No. 25-159

In the Supreme Court of the United States

LEONARD W. HOFFMAN, 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 IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities ii
Introduction 1
Statement 3
A. Legal background 3
B. Factual and procedural background 7
Reasons for Denying the Petition 11
A. This case does not implicate the question presented. 12
B. There is no split warranting this Court's review. 17
C. The decision below is correct. 21
1. Attorneys' fees are unavailable in federal condemnation proceedings regardless of delegations. 21
2. Even under Kimbell Foods, compensation in federal condemnation proceedings should be governed by federal law. 29
Conclusion 31

TABLE OF AUTHORITIES

Cases

Almota Farmers Elevator & Warehouse Co. v. *United States*, 409 U.S. 470 (1973) 23

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975) 16

Berman v. *Parker*, 348 U.S. 26 (1954) 4

California v. *Cent. Pac. R.R. Co.*, 127 U.S. 1 (1888) 4

Cherokee Nation v. *S. Kan. Rwy. Co.*, 135 U.S. 641 (1890) 4

Columbia Gas Transmission Corp. v. *Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992) 18

Custiss v. *Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233 (1810) 4

Dohany v. *Rogers*, 281 U.S. 362 (1930) 14

FCC v. *NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293 (2003) 25

Georgia Power Co. v. *138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980) 18, 19, 20, 23, 31

Hardt v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010) 14

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 16

Cases—continued

Jackson v. *Metro. Edison Co.*,
419 U.S. 345 (1974) 5

Joseph B. Doerr Tr. v. *Cent. Fla. Expressway Auth.*,
177 So.3d 1209 (Fla. 2015) 13, 19

Keeton v. *Alaska*,
441 P.3d 933 (Alaska 2019) 13

Kirby Forest Indus., Inc. v. *United States*,
467 U.S. 1 (1984) 24

Kohl v. *United States*,
91 U.S. 367 (1875) 3, 4, 23, 24, 28

Lackey v. *Stinnie*,
145 S. Ct. 659 (2025) 16

Luxton v. *N. River Bridge Co.*,
153 U.S. 525 (1894) 4, 5, 12, 22

Marx v. *Gen. Revenue Corp.*,
568 U.S. 371 (2013) 28, 29

Miss. & Rum River Boom Co. v. *Patterson*,
98 U.S. 403 (1878) 3

Mississippi River Transmission Corp. v. *Tabor*,
757 F.2d 662 (5th Cir. 1985) 19

Monongahela Nav. Co. v. *United States*,
148 U.S. 312 (1893) 23

NLRB v. *SW. Gen., Inc.*,
580 U.S. 288 (2017) 26

Cases—continued

PennEast Pipeline Co. v. *New Jersey*,
594 U.S. 482 (2021) 1, 3-7, 10-12, 20-23, 25, 27, 29, 30

Petersburg Sch. Dist. of Nelson Cnty. v. *Peterson*,
103 N.W. 756 (N.D. 1905) 15

Ruckelshaus v. *Sierra Club*,
463 U.S. 680 (1983) 14

Sabal Trail Transmission, LLC v. *18.27 Acres of Land*,
59 F.4th 1158 (11th Cir. 2023) 19, 20, 23

Sabal Trail Transmission, LLC v. *3.921 Acres*,
74 F.4th 1346 (11th Cir. 2023) 20, 23

Schneidewind v. *ANR Pipeline Co.*,
485 U.S. 293 (1988) 5, 6

Smith v. *GTE Corp.*,
236 F.3d 1292 (11th Cir. 2001) 20

California ex rel. State Lands Comm'n v. *United States*,
457 U.S. 273 (1982) 16

Sunray Mid-Con. Oil Co. v. *FPC*,
364 U.S. 137 (1960) 31

Tennessee Gas Pipeline Co. v. *Permanent Easement for 7.053 Acres*,
931 F.3d 237 (3d Cir. 2019) 17, 23

Transwestern Pipeline Co. v. *17.19 Acres of Prop. Located in Maricopa Cnty.*,
627 F.3d 1268 (9th Cir. 2010) 17, 24

United States v. *93.970 Acres of Land*,
360 U.S. 328 (1959) 9, 23, 26, 27

Cases—continued

United States v. *Bodcaw Co.*,
440 U.S. 202 (1979) 10, 11, 15, 23

United States v. *Carmack*,
329 U.S. 230 (1946) 27

United States v. *Johnson*,
529 U.S. 53 (2000) 25

United States v. *Kimbell Foods, Inc.*,
440 U.S. 715 (1979) 3, 9, 29-31

United States v. *Miller*,
317 U.S. 369 (1943) 23, 24, 26

White v. *Georgia Power Co.*,
227 S.E.2d 385 (1976) 18

Constitutional Provisions

N.D. Const. Art. 1, § 16 13

Statutes

15 U.S.C.
§ 717f(c)(1)(A) 6
§ 717f(c)(1)(B) 6
§ 717f(e) 6
§ 717f(h) 1-3, 7-9, 16, 19, 21, 23-30
§ 717y(b)(2) 25
§ 717y(e)(2)-(3) 25

