No. 25-159

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

BRIEF OF NORTH DAKOTA, ALABAMA, ARKANSAS, FLORIDA, IDAHO, INDIANA, LOUISIANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DREW H. WRIGLEY
Attorney General
PHILIP AXT
Solicitor General
**Counsel of Record*
JOSEPH S. ST. JOHN
Spec. Assist. Att'y Gen.

Office of Attorney General
600 E Boulevard Ave., Dept. 125
Bismarck, ND 58505
Phone: 701-328-2210
Email: pjaxt@nd.gov

Counsel for Amicus Curiae *State of North Dakota*
[additional counsel listed after signature page]

QUESTION PRESENTED

As framed by Petitioners, the question presented is:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI* STATES[1]

The question presented by this case is one of default when faced with Congressional silence. Specifically, when a federal statute authorizes private entities to exercise eminent domain, but the statute is silent on the measure of "just compensation," does that silence create a presumption for or against the borrowing of state law to measure "just compensation"?

Real property law "lies at the core of traditional state authority." *Sackett v. EPA*, 598 U.S. 651, 679 (2023). For that reason, even where federal law governs the resolution of a property dispute, when that federal law is silent on how to define a relevant property interest this Court has repeatedly held, subject to certain constraints, that "state law should be borrowed as the federal rule of decision." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979).

Such is the case here. The Natural Gas Act is silent on whether "just compensation" includes reasonable attorney fees that landowners may incur when their property is seized by private entities exercising eminent domain under that Act.[2] *See* 15 U.S.C. § 717f. Given the traditional role that states have long played in defining and protecting property interests, four Circuits have construed that silence to mean that federal law should borrow state law as the rule of

---

[1] Pursuant to Supreme Court Rule 37.2, *Amici* timely notified counsel of record for the parties of their intent to file this brief.

[2] Such fees could be incurred, for example, where a landowner successfully challenges the valuation of their condemned property. *See* Pet. 2 n.1.

decision.[3] But the Eighth Circuit broke with those courts, reasoning that because a private entity invokes the federal eminent domain authority, state laws for assessing "just compensation" are irrelevant. App.6a. The Eighth Circuit did not hold that borrowing state law in this case would significantly undermine federal policies. It simply believed that statutory silence should be construed *against* borrowing state law when it comes to eminent domain. App.7a–10a

The Fifth Circuit, sitting en banc several decades ago, aptly summarized the interest of Amici States in disputes of this nature, writing:

> [T]he state[s have an] interest in avoiding displacement of [their] laws in the area of property rights … Since … the question of what constitutes property is usually determined with reference to state law, we think it consistent that the value of those rights also be determined with reference to state law.

Ga. Power Co. v. 138.30 Acres, 617 F.2d 1112, 1123 (5th Cir. 1980) (en banc).

Amici States file this brief to protect the balance between state and federal power that's at the heart of our constitutional order when it comes to defining and protecting real property interests. Amici States also seek to ensure that when their landowners are

---

[3] *Ga. Power Co. v. 138.30 Acres*, 617 F.2d 1112 (5th Cir. 1980) (en banc) (interpreting analogous provision of Federal Power Act); *Columbia Gas Trans. Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992); *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019); *Sabal Trail Trans., LLC v. 18.27 Acres of Land*, 59 F.4th 1158 (11th Cir. 2023).

subjected to condemnation by private entities, those landowners receive the same measure of "just compensation" regardless of whether the private entity invokes a state or federal eminent domain authority—at least where Congress has not clearly expressed an intent to displace state property law in that context, and where applying state law would not significantly undermine federal policies.

SUMMARY OF ARGUMENT

The Natural Gas Act (codified at 15 U.S.C. § 717 et seq.) was not intended to supplant state laws for measuring the value of real property interests. Rather, as this Court long-ago recognized, the Act was intended to fill a regulatory gap without abridging state powers. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517–519 (1947). The Eighth Circuit did not adequately grapple with the statutory history and text indicating the Act was not intended to displace the traditional role of states in defining and measuring real property interests.

