

No. 25-159

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In The

**Supreme Court of the United States**

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LEONARD W. HOFFMAN, ET AL.,

*Petitioners,*

*v.*

WBI ENERGY TRANSMISSION, INC.,

*Respondent.*

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**On Petition for Writ of Certiorari  
to The United States Court of Appeals  
For the Eighth Circuit**

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**BRIEF OF *AMICUS CURIAE*  
OWNERS' COUNSEL OF AMERICA IN  
SUPPORT OF THE PETITION FOR A WRIT OF  
CERTIORARI**

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VINCE EISINGER\*  
ROBERT EL-JAOUHARI  
MAXWELL SHAFER  
CARA COOK  
CRANFILL SUMNER LLP  
5440 Wade Park Blvd.  
Suite 300  
Raleigh, NC 27607  
(919) 863-8703  
veisinger@cshlaw.com  
\* *Counsel of Record*  
*Counsel for Amici Curiae*

## **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?

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## INTEREST OF *AMICUS CURIAE*

Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys.<sup>1</sup> They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is “the guardian of every other right,” and the basis of a free society. See JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (2d ed. 1998). As the lawyers at the front lines of takings law, OCA's members understand the importance of the issues in this case, and how the rule adopted by the Eighth Circuit, if allowed to stand, will undermine the constitutional right to “just compensation.”

OCA brings unique expertise to this task. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for

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<sup>1</sup> Counsel of record for all of the parties received notice of OCA's intention to file an *amicus* brief at least 10 days prior to the deadline to file this brief. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by any person or entity other than the *amicus curiae*, its members, or its counsel.



a party or amicus in many of the property cases this Court has considered in the past forty years.<sup>2</sup>

OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.

### SUMMARY OF ARGUMENT

This case concerns whether property owners' guaranteed rights under several states' "just compensation" laws can be undermined by private condemnors invoking eminent domain under the Natural Gas Act. In undermining those state laws the Eighth Circuit contravened four sister circuits and robbed property owners of the just compensation guaranteed to them by state law and—arguably—by Congress. Although only North Dakota's guarantee of attorneys' fees in just compensation cases is specifically at issue in this case, state-created rights to attorneys' fees will be stricken in six of the seven states of the Eighth Circuit, and will be at serious risk in at least 14 other states if the Eighth Circuit's

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<sup>2</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

new-fashioned split widens.<sup>3</sup> See Andrew Prince Brigham & Lindsey Brigham Knott, A Practitioner’s Perspective on How Best to Avoid the Risk of Unjust Compensation, 10 PROP. RTS. J. 351, 361–65 (2021). The threat to landowners and private property thus spans the nation. To protect those owners in at least these 21 states the circuit split should be resolved, and resolved in favor of guaranteed rights.

OCA has been on the front lines of critical just-compensation litigation nationwide, and across the country has argued against abrogation of critical property rights specifically established by states or constitutions to protect citizens from unlawful government takings. The Eighth Circuit’s decision is precisely such an abrogation. Strikingly, the Eighth Circuit’s abrogation is of the North Dakota *constitution’s* guarantee of just compensation, which as early as 1905 meant that the landowner must receive “just compensation for his property, and not that the just compensation assessed by a jury shall be diminished to the extent of his costs.” *Petersburg Sch. Dist. v. Peterson*, 103 N.W. 756, 759 (N.D. 1905). Put succinctly, “if the owner must disburse for costs the money received for his land, the compensation cannot be regarded as ‘just,’ within the meaning of the constitutional provision.” *Id.* at 759 (citation omitted). The Eighth Circuit’s decision slashes this constitutional guarantee and like guarantees across

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<sup>3</sup> Thirteen states comprise the “Third, Fifth, Sixth, and Eleventh Circuits[.]” where “questions of compensation in Natural Gas Act condemnations are determined by state law[.]” (Cert. Pet. p. 6), and are thus protected from the Eighth Circuit’s decision’s effects.

its jurisdiction, diminishing just compensation lawfully owed when private property is taken.

Without correction by this Court, the Eighth Circuit's upturned rationale similarly exposes landowners in other circuits across the country. Paying the full and complete amount of just compensation required under state law—equivalent to the compensation required when the condemnor is a state or local government—is an important check and balance against unrestrained private takings by for-profit enterprises. Without that check landowners are exposed to for-profit ravaging, taking more from them than when the same taking is exercised by those landowners' own elected state and local officials. Indeed, the Eighth Circuit's decision means that private condemnors under the Natural Gas Act can take land in several states more cheaply than those states' own governments could—and thus that private landowners in those states are less compensated when the condemnor is a for-profit enterprise than they would be had their state or local government taken the land. Subjecting American landowners to discounted land grabs by private parties not only contravenes those landowners' guarantees under their states' constitutions and laws, but has no basis in rational government.