16 U.S.C.
§ 814 6
§ 824p(e) 28
§ 824p(f)(2) 28

Statutes—continued

28 U.S.C.
§ 1331 16
§ 2072(b) 9
§ 2412(b) 15
§ 2412(d)(2)(H) 15

33 U.S.C. § 532 25

42 U.S.C.
§ 4601(1) 16, 24
§ 4601(5) 16

42 U.S.C.
§ 4651 ..... 30, 31
§ 4654 30
§ 4654(a) 17, 24

Act of Mar. 3, 1809, 2 Stat. 539 4

Pub. L. No. 80-245, 61 Stat. 459 (1947) 7

Pub. L. No. 100-17, 101 Stat. 132 16

N.D.C.C.
§ 32-15-01(2) 13
§ 32-15-22 13
§ 32-15-32 ..... 9, 13, 15

26 Pa. Cons. Stat. § 706(a) 18

Other Authorities

82 Fed. Reg. 60,007 (Dec. 18, 2017) 8

William Baude, *The Judgment Power*, 96 Geo. L.J. 1807 (2008) 19

Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517 (2009) 3

Other Authorities—continued

Advisory Committee Note to Rule 71A (1951) 9

Cost, *Black's Law Dictionary* (12th ed. 2024) 15

Env't & Natural Res. Div., *History of the Federal Use of Eminent Domain*, Dep't of Justice (Jan. 30, 2024) 4

1A *Nichols on Eminent Domain* § 3.03(6)(b) (3d ed. 2018) 26

N.D. R. Civ. P. 54(e) 15

Fed. R. Civ. P. 71.1 ..... 8, 9, 27

S. Rep. No. 429, 80th Cong. (1947) 6, 7, 30

INTRODUCTION

In 1947, Congress amended the Natural Gas Act to allow pipeline developers to acquire property through "the right of eminent domain." See 15 U.S.C. § 717f(h). Prior to this change, private companies whose projects were approved by federal agencies had to rely on eminent domain authority originating in *state* law. And because numerous states imposed state-specific restrictions on condemnations that were difficult for pipeline projects to fulfil, a federal pipeline permit often provided "only an illusory right to build." *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. 482, 489 (2021).

Pipelines were nonetheless crucial to the development of domestic energy and the integrity of American industry. To ensure that these critical nationwide projects were not stymied by parochial and highly varying state implementation of eminent domain, Congress delegated to the pipeline companies "the *federal* eminent domain power." *PennEast*, 594 U.S. at 489.

Petitioners question whether state or federal law controls the bounds of compensation to be awarded in Natural Gas Act condemnation proceedings. But the specific dispute in this case is limited to whether petitioners may recover "attorney's fees and expenses." Pet. App. 18a. While North Dakota authorizes awards of attorneys' fees in *state* condemnation cases, it is well established that fees are generally unavailable where the United States condemns property under its own authority. In understanding the contours of the "right of eminent domain" conferred in the Natural Gas Act, 15 U.S.C. § 717f(h), the Eighth Circuit turned to federal, rather than state, law, and therefore held that attorney fees were unavailable.

That decision does not present an appropriate candidate for certiorari, for three reasons.

First, this case is a poor vehicle for review of the question presented, which petitioners frame as whether "just compensation" in Natural Gas Act condemnation proceedings should "be determined by reference to state law." Pet. i. But this case is about attorneys' fees, and unlike certain other states, North Dakota does not define just compensation to include those fees—it merely has a separate fee-shifting provision applicable in condemnation proceedings that gives courts *discretion* to award costs and fees, distinct from the compensation owed for the value of the property. Quite apart from the question of which law governs the measure of compensation for a taking, there is no reason to think that Congress intended for state fee-shifting statutes to control in the federal cause of action it created in Section 717f(h).

Second, the split on this issue—to the extent one exists—is recent and shallow. Because the availability of fees in North Dakota is not a question of just compensation, the judgment below does not conflict with cases where courts actually faced the question presented. And in any event, the Eighth Circuit is the only appellate court to have considered the question on a fresh slate since this Court clarified the nature of Section 717f(h)'s delegation in *PennEast*. While one other court has, in a divided ruling, declined to reconsider its pre-*PennEast* precedents, there is a strong likelihood that the Eighth Circuit's opinion could shift the tide and bring the circuits to consensus on the correct side of this legal question. The Court should allow the issue to further percolate in the lower courts, as waiting may obviate the need for this Court's review.

Third, the Eighth Circuit was correct on the merits. When a pipeline company condemns property under the Natural Gas Act, it is exercising the United States's own sovereign power of eminent domain. More than a century of precedent carefully circumscribed the permissible remedies in federal condemnation proceedings, and had foreclosed the availability of attorneys' fees for decades when Congress adopted Section 717f(h). The provision thus contains no gap to be filled by reference to state law. And even if it did, the *Kimbell Foods* analysis demonstrates the need for a uniform federal rule.

The petition should be denied.

STATEMENT

A. Legal background

1. Sovereign governments have possessed the right of eminent domain for centuries, dating back to biblical times. Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 524 (2009) (citing 1 Samuel 8:14). The power is so nearly an inherent aspect of sovereignty that it "appertains to every independent government." *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U.S. 403, 406 (1878). And while "the Constitution and Bill of Rights * * * did not include the words 'eminent domain,'" the federal government has "excersi[zed] its eminent domain authority" since "[s]hortly after the founding." *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. 482, 494 (2021). Because eminent domain "was one of those means well known when the Constitution was adopted," the federal government's authority to condemn property through eminent domain "ought not to be questioned." *Kohl* v. *United States*, 91 U.S. 367, 372 (1875).

