Private companies like WBI would still be able to use eminent domain to transport natural gas. They would simply do so using state law to determine how much they owed for the property they took. App. 43a.

Finally, it determined that imposing a federal rule here would disrupt existing state commercial relationships. State-law definitions of property and its valuation had "been cemented into North Dakota's foundational practices and procedures in the area of property rights," which counseled in favor of allowing those foundational rules to govern private

condemnations in federal court just as they would in state court. App. 44a.

Applying state substantive law, the district court found (as all parties agreed) that North Dakota law authorizes courts to place condemnees in the same pecuniary position as they would have been absent the condemnation—which means courts may award "reasonable actual . . . costs . . . and reasonable attorney's fees for all judicial proceedings" in the condemnation. App. 45a. It later did so, finding that the landowners had reasonably incurred $383,375.76 in fees and litigation expenses over the course of the condemnation proceedings, which the district court ordered WBI to reimburse. App. 22a.

WBI timely appealed, and the Eighth Circuit reversed. That court acknowledged that other courts nationwide had, like the district court, held that state law controls compensation decisions under the Natural Gas Act. App. 7a n.2 (acknowledging split of authority). But in the Eighth Circuit's view, those other courts were wrong. Instead, the Natural Gas Act's delegation of the power of eminent domain allowed private companies to "step[] into the federal government's shoes [and] inherit[] all its rights and obligations." App. 4a. On this reading, the Act's silence on the question of compensation was irrelevant: Since a private condemnor under the Act is assumed to stand in the shoes of the federal government, any "gaps" on the question of compensation are filled by the Fifth Amendment, not state law, and a Natural Gas Act condemnor pays only what the federal government would have paid had it taken the land itself. App. 6a. In short, once Congress delegates its power of eminent domain, courts should presume that the delegee

will pay only whatever minimum compensation is needed to save the taking from unconstitutionality.

This petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents a square and acknowledged circuit split. For over 40 years, lower courts have consistently held that private companies exercising the federal power of eminent domain under the Natural Gas Act must follow the compensation rules of the states in which the condemned property sits. The Eighth Circuit below broke from that consensus, holding that when Congress delegates its eminent-domain power to private entities, it means (through its silence) to strip property owners of compensation rights they would otherwise enjoy under state law. This is an important split, implicating the rights of property owners (and condemnors) nationwide, and this Court should resolve it.

I. The Decision Below Openly Conflicts With the Precedent of Four Other Circuits.

The decision below forthrightly acknowledged that it split with published decisions of the Third, Fifth, Sixth, and Eleventh Circuits. In those jurisdictions, questions of compensation in Natural Gas Act condemnations are determined by state law. In the Eighth Circuit, state law is irrelevant and federal law controls.

1. The decision below acknowledges that it splits from the Third Circuit's holding in *Tennessee Gas Pipeline Co.* v. *Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019). App. 7a n.2. Like

the district court below, the Third Circuit invoked *Kimbell Foods* and held that state law controlled compensation questions. *Tenn. Gas*, 931 F.3d at 247–55. It first noted that none of this Court's jurisprudence answered the question because this Court has addressed compensation only where the federal government (rather than a private licensee) is condemning property. *Id.* at 247–48. It then recognized that the Natural Gas Act itself is silent on the question of compensation. *Id.* at 249–50. And it rejected the idea that federal law should control simply because a body of federal law about compensation already exists. *Ibid.*

As to the *Kimbell Foods* factors, the Third Circuit found each cut in favor of state law. There was no overwhelming need for a uniform national rule in cases where the federal government itself was not even a party. *Id.* at 251. This was all the more true in the context of property rights, which "are traditionally an area of state concern." *Ibid.* And the Natural Gas Act specifically contemplates that state law may factor into the process—including by specifically authorizing (and sometimes requiring) licensees to bring condemnation actions in state court. *Id.* at 252.