The Eighth Circuit's decision thus has a real, tangible impact on landowners. OCA herein presents a synopsis of that impact to the Court. This brief identifies the states where landowners facing eminent domain are entitled to recover attorneys' fees under state law, but where that protection is now lost, or is at risk of being lost, as a result of the Eighth

Circuit's decision. For each such state this brief summarizes landowners' rights to recover attorneys' fees in condemnation actions, and thus summarizes what the Eighth Circuit's decision would strip away.

## **ARGUMENT**

### **I. THE EIGHTH CIRCUIT'S FLAWED CHOICE-OF-LAW ANALYSIS WOULD NEGATE THE LAWS OF NUMEROUS STATES THAT HAVE EXCEEDED THE CONSTITUTIONAL FLOOR FOR "JUST COMPENSATION"**

The Fifth Amendment to the United States Constitution (the "Fifth Amendment") provides that private property shall not "be taken for public use, without just compensation." U.S. Const, amend. V; *see also U.S. v. Reynolds*, 397 U.S. 14, 16 (1970) (stating that the Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use and without just compensation"). The question of what constitutes "just compensation" has resulted in a body of federal case law interpreting this fundamental right.

"Just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Reynolds*, 397 U.S. at 16. Precedent dictates that "just compensation is for the property, and not to the

owner,” meaning that “indirect costs to the property caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled.” *U.S. v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (internal quotations omitted) (quoting *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 326 (1893)). As such, at a constitutional level, “attorneys’ fees and expenses are not embraced within just compensation.” *Id.* While there are some federal statutes that allow for the recovery of attorneys’ fees and costs, those allowances are “a matter of legislative grace rather than constitutional command” required by the Fifth Amendment. *Id.* at 204.

But when a statute is silent as to the meaning of “compensation,” the federal judiciary then determines whether state law or federal common law applies. *See generally Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy Cnty.*, 59 F.4th 1158, 1163 (11th Cir. 2023) (determining that state law supplies the definition of “compensation” for eminent domain actions taken by licensees under the Natural Gas Act); *see also Ga. Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (concluding that state law supplies the definition of “compensation” for eminent domain actions taken by licensees under the Federal Power Act).

Directly at issue in this case, the Natural Gas Act is one such statute that is silent on the meaning of “compensation.” Several federal circuit courts, however, have concluded that state law provides the measure of just compensation in condemnation proceedings brought by federal licensees. *See*

*generally Sabal Trail Transmission, LLC*, 59 F.4th at 1163; *Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 255 (3d Cir. 2019); *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1199 (6th Cir. 1992); *see also Bison Pipeline, LLC v. 102.84 Acres of Land*, 560 Fed. Appx. 690, 695 (10th Cir. 2013) (stating that for the purpose of the appeal, the court assumed “that the law of the state where the subject property is located can prescribe the measure of just compensation in an eminent-domain proceeding under the Natural Gas Act”).

In one such case, litigated by OCA’s Florida member, the Eleventh Circuit concluded that, because “state law provides the measure of compensation in proceedings that arise under Section 717(f) of the Natural Gas Act,” the property owner was entitled to attorneys’ fees and costs pursuant to state law. *See generally Sabal Trail Transmission*, 59 F.4th at 1163. The court in *Sabal Trail Transmission, LLC* based its decision to apply state law to condemnation actions under the Natural Gas Act partly on the fact that Natural Gas Act condemnation proceedings are brought under state law—and “the federal standard for compensation in eminent-domain cases establishes the floor, not the ceiling, on compensation.” *Id.* at 1170.

Thus, although the Constitution provides a minimum for just compensation, it is clear that states can go beyond that floor in their determination of what aspects constitute just compensation, including the recovery of attorneys’ fees and costs. Multiple federal circuit courts have accepted this principle in

the context of condemnation actions brought pursuant to the Natural Gas Act and have allowed parties to those actions to collect attorneys' fees and costs as allowed by state law.<sup>4</sup>

The Eighth Circuit is the sole Court of Appeals to hold otherwise. Its reading of the law would mean Congress struck through a massive swath of property rights nationwide, otherwise guaranteed to landowners under state laws, when it adopted the Natural Gas Act. With nary an explicit word for such sweeping impact. Worse, the Eighth Circuit's ruling would mean that Congress did of all of this where the entity exercising the eminent domain power *is a private entity*. See Brigham & Knott, *supra*, at 358–61 (explaining why the protections of state law are particularly necessary in cases of a private condemnor); see also *id.* at 366–83 (describing the *Sabal Trail Transmission* lawsuit, including that the defendant-pipeline company's experts had “always opin[ed] to ‘zero damages’” (emphasis removed)).