At first, the Federal Government's uses of eminent domain were limited principally to "areas subject to exclusive federal jurisdiction," such as the District of Columbia. *PennEast*, 594 U.S. at 494 (citing Act of Mar. 3, 1809, 2 Stat. 539)). But within a few decades, this Court confirmed that the United States could exercise eminent domain over property within state borders. *Kohl*, 91 U.S. 367. So long as "the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Berman* v. *Parker*, 348 U.S. 26, 33 (1954). Exercising this authority, the federal government has used eminent domain "to facilitate transportation, supply water, construct public buildings, and aid in defense readiness." Env't & Natural Res. Div., *History of the Federal Use of Eminent Domain*, Dep't of Justice (Jan. 30, 2024), perma.cc/N5XR-6B4Q. It has also condemned property to create parks and wildlife reserves, including Rock Creek National Park. *Ibid.*

Just as clear as the federal government's eminent domain power is that Congress may exercise "its eminent domain authority through both its own officers and private delegatees." *PennEast*, 594 U.S. at 493. "For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties." *Id.* at 495. Such delegations were ubiquitous among the states throughout the nineteenth century (Bell, *supra*, at 545), and commonplace for the federal government. See, *e.g.*, *Custiss* v. *Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233 (1810); *California* v. *Cent. Pac. R.R. Co.*, 127 U.S. 1 (1888); *Cherokee Nation* v. *S. Kan. Rwy. Co.*, 135 U.S. 641 (1890); *Luxton* v. *N. River Bridge Co.*, 153 U.S. 525, 532-534 (1894). The thrust of this consistent

history is that Congress "may, at its discretion, use its sovereign powers, directly or through a corporation * * * for the accommodation of interstate commerce." *Luxton*, 153 U.S. at 530.

When a private delegee exercises the eminent domain power, the "delegation[] essentially put[s] the private actor * * * in the place of the government with regard to the law of eminent domain." Bell, *supra*, at 545. Because eminent domain "is traditionally associated with sovereignty," those wielding that power are necessarily state actors. *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 353 (1974). There is no such thing in our constitutional order as a "private" use of eminent domain. When a private entity condemns land under authority granted to it by Congress, it acts "to give effect to the federal eminent domain power." *PennEast*, 594 U.S. at 502. It is *Congress* condemning the property for federal purposes, not the entity itself.

2. The Natural Gas Act (NGA) "follows this path." *PennEast*, 594 U.S. at 498. "Natural gas has been part of the Nation's energy supply since at least the 1820s." *Id.* at 488. As technology improved, companies began to develop pipelines to carry natural gas across the country. *Id.* at 488-489. Congress thus enacted the NGA in 1938 "to regulate the transportation and sale of natural gas in interstate commerce." *Id.* at 489. The NGA gave the Federal Power Commission (now the Federal Energy Regulatory Commission, FERC) exclusive jurisdiction to regulate the rates and facilities of natural gas companies. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988).

Before it can construct, extend, acquire, or operate any facility for the transportation of natural gas in interstate commerce, a natural gas company must ob-

tain from FERC a "certificate of public convenience and necessity." 15 U.S.C. § 717f(c)(1)(A). A certificate will issue only after notice and hearing, at which members of the public and affected property-holders may object. 15 U.S.C. § 717f(c)(1)(B). FERC will grant the certificate only on finding the company willing and able to complete the project in compliance with the provisions of the NGA and FERC's implementing regulations, which are "extensive." 15 U.S.C. § 717f(e); *ANR Pipeline Co.*, 485 U.S. at 302. FERC may also attach "to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).

The NGA was enacted alongside the Federal Power Act (FPA), and the two statutes share many parallel provisions. From its inception, the FPA has authorized licensees to exercise "the right of eminent domain" to acquire necessary rights-of-way for the transmission of electric power. 16 U.S.C. § 814. The NGA lacked such a mechanism. *PennEast*, 594 U.S. at 489.

Instead, companies that had obtained certificates to build pipelines were forced to rely on *state* eminent domain procedures to secure the property rights they needed. *PennEast*, 594 U.S. at 489. But those state procedures were frequently unavailable to pipeline companies. Some states limited eminent domain to projects that would demonstrably benefit the states' residents. S. Rep. No. 429, 80th Cong., at 2 (1947) (collecting cases). Pipelines, which moved natural gas across numerous states, had difficulty satisfying that requirement. *Ibid.* Other states had statutory or con-

stitutional provisions denying eminent domain power to out-of-state corporations. *Id.* at 2-3. And still others restricted eminent domain to corporations that distributed natural gas within the state. *Ibid.* Because major pipelines had to cross numerous states, the result of the inconsistent state approaches to eminent domain meant "that certificate holders often had only an illusory right to build." *PennEast*, 594 U.S. at 489.

Congress amended the NGA in 1947 to remedy this problem. Rather than resorting to state eminent domain authority, Congress provided that "any holder of a certificate of public convenience and necessity" may acquire necessary property rights "by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h); Pub. L. No. 80-245, 61 Stat. 459 (1947). If a certificate holder "cannot acquire by contract" or was "unable to agree with the owner" on the appropriate compensation for the property or right-of-way needed for the project, the certificate holder may institute a condemnation proceeding in "the district court of the United States for the district in which such property may be located, or in the State courts." *Ibid.*