Principles of federalism reinforce that the Natural Gas Act was not intended to displace state law through silence. Under our system, property law and property rights have long been held to lie at the very "core" of state authority and state lawmaking prerogatives. *Sackett*, 598 U.S. at 679. Consequently, while Congress may have the ability to strip states of their traditional authorities or displace those authorities in some respects, it should not be understood as doing so unless such an intent is made "exceedingly clear." *Id.* (quoting *U.S. Forest Serv. v. Cowpasture R. Pres. Ass'n*, 590 U.S. 604, 622–623 (2020)). The Eighth Circuit gave short shrift to the traditional role played by states in defining real

property interests when it held that *silence* in a federal eminent domain statute should be deemed to displace any application of state law.

Finally, the fact the Natural Gas Act authorizes the exercise of eminent domain only by private entities, rather than by the United States itself, is relevant to the inquiry. While the United States may delegate eminent domain authority, courts take "quite a different view" when that "power is delegated to a private corporation." *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896). A private entity exercising eminent domain authority on its own behalf operates under constraints and incentives that are very different from a government exercising that authority directly. And concerns that borrowing state law for measuring "just compensation" might thwart essential functions of the federal government are reduced when it is not the government itself forcing the condemnation. The Eighth Circuit erred by treating as irrelevant the fact that condemnations under the Natural Gas Act are done solely by private entities acting on their own behalf.

Under the Eighth Circuit's decision, landowners in seven states no longer have the benefit of state law property rights that landowners in the rest of the country have. Amici States encourage the Court to grant the petition for review and resolve the split.

REASONS FOR GRANTING THE PETITION

I. The Natural Gas Act was not intended to displace traditional state authority for assessing real property value.

In construing and enforcing the Natural Gas Act, this Court is guided by the Act's history and by its

regulatory gap-filling purpose. *Panhandle E. Pipe Line Co.*, 332 U.S. at 515–524; *see also Fed. Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502 & n.2 (1949) (compiling authorities).

1. Prior to the Natural Gas Act, this Court had pragmatically fashioned "a bright line dividing permissible from impermissible state regulation" for natural gas under the Commerce Clause. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (discussing several pre-Natural Gas Act decisions). "Simply put, the doctrine … was that the retail sale of gas was subject to state regulation, even though the gas be brought from another State and drawn for distribution directly from interstate mains…." *Id.* at 377–378. But due to the dormant Commerce Clause, "the wholesale sale of gas in interstate commerce was not subject to state regulation even though … the gas being sold was produced within the State." *Id.* at 378.

The net effect of those judicial decisions was to create a gap in regulation. States were not permitted to regulate certain aspects of the natural gas distribution chain, only the federal government could. However, at that point in time, Congress had not specifically given any federal agency authority to do so. That regulatory gap resulted in exploitation by natural gas companies. *See Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610, 612 (1944). So Congress filled that gap with the Natural Gas Act. *See* Pub. L. No. 75-688, 52 Stat. 821 (1938).

2. As the Court noted, "[t]he bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority." *Interstate Nat. Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690 (1947) (quoting H.R. Rep. No. 75-709 (1937)). Instead, by enacting the Natural Gas Act, Congress sought "to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act." *Id.* As the Court elaborated in *Panhandle Eastern*:

> The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.

332 U.S. at 517–518.

3. As originally enacted, the Natural Gas Act did not bestow eminent domain powers. But in 1947, the Act was amended to include a delegation of the federal eminent domain power due to concerns that the states would not, or could not, authorize eminent domain for natural gas pipelines where the public benefit of those pipelines primarily accrued in other states. *See* S. Rep. No. 80-429, at 2 (1947) (citing, *e.g.*, *Grover Irr. & Land Co. v. Lovella Ditch, Reservoir, & Irr. Co.*, 131

P. 43 (Wyo. 1913)); *see also PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 489–490 (2021).

Congress accordingly sought to correct the "deficiency and omission" of a federal eminent domain authority in the Natural Gas Act, S. Rep. No. 80-429 at 3, by adding a new Subsection 7(h). *See* Act of July 25, 1947, Pub. L. No. 80-245, 61 Stat. 459.