The Third Circuit also found (like the district court below) that state compensation rules would not frustrate any federal policy. *Id.* at 252–54. It acknowledged, of course, that hypothetical "crazy state laws" might require so much compensation that pipeline construction would grind to a halt—but it also noted that those laws do not exist in reality and that the condemnor, when pressed, could identify none. *Id.* at 254.

Finally, it found (again like the district court) that upsetting state-created compensation rules would upset commercial expectations. *Ibid.* After all, "'[s]ince state law usually governs the question of what constitutes property, the value of property rights is ordinarily best determined according to state law as well.'" *Ibid.* (quoting *Nat'l R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261, 1267 (2d Cir. 1987)).

2. The opinion below likewise acknowledges a split with the Sixth Circuit's decision in *Columbia Gas Transmission Corp.* v. *Exclusive Natural Gas Storage Easement*, which similarly holds that state law controls questions of compensation. App. 7a n.2 (citing 962 F.2d 1192 (6th Cir. 1992)). In *Columbia Gas*, the Sixth Circuit also concluded that state law should control compensation questions, in large part because "property rights have traditionally been, and to a large degree are still, defined in substantial part by state law." 962 F.2d at 1198. Replacing state-created compensation rights with federal common law might upset settled commercial expectations and would "at best merely superimpose a layer of property right allocation onto the already well-developed state property regime." *Ibid.* And, like other courts have, the Sixth Circuit observed that variations among state compensation rules would not be so great as to actually stymie the construction of pipelines (thereby frustrating the objectives of the Natural Gas Act) and that there was no particular need for a uniform nationwide rule to govern every disparate natural-gas project nationwide. *Id.* at 1198–99.

3. The same is true of the Fifth Circuit. App. 7a n.2 (acknowledging split with *Ga. Power Co.* v. *138.30 Acres*, 617 F.2d 1112 (5th Cir. 1980) (en banc)). *Georgia Power Co.* interpreted the Federal Power Act (16 U.S.C. § 814), which similarly authorizes private condemnations without specifying a measure of compensation, and held that compensation was controlled by state law.[2]

The choice-of-law question, the court said, depended largely on one's starting assumptions: whether "one begins with the position that state law should be adopted unless it is shown that . . . sufficient reasons exist to displace state law with federal common law or with the position that federal common law should be utilized unless . . . sufficient reasons exist to warrant adoption of state law." 617 F.2d at 1115. The choice between the two was easy. "Basic considerations of federalism, as embodied in the Rules of Decision Act," meant that courts should begin with state law unless persuaded that Congress meant to displace it. *Id.* at 1115–16. And there was no evidence of that sort of intent, either in the text of the law or in its legislative history. *Id.* at 1118.

The *Kimbell Foods* factors counseled similarly. There was no reason to believe that applying state law would frustrate federal objectives—after all, the government's interest was in seeing the project constructed, not in minimizing the costs to the private

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[2] A few years later, the Fifth Circuit directly extended the logic of *Georgia Power Co.* to the Natural Gas Act. *Miss. River Transmission Corp. v. Tabor*, 757 F.2d 662, 665 n.2 (5th Cir. 1985) (noting that "Louisiana law controls the [compensation] issues in this case").

company doing the construction. *Ibid.* And questions of costs cut both ways: Applying federal law to reduce costs to the condemnor would necessarily "require certain Georgia landowners partially to subsidize a private Georgia utility and consumers of electric power in a way which would not be required of them if Georgia law were applied." *Id.* at 1124. The court refused to presume, without any evidence, that Congress had meant to foist that burden onto landowners. *Ibid.*

4. Finally, the Eleventh Circuit agrees, too. See *Sabal Trail Transmission, LLC* v. *18.27 Acres of Land*, 59 F.4th 1158 (11th Cir. 2023); App. 7a n.2 (acknowledging split). That court is bound by the prior precedent of the Fifth Circuit, and so the Fifth Circuit's 1980 en banc decision in *Georgia Power* was "game over." 59 F.4th at 1160. But the Eleventh Circuit went further, addressing the condemnor's objections to the Fifth Circuit's earlier decision in two respects.