B. Factual and procedural background

1. WBI is an interstate natural gas company. Since 1985, WBI has held a certificate of public convenience and necessity from FERC authorizing it to acquire and operate interstate pipeline facilities previously owned and operated by Montana-Dakota Utilities Co. Pet. App. 28a. On November 30, 2017, WBI filed a prior notice request for authorization to construct and operate approximately 12 miles of 24-inch diameter pipeline connecting WBI's existing Spring Creek Meter Station to the existing Cherry Creek Valve Setting, and to expand two meter stations,

within McKenzie County, North Dakota. Pet. App. 29a; see 82 Fed. Reg. 60,007 (Dec. 18, 2017). FERC issued a notice of authorization under WBI's existing certificate, which was published several days later in the Federal Register. *Ibid.*

WBI brought a condemnation action under Federal Rule of Civil Procedure 71.1 and Section 717f(h) of the NGA to obtain permanent easements and temporary rights-of-way over Petitioners' property in North Dakota. Pet. App. 28a-29a. The district court promptly adopted the parties' stipulation that WBI could immediately use and possess the easements, leaving only the amount of compensation to be determined. *Id.* at 29a. The parties reached a settlement on that question, with Petitioners reserving their right to seek attorneys' fees and expenses (and WBI reserving the right to oppose). Pet. App. 29a-30a.

2. The district court held that the availability of attorneys' fees to the condemnee in federal eminent domain proceedings is determined by the law of the state in which the condemned property is located. Pet. App. 14a-23a.

The district court began with the premise that the analysis where a delegee condemns property must be "distinct, unique, and separate from circumstances in which the United States" itself "is filling the role of the condemner." Pet. App. 31a. It correctly noted that nothing in the text of Section 717f(h) required the application of state law.[1] But it then concluded that Rule

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[1] A later clause in Section 717f(h) states that the "practice and procedure in any action or proceeding * * * 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

71.1 and the NGA "are silent regarding the application of state law in condemnation proceedings under the statute." *Id.* at 32a. And in North Dakota, the court "may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include * * *reasonable attorney's fees for all judicial proceedings." N.D.C.C. § 32-15-32. The district court thus endeavored to determine whether federal or state law provided the rule of decision.

The court rejected WBI's arguments that federal law foreclosed the availability of attorneys' fees. Pet. App. 32a & n.2. It then applied the framework this Court laid out in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). The court surveyed several decisions by federal appellate courts. Pet. App. 35a-40a. It concluded that there is no overriding need for a nationally uniform rule. *Id.* at 41a-42a. The district court then held that applying North Dakota's fee-shifting statute would not frustrate the NGA's objectives, and that instead a uniform federal rule would

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is situated." That language required conformity in "procedural matters only" (*United States* v. *93.970 Acres of Land*, 360 U.S. 328, 333 n.7 (1959)), and so does not resolve the availability of attorneys' fees in a condemnation action. And in any event, this clause has been superseded by what is now Rule 71.1. *Ibid.*; see Advisory Committee Note to Rule 71A (1951) (rule "affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and * * * supplants all statutes prescribing a different procedure."); 28 U.S.C. § 2072(b) ("All laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect."). Rule 71.1 thus supplants any procedures that would have been required by Section 717f(h).

upset existing commercial relationships. *Id.* at 43a-44a.

Because it believed all three *Kimbell Foods* factors favored state law, the district court concluded that fees were available in the federal proceeding as an application of North Dakota's law. Pet. App. 45a-46a.

3. The Eighth Circuit reversed. It began by observing that the NGA's delegation of eminent domain authority was "categorial." Pet. App. 4a (quoting *PennEast*, 594 U.S. at 498). As the delegee exercising the federal government's eminent domain power, WBI "inherited all its rights and obligations." *Ibid.* The nature of the power WBI possessed was to take property (state or private), and the corresponding obligation was to pay just compensation. *Ibid.*

The court of appeals next observed that "[j]ust compensation" under the Fifth Amendment "has a well-established legal meaning." Pet. App. 4a. The measure of that compensation depends on the value of the property, not the cost to the condemnee. Just compensation under federal law thus normally excludes attorneys' fees. Pet. App. 5a; see *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 (1979) ("[A]ttorneys' fees and expenses are not embraced within just compensation.") (quotation marks omitted). The only exceptions to this general rule are where Congress has provided otherwise by statute. Pet. App. 5a. Because no exception applies here, the court concluded that the required compensation in Section 717f(h) proceedings does not include attorneys' fees.

The Eighth Circuit rejected the district court's application of *Kimbell Foods*. Pt. App. 7a. While *Kimbell Foods* is the right analysis to fill statutory "gaps," "when it comes to eminent domain, congressional si-

lence leaves no 'gaps' to fill." *Ibid.* The court perceived no reason why the well-established rules concerning just compensation should change "when the federal government hands the keys over to a private party." Pet. App. 8a. It grounded its holding in this Court's recent decision in *PennEast*. There, as the Eighth Circuit explained, this Court held that "through the Natural Gas Act, the gas company received what amounted to the *entire* federal eminent-domain power, not just some diluted form of it." Pet. App. 8a.

Moreover, any "policy arguments" in favor of fees are "better addressed to Congress." Pet. App. 9a. The Court concluded that "[t]he Fifth Amendment, not state law or federal common law, fills any 'gaps' in the Natural Gas Act." Pet. App. 9a-10a. And fees are unavailable under the Fifth Amendment. *Bodcaw*, 440 U.S. at 203.

REASONS FOR DENYING THE PETITION

This case is not an appropriate candidate for review, for three reasons.

First, this case does not implicate the question presented. Because North Dakota allows for fees in condemnation actions through a standalone fee-shifting statute rather than by incorporating fees into its measure of just compensation, the question of "how to determine the amount of just compensation" (Pet. i) does not arise, and the case is instead easily resolved by application of the common-law American Rule.