However, nothing in that amendment suggests that, by delegating federal eminent domain authority to fix a regulatory gap, Congress thereby intended to displace traditional state authorities for defining real property interests. To the contrary, the statute expressly provided that "[t]he practice and procedure in any … proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated[.]" 15 U.S.C. § 717f(h)).[4]

II. Principles of federalism support borrowing state law to determine "just compensation."

Given that the Natural Gas Act is silent on what constitutes "just compensation" when eminent domain is exercised under that statute—indeed, the

[4] While "this language required conformity in procedural matters only," *United States v. 93.970 Acres of Land*, 360 U.S. 328, 333 n.7 (1959), and has since been superseded by Federal Rule of Civil Procedure 71.1, which revised the procedures for all condemnation cases in federal court, it nonetheless evidences Congressional intent that the delegation of federal eminent domain authority in the Natural Gas Act was not intended to displace traditional state authority.

Act does not mention "just compensation" at all—principles of federalism strongly militate for borrowing state law as the rule of decision.

1. As this Court has explained, statutory interpretation requires "recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014) (citation omitted). One of those presumptions is "the well-established principle" that Congress must speak with a clear voice when it intends to override the "usual constitutional balance of federal and state powers." *Id.* at 858 (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991)). And the Court applies that "background principle when construing federal statutes that touch[] on … areas of traditional state responsibility." *Id*.

A corollary to the presumption that Congress must speak clearly if it intends to displace traditional state authority is the principle that, while "federal law [may] ultimately control[] the issue in th[e] case, … 'controversies ... governed by federal law, do not inevitably require resort to uniform federal rules.'" *Wilson*, 442 U.S. at 672 (cleaned up) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727–728 (1979)). Instead, this Court has directed that where a federal statute is silent on some facet of its application, courts assess whether to borrow state law as the rule of decision by considering: (1) the "need for a nationally uniform body of law"; (2) "whether application of state law would frustrate specific objectives of the federal programs"; and (3) the potential disruption to "commercial relationships predicated on state law." *Kimbell Foods*, 440 U.S. at 728–729. "The presumption that state law should be

incorporated … is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights … would be governed by state-law standards." *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 98 (1991).

2. Real property law "lies at the core of traditional state authority." *Sackett*, 598 U.S. at 679. Indeed, this Court has long recognized that the power to ensure people remain secure in their titles to real property "inheres in the very nature of state government." *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 544 (1994) (brackets omitted) (quoting *Am. Land Co. v. Zeiss*, 219 U.S. 47, 61 (1911)). For that reason, "this Court require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power … over private property." *Sackett,* 598 U.S. at 679 (quoting *U.S. Forest Serv.,* 590 U.S. at 621–622).

Relatedly, when it comes to defining the extent of property rights where federal law is silent, this Court has time and time again held that, absent a demonstrated need for national uniformity or the frustration of a specific federal policy, "state law should be borrowed as the federal rule of decision." *Wilson*, 442 U.S. at 673; *see also, e.g.*, *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co*., 429 U.S. 363, 378–79 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. … This is particularly true with respect to real property[.]"); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) ("The great body of law in this country which controls … [the] transfer of property,

and defines the rights of its owners … is found in the statutes and decisions of the state[s].").

Thus, although Congress can in some circumstances override traditional state authorities for defining property interests, "where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *BFP*, 511 U.S. at 546.

3. Applying those principles here, there can be no doubt that establishing how to assess and measure the "just compensation" owed to a landowner when his or her property is subjected to eminent domain is a core aspect of traditional state authority.

However, the Natural Gas Act is silent as to what constitutes the measure of "just compensation" when property is condemned under that Act. Silence on the question is the opposite of the "exceedingly clear language," *Sackett*, 598 U.S. at 679 (citation omitted), that would be necessary to alter the state-federal balance on a core issue of traditional state authority.