First, the Eleventh Circuit rejected the idea that this Court's precedents—including this Court's intervening decision in *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. 482 (2021)—forbid the application of state compensation rules. *Id.* 1172–73. They do not. This Court's relevant compensation cases address situations where the government itself is the condemnor, and *PennEast* speaks only to the scope of the federal eminent domain power, not the measure of compensation under the statute. *Sabal Trail*, 59 F.4th at 1172–73.

The Eleventh Circuit also rejected the argument that Federal Rule of Civil Procedure 71.1 (which establishes uniform federal procedures for eminent

domain actions in federal court) somehow forbids an award of attorney's fees. *Id.* at 1174. It does not: Rule 71.1 dictates *procedures*, but not substantive questions like the measure of compensation, which must be governed by some other source of law in each case. *Ibid.*

Each decision above comes to the same conclusion: Congress's failure to specify a rule to determine compensation in private condemnations under the Natural Gas Act means state compensation rules control. The Eighth Circuit openly disagrees. See App. 7a n.2. That is a division of authority on the interpretation of an important federal statute, and it merits this Court's attention.

II. The Question Presented Is Important.

This case presents an acknowledged division of authority on a federal statutory question that routinely arises—and will continue to routinely arise—in the lower courts. The United States currently has some 3 million miles of natural-gas pipelines, with more constantly on the way.[3] These pipelines frequently lead to condemnations nationwide.[4] And the

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[3] See U.S. Energy Info. Admin., *Natural gas explained*, available at https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php.

[4] For just a recent sampling, see, *e.g.*, *E. Tenn. Nat. Gas, LLC* v. *4.82 Acres*, No. 2:25-cv-00043 (M.D. Tenn.) (complaint filed June 2, 2025); *E. Tenn. Nat. Gas, LLC* v. *0.85 Acres,* No. 2:25-cv-00047 (M.D. Tenn.) (complaint filed June 2, 2025); *Venture Global C P Express, LLC v. Pipeline Servitude,* No. 2:25-cv-00037 (W.D. La.) (complaint filed January 10, 2025); *N. Nat. Gas Co.* v. *Approx. 1.5152 acres*, No. 4:24-cv-04227 (D. S.D.) (complaint filed December 27, 2024); *LA Storage, LLC* v. *110.133 Acres*, No. 24-cv-01754 (W.D. La.) (complaint filed December 17,

question of just compensation is at issue in every single one of those condemnations—to say nothing of the countless private negotiations that happen in the shadow of a pipeline company's condemnation power. The real-world consequences of the circuit split are obvious.

And those consequences stretch across a wide variety of state-created property rights. The difference between state and federal law here is that North Dakota recognizes that condemnees should be allowed to recover the costs of defending against their own condemnation.[5] But the rule articulated below reaches far more. Indeed, just looking at the cases making up the split demonstrates that the Eighth Circuit's rule would displace a wide variety of state property rules. In *Tennessee Gas Pipeline*, Pennsylvania had a "more inclusive concept" of what counted as a property's fair market value than does federal law, taking into account certain consequential damages. 931 F.3d at 244. In *Georgia Power*, the dispute was about how to account for the effect of the project on the value of the land. 617 F.2d at 1115. In *Columbia Gas Corp.*, the property owner wanted to take advantage of an Ohio rule that said contracts to buy commodities associated with the land were

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2024); *Venture Global CP Express LLC* v. *5.41 Acres of Land*, No. 1:24-cv-00451 (E.D. Tex.) (complaint filed November 6, 2024).

[5] Other states agree. See *Keeton* v. *State, Dep't of Transp. & Pub. Facilities*, 441 P.3d 933, 939 (Alaska 2019) (state constitution "generally require[s] payment to a condemnee of necessary appraiser's and attorney's fees." (quotation marks omitted)); *Joseph B. Doerr Tr.* v. *Cent. Fla. Expressway Auth.*, 177 So. 3d 1209, 1215 (Fla. 2015) ("[F]ull compensation under the Florida Constitution includes the right to a reasonable attorney's fee for the property owner.").

independent assets that could be valued separate from the underlying land (even though general "lost profits" could not be). 962 F.2d at 1199. In other words, Ohio law recognized an asset that federal law did not—and the choice of law determined whether that asset existed in a way that could be valued as part of the condemnation.