Second, for that same reason there is no true split over the issue in this case. To the extent the cases cited by petitioner involved attorney fees at all (most did not), they concerned states that—unlike North Dakota—*do* count attorney's fees in the measure of just compensation under state law. The difference in

outcomes is therefore attributable to differences in the law of the relevant states, not a split over an important federal-law question.

Moreover, even if the case were a proper vehicle for the question presented, any split on this question is recent and shallow. The Eighth Circuit based its holding in large part on this Court's recent decision in *PennEast Pipeline Co.,* v. *New Jersey*, 594 U.S. 482 (2021). It is the only court of appeals to have considered on a clean slate whether state or federal law defines just compensation since the Court clarified that when Congress delegates the federal eminent domain power to a private corporation, Congress is still "us[ing] its sovereign powers." *Id.* at 496 (quoting *Luxton* v. *N. River Bridge Co.*, 153 U.S. 525, 530 (1894)). That *PennEast* led the Eighth Circuit to the correct result here suggests that further percolation is warranted.

And *third*, the Eighth Circuit was correct. There is no gap in the NGA to be filled by state law, and even if a gap existed, the Court's framework mandates a uniform federal law to govern the implementation of the nationwide gas pipeline system, rather than a patchwork of parochial state laws.

The petition should be denied.

A. This case does not implicate the question presented.

Petitioners seek this Court's review to answer whether "just compensation" in NGA condemnation proceedings should "be determined by reference to state law." Pet. i. While there are indeed cases where that question would be outcome-determinative, this is not one of them.

Petitioners admit that the dispute here is solely over "fees and costs." Pet. 2; see, *e.g.*, Pet. App. 2a, 10a, 18a, 22a-23a. And all agree that attorneys' fees are available in condemnation proceedings in North Dakota courts. A state statute says so in unambiguous terms: "The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include * * * reasonable attorney's fees for all judicial proceedings." N.D.C.C. § 32-15-32.

But that law does not make those fees *part* of the measure of just compensation. Instead, North Dakota statutes require that compensation for the use of eminent domain must be "ascertain[ed]" by a jury unless waived (N.D.C.C. § 32-15-01(2)), and provide a list of the categories of compensation that the jury may award (*id.* § 32-15-22). That list does not include attorneys' fees, which are instead governed by the separate statutory provision just cited. And that separate fee-shifting provision merely *permits* "the court" (not the jury that must determine just compensation) to shift fees "in its discretion" (*id.* § 32-15-32)—which discretion would be impermissible if fees were actually part of the "just compensation" guaranteed to property owners by the state constitution. See N.D. Const. Art. 1, § 16.

This structure is different from the mechanisms employed by some other states, which *have* made attorneys' fees part of their constitutional standards of just compensation. See, *e.g.*, *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."); *Keeton* v. *Alaska*, 441 P.3d 933, 939 (Alaska 2019) ("[P]ayment to a con-

demnee of necessary appraiser's and attorney's fees" is required under "the just compensation principle of the Alaska Constitution.") (quotation marks omitted).

North Dakota's choice to make attorneys' fees discretionary, rather than to guarantee them as part of just compensation, is, of course, a permissible one. Property owners are entitled under the Fourteenth Amendment to a minimum "just compensation" in state condemnation proceedings. *Dohany* v. *Rogers*, 281 U.S. 362, 366 (1930). But "[a]ttorneys' fees and expenses are not embraced within just compensation" for purposes of determining whether state procedures offend the federal Constitution. *Id.* at 368. Thus, "[a] state may allow the recovery of an attorney's fee in special classes of [condemnation] proceedings while withholding them in others"—or, it may constitutionally deny recovery of fees altogether. *Ibid.* That decision is ultimately one of policy left to state legislatures.

By contrast, Congress has chosen *not* to authorize fee shifting in Section 717f(h) actions. When Congress created the condemnation cause of action at issue here and provided district courts with jurisdiction, it was silent as to the availability of fees. But the "'basic point of reference' when considering the award of attorney's fees is the bedrock principle known as the 'American Rule.'" *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-253 (2010) (quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 683 (1983)). In the federal system, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Ibid.*

The distinction between fees included in just compensation and fees awarded once just compensation

has been determined is especially clear in condemnation proceedings initiated by the federal government itself. There is no dispute that fees are excluded from the measure of just compensation in such cases. *Bodcaw*, 440 U.S. at 203; Pet. 18. But fees are, in some cases, nonetheless available. The Equal Access to Justice Act allows an award of fees to the prevailing party in litigation brought by or against the United States. 28 U.S.C. § 2412(b). This rule applies in eminent domain cases—the statute contains an express mathematical definition for determining the "prevailing party" in "the case of eminent domain proceedings." 28 U.S.C. § 2412(d)(2)(H).