And the lack of "exceedingly clear language" to displace traditional state authority in this context is not surprising. As discussed *supra*, the "primary purpose" of the Natural Gas Act "was to aid in making state regulation effective," *Panhandle E. Pipeline*, 332 U.S. at 517, using federal law to fill a regulatory gap while still "preserv[ing] in the States powers of regulation in areas in which the States are constitutionally competent to act," *Interstate Nat. Gas*, 331 U.S. at 690 (citation omitted).

Amici States acknowledge the possibility that some states may behave as bad actors, deliberately adopting state laws designed to thwart national

energy policies. But properly applied, the *Kimbell Foods* analysis already accounts for that possibility. "Adopting state law as an appropriate federal rule does not preclude federal courts from excepting local laws that prejudice federal interests." *Kimbell Foods*, 440 U.S. at 735 n.37; *accord Tenn. Gas Pipeline*, 931 F.3d at 253–254 (state compensation law shouldn't be borrowed if "so far out of step with federal law" as to "frustrate the [Natural Gas Act]'s purpose"). The solution to a few states potentially trying to thwart federal policy by modifying their eminent domain compensation laws is thus not to jettison entirely the traditional role that states have played in defining real property interests, but simply to give proper weight to the second *Kimbell Foods* factor.

The district court below was therefore correct to begin its analysis "with the presumption that state law should be incorporated unless there is an expression of legislative intent to the contrary, or a showing that state law significantly conflicts with the federal interest present." App.40a (citing *Kimball Foods*, 40 U.S. at 739). The Eighth Circuit's contrary approach—presuming the displacement of state authority from Congressional silence—does injury to the role traditionally played by states in defining and securing real property interests.[5]

---

[5] Relatedly, the Eighth Circuit's observation that Congress knows how to expressly invoke state law for measuring "just compensation" in other statutes is perhaps beside the point. *Cf.* App.5a (citing, inter alia, 33 U.S.C. § 532). Congress also knows how to define "just compensation" to exclude reference to state law when it so chooses. *E.g.*, 16 U.S.C. § 824p(f)(2). The question here is not whether Congress has the ability to define "just compensation" for any particular eminent domain statute, but how the scale tilts where it has chosen to remain silent.

III. The fact that only private entities exercise eminent domain authority under the Natural Gas Act is relevant.

The delegation of the eminent domain authority in the Natural Gas Act to only private entities further establishes the lack of clear Congressional intent to displace state authority.

1. On its face, the Natural Gas Act's delegation of eminent domain authority can be exercised only by a "holder of a certificate," which must be a "natural-gas company." 15 U.S.C. § 717f(h), (c). The definition of "natural-gas company" is, in turn, limited to individuals and corporations, to the exclusion of states and localities. 15 U.S.C. § 717a; *accord City of Clarksville v. FERC*, 888 F.3d 477, 483 (D.C. Cir. 2018) (compiling authorities). So neither the federal government nor states and localities can exercise eminent domain under the Act. That is important. And it explains why this Court's decision in *United States v. Miller*, 317 U.S. 369 (1943)—which held that state law is not borrowed when the United States itself is the condemnor—does not govern this case.

To be sure, private entities may be delegated federal eminent domain power. *E.g.*, *PennEast Pipeline Co.*, 594 U.S. at 488. But courts have taken "quite a different view" of condemnation "when this power is delegated to a private corporation." *Gettysburg Elec. Ry. Co.*, 160 U.S. at 680 (noting "[t]he responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right"). Consequently, when a statute delegates to a private entity the authority to condemn property, a "distinction exists," and the private entity possesses more "limited powers" than a condemnation carried

out by the sovereign itself. *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946). The Eighth Circuit therefore erred in its conclusion that it is irrelevant if private entities exercise the eminent domain authority on their own behalf. App.8a.

2. Treating condemnations that are carried out by private entities different from condemnations carried out by the sovereign itself also makes sense in this context. As the Third Circuit ably explained: "the powerful federal interest at play when the federal government is the condemnor is considerably weakened when a private entity is the condemnor." *Tenn. Gas Pipeline*, 931 F.3d at 248.