In short, this case implicates not just the correct interpretation of a decades-old federal statute but also state-created property rights nationwide. For decades, lower courts held that the Natural Gas Act required them to respect those rights—a rule that private condemnors seem to have been able to follow without a problem. In the decision below, though, the Eighth Circuit held that this was error, and that federal courts should have been sweeping these rights aside for the past four decades. The petition for certiorari should be granted so this Court can decide which view is correct.

III. The Decision Below Is Wrong.

This case is worth this Court's attention not just because the decision below creates an acknowledged split with 40 years of lower-court cases. It is also worth this Court's attention because the Eighth Circuit was likely wrong to do so.

While the opinion below openly disagrees with its sister circuits, see App. 7a n.2, it does not dispute that the general rule is that federal courts must follow state law unless commanded otherwise. 28 U.S.C. § 1652. Instead, it says that eminent domain is different. When the government delegates its eminent-domain power, says the Eighth Circuit, the private delegee "step[s] into the government's shoes [and]

inherit[s] all its rights and obligations[,]" just as if the United States were taking property directly. App. 4a. It does not matter that "nothing in the Natural Gas Act tells certificate holders what they must pay when taking property" because "any gaps [in the statute] are filled by the Fifth Amendment itself." App. 8a. In other words, once Congress delegates the eminent domain power, it will be presumed to have delegated that power to the fullest extent possible, silently overriding all state laws defining property rights in a way that surpasses the constitutional minimum of just compensation.[6]

This is wrong for at least five reasons. It adopts the wrong rule of construction for eminent-domain delegations. It ignores the specific context of the Natural Gas Act itself. It ignores the history of condemnations in the United States. It ignores that Congress expressly *limits* just compensation to the constitutional minimum in other statutes. And it transports federal law that was crafted in the shadow of

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[6] The opinion below says this Court's decision in *PennEast Pipeline Co.* v. *New Jersey* as "confirm[ing its] conclusion," App. 8a, but (as the Eleventh Circuit explained in 2023) that case addressed only whether States retained any immunity from federal condemnation when they consented to the plan of the Convention. 594 U.S. at 500. Once the Court concluded that there was no such immunity, it was a short hop to conclude that §717f(h) delegates the power to condemn state land—after all, it would be a strange statute that purported to delegate the government's power to condemn land while silently withholding some of the government's power to condemn land. *Id.* at 507–08. That decision tells us nothing about what law should govern compensation in private condemnation lawsuits.

sovereign immunity into a lawsuit between private parties, neither of whom is immune from anything.

First, construction. The rule adopted below essentially says that (unlike other statutes) a delegation of the eminent domain power necessarily carries with it federal law in every aspect, even if it is wholly silent as to some of them. But to the extent there is a special rule for eminent domain statutes, it is the opposite of the one adopted below. Delegations of the eminent domain power are in derogation of property rights and therefore must be strictly construed *against* the condemnor and in favor of the property owners. 1A *Nichols on Eminent Domain* § 3.03(6)(b) (3d ed. 2018) (grants of eminent domain power "must be construed strictly against the grantee"). As this Court has explained, delegations of the eminent domain power to entities like public utilities are inherently different from statutes authorizing government officials to use eminent domain: The private grants "are, in their very nature, grants of limited powers . . . [and] do not include sovereign powers greater than those expressed or necessarily implied[.]" *United States* v. *Carmack*, 329 U.S. 230, 243 n.13 (1943). If anything, courts construing private delegations of eminent-domain powers should be *more* solicitous of state-law rights than they would be when construing another kind of statute. But the decision below commands them to be less.