Fees can thus be available either as a matter of just compensation or by separate legislative proviso. This case turns not on whether North Dakota law requires fees in its constitutional definition of just compensation—it does not[2]—but on simple question whether North Dakota's fee shifting provision applies

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[2] The Eighth Circuit cited (at Pet. App. 3a) *Petersburg Sch. Dist. of Nelson Cnty.* v. *Peterson*, 103 N.W. 756, 759 (N.D. 1905), for the proposition that the North Dakota constitution incorporates fees into just compensation. But that case discusses only "taxable costs" (*ibid.*) which are by definition those costs that do not require a separate award. See Cost, *Black's Law Dictionary* (12th ed. 2024). Under the American Rule, taxable costs do not ordinarily include attorneys' fees in the absence of a contrary statute, and the same is true in North Dakota. See N.D. R. Civ. P. 54(e) (distinguishing between taxable "costs" and "attorneys' fees and related nontaxable expenses"). That is presumably why North Dakota enacted N.D.C.C. § 32-15-32 in the first place. And if *Petersburg School District* really meant that all costs were constitutionally guaranteed, that would render Section 32-15-32—which makes them discretionary—unconstitutional. See page 13, *supra*.

to a federal cause of action that does not provide for fee shifting itself.

The answer to that simple question is a simple "No." While state rules of decision may apply in diversity cases, jurisdiction in Section 717f(h) cases is provided for by Section 717f(h) itself and, potentially, 28 U.S.C. § 1331. In such cases, "[w]hat Congress has done * * * while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975). Federal courts may depart from the American Rule only if "there is express statutory authorization to the contrary." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983); accord *Lackey* v. *Stinnie*, 145 S. Ct. 659, 666 (2025). And where federal common law (like the American Rule) already exists, the Court has rejected arguments that state law should provide the rule of decision. See, *e.g.*, *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 284 (1982).

Indeed, Congress *has* spoken to the issue of attorneys' fees in condemnation proceedings. In 1987, Congress amended the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) to define "Federal agency" to include "any person who has the authority to acquire property by eminent domain under Federal law." Pub. L. No. 100-17, § 401, 101 Stat. 132, 246; see 42 U.S.C. § 4601(1). And "person" means "any individual, partnership, corporation, or association." 42 U.S.C § 4601(5). The Relocation Act provides for awards of attorneys' fees in two narrow classes of condemnation proceedings: if "the final

judgment is that the Federal agency cannot acquire the real property by condemnation;" or "the proceeding is abandoned by the United States." 42 U.S.C. § 4654(a). Courts have applied this provision in NGA proceedings. See, *e.g.*, *Transwestern Pipeline Co.* v. *17.19 Acres of Prop. Located in Maricopa Cnty.*, 627 F.3d 1268 (9th Cir. 2010). It is undisputed that this case does not match either scenario, making fees unavailable under federal law. Pet. App. 5a. It is thus implausible that Congress intended the availability of fees to be governed by state law.

Given that Congress did not provide for fee shifting, fees are unavailable as a matter of federal law. And because fees are available in North Dakota condemnation proceedings only through a statutory fee shifting mechanism (as opposed to inclusion within just compensation itself, as in certain other states), the measure of just compensation has no relevance to the availability of fees under Section 717f(h) in this case. This case therefore is not a proper vehicle for the Court to consider the question presented.

B. There is no split warranting this Court's review.

1. As just discussed, this case does not implicate the question presented. For the same reason, it does not conflict with the cases identified in the Petition.[3]

Petitioners rely heavily on the Third Circuit's opinion in *Tennessee Gas Pipeline Co.* v. *Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019).

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[3] To the extent the Eighth Circuit believed its opinion inconsistent with that of other circuits, that belief was based on untested assumptions about North Dakota's inclusion of fees in the measure of just compensation. See *supra* note 2.

There, the court did confront differences between the contours of state and federal law. Departing from federal law, Pennsylvania statutes define fair market value—the measure of just compensation—to include "the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken." 26 Pa. Cons. Stat. § 706(a). Determining which measure of just compensation applied was thus crucial to the Third Circuit's holding, because the damages sought were *part* of just compensation. But the opinion did not determine the availability of attorneys' fees—indeed, Pennsylvania does not generally allow fee shifting in non-default condemnation cases. See Owners' Counsel Br. 15. It has no relevance to the American Rule analysis here.

The same is true of the Sixth Circuit's opinion in *Columbia Gas Transmission Corp.* v. *Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992). There, Ohio law and federal law used different measures for the value of property to determine just compensation. *Id.* at 1195. But once again, that opinion said nothing about how to resolve the availability of fees when fees were not included in the state's definition of just compensation. And, just like Pennsylvania, Ohio does not appear to allow fee shifting in eminent domain proceedings as a general matter. Owners' Counsel Br. 14-15.

Nor does the judgment here conflict with *Georgia Power Co.* v. *138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980). There, attorneys' fees were (at the time) available because they were "included in the measure of just compensation under the Georgia constitution." *Id.* at 1115 n.4 (citing *White* v. *Georgia Power Co.*, 227

S.E.2d 385 (1976)). That case thus did not resolve the applicability of a state fee-shifting statute when state and federal definitions of just compensation matched. Indeed, it is a clear example of an attorneys' fees case that *would* implicate the question presented—unlike this case.[4]

Finally, the Eleventh Circuit's holding in *Sabal Trail Transmission, LLC* v. *18.27 Acres of Land*, 59 F.4th 1158 (11th Cir. 2023) is on all fours with *Georgia Power Co.* As noted, Florida's constitution defines just compensation to include attorneys' fees. *Joseph B. Doerr Tr.*, 177 So.3d at 1215. The choice between state and federal compensation thus determines the availability of attorneys' fees. But the Eleventh Circuit did not—and could not—opine on whether a state fee-shifting statute *separate* from the measure of just compensation applies in NGA condemnation proceedings.

In sum, Petitioners have identified several cases where the question presented would be dispositive. But, because it is not relevant on the facts of this case, the Eighth Circuit's judgment does not conflict with those decisions. Cf., *e.g.*, William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1844 (2008) ("*Judgments* become binding law, not *opinions*.").