This is true in several respects. For one, when a private entity condemns lands on its own behalf, it is generally not performing the same kind of essential federal government function that has been found to weigh against the borrowing of state law in other contexts. *See id.* at 248–249. For another, when a private entity condemns lands on its own behalf, it does not raise the same concerns about impacting the federal fisc that may arise when the condemnation is performed by the United States. *See id.* at 249. For a third, when a private entity condemns lands on its own behalf, it does not raise the same concerns regarding the United States' non-waiver of immunity from attorney fees and other costs that state law may include in "just compensation." *Cf. United States v. Bodcaw Co.*, 440 U.S. 202, 203 n.3 (1979). And fourth, there is the simple reality that private entities acting on their own behalf will likely not have the same constraints as a government that is accountable to an electorate. Allowing private condemnors to avoid state laws for measuring "just compensation" in this

context could potentially encourage forms of exploitive conduct that state laws are designed to prevent. For example, "landowners in smaller value condemnation actions [may be forced] to accept unfair 'low-ball' settlement offers to avoid exhaustion of additional condemnation proceeds through attorney fee expenditures." *Valley Elec. Ass'n v. Overfield*, 106 P.3d 1198, 1199 (Nev. 2005). That would be an "exceedingly incongruous result," *Panhandle E. Pipeline*, 332 U.S. at 519, for a statute intended to protect against potential abuses by private entities, *Fed. Power Comm'n*, 320 U.S. at 610.

3. The Eighth Circuit acknowledged that there "may well be" different concerns at stake when the United States exercises eminent domain authority on its own behalf rather than when it is exercised by a private entity, but shrugged them off as "policy arguments better addressed to Congress." App.9a.

That point would be fair enough, except that Congress has already provided that policy preference, declaring in statute that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. And in *Kimbell Foods* and its progeny, this Court has articulated a framework for assessing when federal laws should adhere to that policy choice and borrow state law as the rule of decision. The differences that inure when a private entity invokes eminent domain on its own behalf bear on that *Kimbell Foods* analysis.

In short, Congress has already made a policy choice—reinforced by our federalist structure and by

analytical frameworks provided by this Court—that when federal law affects areas of traditional state authority, like the valuation of real property interests, state law should generally be borrowed as the rule of decision unless there is a clear expression of legislative intent to the contrary, or a showing that the application of state law would significantly undermine federal interests. And those federal interests are generally weaker where the federal government does not itself exercise the eminent domain power—as the district court and every other Circuit to address the question thus far has held.

CONCLUSION

The Eighth Circuit's opinion broke with at least four other Circuits to hold that state law providing for the measurement of "just compensation" is irrelevant when private entities exercise eminent domain under the Natural Gas Act. That holding does injury to the traditional role held by states in our federalist system for securing real property interests, and it has effectively diminished the property rights held by landowners in seven states. Amici States encourage the Court to grant the petition for review.[6]

[6] Amici States understand that in the underlying appeal the parties disputed how state law would measure "just compensation" in this particular case. Amici States take no position on how a proper application of state law would measure "just compensation" in the underlying dispute.

September 8, 2025

Respectfully submitted,

DREW H. WRIGLEY
Attorney General
PHILIP AXT
Solicitor General
**Counsel of Record*
JOSEPH S. ST. JOHN
Spec. Assist. Att'y Gen.

Office of Attorney General
600 E Boulevard Ave.,
Dept. 125
Bismarck, ND 58505
Phone: 701-328-2210
Email: pjaxt@nd.gov

Counsel for State of North Dakota

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TIM GRIFFIN
Attorney General
State of Arkansas

JAMES UTHMEIER
Attorney General
State of Florida

RAÚL LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

LIZ MURRILL
Attorney General
State of Louisiana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

JONATHAN SKRMETTI
Attorney General
State of Tennessee

KEN PAXTON
Attorney General
State of Texas