OCA submits this *amicus* brief to survey for the Court the laws of many states that—like North Dakota's—allow for an award of attorneys' fees to a property owner in certain circumstances. Property owners in the following several states would be stripped of their guaranteed rights if the Eighth Circuit's choice-of-law analysis were adopted nationwide.

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<sup>4</sup> OCA's Florida member has written about the importance of the potential for an award of attorneys' fees and costs as one of the “checks and balances” against “unjust compensation.” See Brigham & Knott, A Practitioner's Perspective, *supra*, at 381–92.

<b>State</b>	<b>Applicable Law for Recovering Attorneys' Fees and Costs</b>
Alaska	The condemnor is required to pay the owner's attorneys' fees and costs when (1) the taking of the property is denied, (2) the condemnor appeals from the master's award and the landowner does not appeal, (3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant, (4) the action was dismissed, or (5) the allowance of costs and attorneys' fees appears necessary to achieve a just and adequate compensation of the owner. ALASKA R. CIV. PRO. 72.
Arkansas	Owner's costs, expenses, and reasonable attorney's fees related to the final hearing if the amount awarded is greater than the condemning entity's offer by 20% or more. ARK. CODE ANN. § 18-15-103(11).
Colorado	Litigation costs can be recovered if the costs were reasonably incurred, but the landowner



	<p>must prove their reasonableness. If immediate possession is taken and the award exceeds the deposit, the owner can receive interest on the difference of those amounts. Reasonable attorneys' fees can be recovered if the court finds the government lacked authority to condemn the property and/or if the award is over \$10,000 and at least 30% more than the last written offer before filing suit. COLO. REV. STAT. § 38-1-122.</p>
Florida	<p>Reasonable attorneys' fees and costs are part of Florida's constitutional standard of "full compensation" to be paid by the condemnor. <i>Dade Co. v. Brigham</i>, 47 So. 2d 602 (Fla. 1950). In actions where the property is acquired, FLA. STAT. § 73.092 sets attorneys' fees based upon a percentage of the benefit achieved as a difference between the initial offer and settlement or final judgment (including monetary and non-monetary benefits or the owner). If the owner defeats a taking or attorneys' fees are incurred in a supplemental proceeding, the court will award</p>

	fees based upon facts set forth in FLA. STAT. §73.092.
Idaho	The court determines if the owner will receive reasonable costs and fees. IDAHO CODE § 7-711A(8). This is determined by whether the owner obtained a trial judgment at least 10% higher than the condemner's last timely offer before filing suit or whether the owner contested the taking or possession of the property. <i>Id.</i>
Iowa	If the appraisement by the compensation commission exceeds by 10% the last and final offer of condemnor, the compensation commission is entitled to award the condemnee reasonable attorneys' fees and costs, including the reasonable cost of one appraisal. IOWA CODE § 6B.33. All costs of the appeal, including reasonable attorney's fees and costs, as well as "the reasonable cost incurred by the property owner for one appraisal" is recoverable, "unless on the trial thereof the same or a lesser amount of damages is awarded than was allowed" by the commission. IOWA CODE § 6B.33. Under a 2006

	amendment to § 6A.24(3), attorneys' fees and costs are awarded to the prevailing challenger of condemnation authority or proceedings. When a condemnation is abandoned or the condemnor refuses to pay final award, attorneys' fees, costs and actual damages are awarded. IOWA CODE § 6B.34.
Louisiana	An award of reasonable attorneys' fees is authorized in connection with expropriation proceedings if certain conditions are met: (1) if the amount of compensation awarded to owner is higher than the highest offer from the expropriating authority, LA. REV. STAT. § 19:8(A)(3), or (2) in a "quick take" the court may award reasonable attorneys' fees if the compensation deposited with the court "is less than the amount of compensation awarded in the judgment[,]" LA. REV. STAT. § 48:453(E).
Michigan	Attorneys' fees, expert fees, and costs incurred in the condemnation action may be awarded. <i>See</i> MICH. COMP. LAWS SERV. § 213.66.
Minnesota	If final judgment or award is more than 40% greater than

	condemning authority's last written offer before condemnation petition is filed, then award of "reasonable attorney fees, litigation expenses, appraisal fees, other experts fees, and other related costs" is mandatory. <i>See</i> MINN. STAT. § 117.031(a). If the award is 20–40% more than the final offer, the court chooses the recoverable amount. <i>Id.</i>
Montana	If the court denies the condemnation or the owner is awarded more than a final offer from the comdenmor, the owner is entitled to the "necessary expenses of litigation[.]" MONT. CODE ANN. § 70-30-305. "Necessary expenses of litigation" is defined as including, among other expenses, attorneys' fees, exhibit costs, expert witness fees, and court costs. <i>Id.</i> at § 70-30-306.
Nebraska	A district judge must award the owner a reasonable amount for attorney fees and the fees of two expert witnesses, if: (1) the owner appealed and the final judgment is at least 15% more than Board of Appraisers' award, or (2) condemning authority