2. Even if this case *did* turn on whether federal or state law controlled the definition of just compensa-

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[4] *Mississippi River Transmission Corp.* v. *Tabor*, 757 F.2d 662 (5th Cir. 1985), is even further afield. There, the Fifth Circuit held that Louisiana law governed under the defunct "practice and procedure" language in Section 717f(h). *Id.* at 665 n.3; see *supra* note 1.

tion in Section 717f(h) proceedings, this Court's review would still be unwarranted.

The only other appellate court to consider whether state or federal law governs the measure of compensation in NGA proceedings since this Court expounded on the nature of Congress's delegation in *PennEast*—the Eleventh Circuit—considered itself bound by "the prior-precedent rule." *Sabal Trail*, 59 F.4th at 1165. There, the court explained that the rule "has no exception when a later panel 'is convinced the prior one reached the wrong result—for whatever reason." *Id.* at 1164 (quoting *Smith* v. *GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001)). "[B]ased on the *Georgia Power* analysis that b[ound]" the court, the Eleventh Circuit determined that state law should apply. *Id.* at 1172.[5]

No other court has considered the applicability of state versus federal law in Section 717f(h) proceedings since *PennEast*. But *PennEast* was, of course, central to the Eighth Circuit's holding. It is likely that, given the Court's clarifications in that opinion, courts approaching this issue on a blank slate will reach the same conclusion as the Eighth Circuit. And courts reviewing their precedent will likely conform to the Court's recent pronouncement. Even in *Sabal Trial*, Judge Jordan was forthright that if he "were writing on a blank slate, [he] would apply the federal standard for just compensation." *Sabal Trail*, 59 F.4th at 1175 (Jordan, J., concurring); accord *Sabal Trail Transmission, LLC* v. *3.921 Acres*, 74 F.4th 1346, 1348 (11th

[5] The Eleventh Circuit evaluated *PennEast* and held that it was not "clearly on point" such that it abrogated *Georgia Power*. *Id.* at 1174.

Cir. 2023) (Grant, J., concurring) ("Like at least one member of that panel, I think *Georgia Power* was wrongly decided.").

Because so few courts have addressed the question presented in the years since *PennEast*, there have been few opportunities to assess how courts will react to and apply the Court's opinion. Percolation following *PennEast* is thus warranted.

C. The decision below is correct.

The Eighth Circuit's holding that fees are unavailable in Section 717f(h) proceedings is correct as a straightforward application of the American Rule. *Supra*, pages 14-17. But even if North Dakota did define just compensation to include attorneys' fees—again, it does not—the holding below would still be correct. Because it is *Congress* exercising its sovereign eminent domain power even when that power is delegated to natural gas companies, the federal rule that fees are excluded from just compensation controls. And, though a *Kimbell Foods* analysis is unnecessary, the NGA has all the hallmarks of a context in which a uniform federal rule is required.

1. Attorneys' fees are unavailable in federal condemnation proceedings regardless of delegations.

a. The Natural Gas Act allows certificate holders like WBI to "exercise * * * the right of eminent domain." 15 U.S.C. § 717f(h). As this Court recently explained, that delegation is "categorical." *PennEast*, 594 U.S. at 498. And when a private delegee condemns land, it is "the Federal Government" that is "exercis[ing] its eminent domain authority." *Id.* at 493. The Court has long recognized that Congress "may, at its discretion, use its sovereign powers * * *

through a corporation," as an alternative to doing so "directly." *Luxton*, 153 U.S. at 530; see *PennEast*, 594 U.S. at 495 ("For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties.").

Because Congress has two equivalent paths through which it can permissibly exercise its sovereign eminent domain power, this Court has found no cause to differentiate between condemnations by the federal government and those by its delegees. In *PennEast*, the Court held that private delegee's "condemnation action to give effect to the federal eminent domain power falls comfortably within the class of suits to which States consented under the plan of the Convention." 594 U.S. at 502. It further explained that the Eleventh Amendment—which ordinarily would bar almost *any* suit by a private party against a nonconsenting state—is no obstacle to delegees' condemnation suits against states. *Id.* at 506. A delegee exercising eminent domain simply stands in the shoes of the federal government, and its rights and obligations are no more and no less than those of the federal government in an identical proceeding.

Indeed, there is no rational basis for any substantive distinction between condemnation proceedings captioned "United States" and proceedings initiated by a delegee. Nobody disputes that Congress could have created a nearly identical statutory scheme in which pipeline companies apply to FERC when they are unable to obtain rights-of-way for FERC-approved projects and then FERC itself condemns the property and transfers the right to the company. In delegating authority to pipeline companies directly, Congress

merely chose between one of two permissible but interchangeable paths to exercise its own sovereign authority. *PennEast*, 594 U.S. at 498. A distinction between the two options thus "has no basis—the choice of how to exercise the eminent domain power and what additional compensation to provide belongs to Congress alone." *Sabal Trail*, 74 F.4th at 1350 (Grant, J., concurring); *accord Sabal Trail*, 59 F.4th at 1175 (Jordan, J., concurring); *Tennessee Gas Pipeline Co.*, 931 F.3d at 257 (Chagares, J., dissenting); *Georgia Power*, 617 F.2d at 1129 (Rubin, J., dissenting).

b. Just compensation under the Fifth Amendment does not include attorneys' fees. The proper measure of just compensation is the "full monetary equivalent of the property taken." *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 473 (1973). The Court has never "deviated" from the principle that "just compensation 'is for the property, and not to the owner.'" *Bodcaw*, 440 U.S at 203 (quoting *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 326 (1893)). Thus, the Court has consistently rejected arguments that the constitutional minimum should reach "indirect costs" like "attorneys' fees." *Ibid*.