The context of the statutory language similarly suggests that reference to state law is appropriate. The Natural Gas Act authorizes license-holders to initiate condemnation actions in either federal or state court—and, to the extent the condemned property

falls below a certain value, it *requires* them to proceed in state court. 15 U.S.C. § 717f(h). The only reference the statute makes to choice of law is to order courts to follow the practice and procedure of the states in which they sit. *Ibid.*[7] Under the Eighth Circuit's reading of the statute, though, a state court hearing a condemnation under a statute that incorporated state procedures should still have understood that Congress meant for it to reject state-law rules about compensation—even though Congress neglected to mention anything about it. That reading is, at minimum, counterintuitive.

And that reading is all the more unlikely in light of longstanding historical practice. For the first century of this country's history, the federal government exclusively relied on state substantive law for all condemnations, only invoking the federal eminent domain power directly for the first time in the latter half of the 19th century. See William Baude*, Rethinking the Federal Eminent Domain Power,* 122 Yale L.J. 1738, 1762 (2013). It should therefore not lightly be presumed that when Congress adopted § 717f, it understood itself to be sweeping aside all state-law rules about compensation—rules that, until just a few decades prior, had been the *only* rules about compensation.

Looking to modern legislative practice leads to the same conclusion as does history. Congress (when

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[7] That choice-of-law provision no longer controls procedures in federal condemnations—procedures in federal condemnations are governed by Rule 71.1—but it is evidence that, to the extent Congress considered state law, it meant to follow it rather than displace it.

it chooses) legislates around the general rule that state law governs compensation in these cases. The leading case establishing the majority rule in the lower courts was interpreting the Federal Power Act (supra at 9) and Congress has responded by amending that Act—but only in part. In 2005, for example, Congress amended the Act to define the just compensation due when rights-of-way are condemned for interstate electric facilities. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified at 16 U.S.C. § 824p(f)) ("Just compensation shall be an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority.") If the background rule is that all delegations of the federal eminent domain power necessarily mean federal compensation rules apply, why bother adopting a definition that tracks ordinary federal compensation rules? The answer, of course, is that the Eighth Circuit is wrong about the background rule—and that changing that rule would thus render language elsewhere in the U.S. Code mere surplusage.[8]

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[8] "Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen Sw. Ry. Co.* v. *Morgan*, 486 U.S. 330, 338 (1988). To be sure, the adoption of a different rule for interstate electric facilities is not dispositive—it is not the same as if Congress had directly amended § 717f to affirm the lower courts' longstanding interpretation—but it is an instructive illustration that Congress can and does legislate around the longstanding lower-court interpretation of eminent-domain delegations when it chooses. It has chosen to do so only selectively and to leave the Natural Gas Act (but not the Federal Power Act) undisturbed.

Finally, the decision below insists that the delegation of federal power here makes no difference—that "the rules of the road do not change . . . when the federal government hands the keys over to a private party[.]" App. 8a. But the rules of the road were written for the sovereign itself, exercising its powers directly and cloaked with sovereign immunity. That is why this Court holds that "litigation costs cannot be assessed *against the United States* in the absence of statutory authorization." *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 n.3 (1979) (emphasis added). And fair enough: Considerations of sovereign immunity and concerns about the public fisc may be sound reasons to assume that Congress means to override state property rules when the United States takes property directly. But the question in this case is not whether Congress *can* displace state-created property rules. It is whether courts must assume it *did*. Until this case, lower courts had uniformly concluded that Congress did not mean to silently nullify state protections for property rights in cases involving private parties that had neither immunity nor any claim on the public fisc. The decision below says otherwise—that Congress *always* and *uniformly* displaces state laws when it delegates any part of its eminent domain power to a private actor. That was likely error, and this Court should intervene to resolve the resulting split of authority.

IV. This Case Is A Good Vehicle.

The question presented was the dispositive legal issue in both the trial-court and the appellate decisions below. And this petition arises out of a case in which the parties expressly agreed that petitioners had the procedural right to move for fees. There are

therefore no procedural obstacles to this Court's answering the question presented, which is the subject of an acknowledged circuit split. The petition for certiorari should therefore be granted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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AUGUST 7, 2025