	<p>appealed and the final judgment is not less than 85% below the Board of Appraisers' award, or</p> <p>(3) both appealed and the final judgment is more than the Board of Appraisers'. NEB. REV. STAT. § 76-720.</p>
New York	<p>Fees, including reasonable attorneys' fees, can be recovered if the court's award is substantially higher than the condemnor's offer and if the court finds extra payment to be necessary for the owner to receive fair compensation. N.Y. EM. DOM. PROC. LAW § 701.</p>
North Dakota	<p>The court has discretion to determine the amount in attorneys' fees, court costs, expert fees, and interest to award the owner. N.D. CENT. CODE §§ 32-15-32, 32-15-35.</p>
Oklahoma	<p>All fees can be recovered if the "final judgment is that the real property cannot be acquired by condemnation," "the proceeding is abandoned," or if the jury verdict is at least 10% higher than the commissioners' award. The condemnor is always responsible for filing and commissioners' fees. Even if the owner loses, they don't have to</p>

	pay attorney or expert fees. OKLA. STAT. tit. 27, §§ 11–12.
Oregon	Fees may be recovered if the final award is higher than the condemnor’s last written offer, the court finds the first written offer was not made in good faith or unreasonably low, or the condemnor fails to take the property within 60 days or abandons it. OR. REV. STAT. §§ 35.300; 35.346(7).
South Carolina	In actions wherein the condemnor’s right to take is challenged, if the court determines that the condemnor has no right “to take all or any part of the property, the landowner’s reasonable costs and litigation expenses . . . must be awarded” to the owner. S.C. CODE ANN. § 28-2-510(A). A landowner that prevails in a condemnation action may recover “reasonable litigation expenses by serving on the condemnor and filing with the clerk of court an application within fifteen days of the entry of judgment” showing that he prevailed; stating the amount sought; including an “itemized statement from an attorney or

	expert witness” stating and explaining the fees charged; and explaining “all actual expense for which recovery is sought.” S.C. CODE ANN. § 28-2-510(B)(1). “If the condemnor abandons or withdraws the condemnation action,” the owner is “entitled to reasonable attorney fees, litigation expenses, and costs as determined by the court.” S.C. CODE ANN. § 28-2-510(B)(2).
South Dakota	If the final award is at least 20% higher than the condemnor’s last offer, the owner can recover reasonable attorneys’ fees and up to two expert witness fees. If the owner is the prevailing party, they may also recover litigation expenses. S.D. CODIFIED LAWS § 21-35-23.
Utah	If the owner makes an offer and award is more than their offer, they can recover attorneys’ fees and costs may not exceed one-third the difference between the compensation awarded and the condemnor’s settlement offer. UTAH CODE ANN. §§ 78B-6-509(7).
Washington	After trial, the condemnor pays for reasonable attorney and expert fees if the award is at least

	10% higher than the condemnor's best offer made 30 days before trial. WASH. REV. CODE § 8.25.070(1)(b).
Wisconsin	Fees can be recovered if the owner wins, the condemnor abandons the property, or if the award is at least 15% or \$2,700 (subject to adjustment by the Department of Administration) higher than the condemnor's offer before the taking. WIS. STAT. § 32.28(3).
Wyoming	The condemnor must pay the owner's attorneys' fees and costs when the final award exceeds the condemnor's presuit offer by 115%. WYO. STAT. ANN. §§ 1-26-502 to 1-26-817.

This Court has expressly recognized the states' authority to provide property owners greater protections than those provided under federal law. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that



carefully limit the grounds upon which takings may be exercised.”). Judicial recognition of heightened protections under state law is more important today than ever, as the power of eminent domain over the property of citizens continues to expand. *See, e.g., id.* To the extent Congress desires to exempt a condemnor from the requirements of heightened protections under state law, it can do so. Congress has not done so here.

State substantive law, not federal common law, defines an owner’s interest in property. *See Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 20 (1990) (O’Connor, J., concurring) (“In determining whether a taking has occurred, we are mindful of the basic axiom that [p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” (internal quotations omitted) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), and *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980))). OCA respectfully submits that the rule should be no different in determining whether a property owner deserves an award of attorneys’ fees when his State has determined that such reimbursement is part of his right to just compensation.

## CONCLUSION

OCA respectfully urges the Court to grant the Petition for Certiorari.

September 10, 2025

Respectfully submitted,

Vince Eisinger\*  
Robert El-Jaouhari  
Maxwell Shafer  
Cara Cook  
Cranfill Sumner LLP  
5440 Wade Park Blvd.  
Suite 300, Raleigh, NC 27607  
(919) 863-8703  
veisinger@cshlaw.com  
*\*Counsel of Record*

*Counsel for Amicus Curiae*