The federal measure of just compensation applies in any proceeding where the "substantive right" to compensation is "grounded upon the Constitution of the United States." *United States* v. *Miller*, 317 U.S. 369, 379-380 (1943); *accord Kohl*, 91 U.S. at 372 "[W]here essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable." *United States* v. *93.970 Acres of Land*, 360 U.S. 328, 332-333 (1959).

A property owner's right to compensation in a Section 717f(h) condemnation originates in the Fifth

Amendment. The NGA does not mention "just compensation," or provide that compensation must be paid for taken property *at all*. 15 U.S.C. § 717f(h). The obligation to pay comes from the delegation of the federal "eminent domain" power, which is bounded by the federal constitutional minimum of just compensation. *Ibid.*

That is, because a pipeline company exercises a categorical delegation of the federal eminent domain power, the substantive right to compensation is triggered by an exercise of federal authority. And that federal authority implicates federal constitutional protections. *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 9 (1984). *Miller* thus instructs that the federal measure of just compensation applies. 317 U.S. at 380. There is simply no gap to be filled by state law, as the contours of the federal eminent domain power "can neither be enlarged nor diminished by a State." *Kohl*, 91 U.S. at 374.

c. Other considerations reinforce the conclusion that Congress left no gap to be filled by reference to state law.

First, Congress *has* in fact spoken to the availability of attorneys' fees in condemnation proceedings brought by private delegees. The URA allows fees in a narrow set of circumstances where federal agencies—defined to include private delegees—exercise the federal eminent domain authority to condemn property. 42 U.S.C. §§ 4601(1), 4654(a). That provision applies to NGA proceedings. *Transwestern Pipeline Co.*, 627 F.3d 1268. But it does not apply *here,* because this case meets neither of the defined fact patterns in which fee shifting is available as an exception to the American Rule. Pet. App. 5a. That fees are unavaila-

ble under this provision is a function of Congress's explicit policy decisions, not of its silence—leaving no room for state law. See, *e.g.*, *United States* v. *Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute * * * [t]he proper inference" * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

Second, the unavailability of fees is underscored by inclusion of relevant language in other, related statutes—including other provisions of the NGA. The General Bridge Act, for example, requires compensation to be "ascertained and paid according to the laws of [the] State" in which the condemnation occurs, including attorneys' fees where available under state law. 33 U.S.C. § 532. And the NGA itself elsewhere is explicit where it permits deviation from the federal standard for just compensation. See 15 U.S.C. §§ 717y(b)(2), (e)(2)-(3). These provisions show that where Congress intends to depart from the federal standard, "it has done so clearly and expressly." *FCC* v. *NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2003).

Third, the context in which Congress enacted Section 717f(h) strongly suggests that Congress intended matters of substance to be governed by federal, rather than state, law. "No one disputes that § 717f(h) was passed specifically to solve the problem of States impeding interstate pipeline development" through "their own eminent domain" laws. *PennEast*, 594 U.S. at 498. To solve this problem, Congress delegated the *entirety* of its eminent domain authority to pipeline companies. Doing so provided pipeline companies an efficient path around restrictive state eminent domain

procedures. It is implausible that in solving this problem Congress intended to nonetheless allow disuniformity on a substantive matter as critical as how to measure compensation.

Indeed, Congress did express that state law should still control *some* aspects of Section 717f(h) condemnations. That language adopted state law as to "procedural matters only." *93.970 Acres*, 360 U.S. at 333 n.7. The measure of compensation is substantive, not procedural. *Miller*, 317 U.S. at 380 (explaining that "the measure of compensation" is a "question[] of substantive right"). That Congress specified state law should apply to one set of questions strongly implies its intent that state law *not* govern questions outside the specified category. See, *e.g.*, *NLRB* v. *SW. Gen., Inc.*, 580 U.S. 288, 302 (2017) ("[E]xpressing one item of an associated group or series excludes another left unmentioned.").

Together, these considerations lead to the inescapable conclusion that Congress designed Section 717f(h) to categorically delegate the federal eminent domain power, and in doing so to incorporate the standards applicable to exercises of the federal eminent domain power. That choice leaves no gap to be filled by state law or federal common law—the inquiry ought to end here.

d. Petitioners' arguments to the contrary are unconvincing.

First, Petitioners invoke a general rule that delegations of eminent domain "must be construed strictly against the grantee." Pet. 15 (quoting 1A *Nichols on Eminent Domain* § 3.03(6)(b) (3d ed. 2018)). True, *some* delegations "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 (1946). But Petitioners' argument on this score completely disregards this Court's holding in *Penn-East* that the delegation in Section 717f(h) is "categorical." 594 U.S. at 498. There is no need to resort to background presumptions (even if those presumptions retain any validity) in the face of a clear, total delegation of the federal eminent domain power.

Second, Petitioners invoke Section 717f(h)'s defunct "practice and procedure" language. Pet. 16. But that language undermines rather than supports Petitioners' argument. It applies to "procedural matters only," and does not cover matters of substance like the measure of compensation. *93.970 Acres*, 360 U.S. at 333 n.7; see *supra* pages 8-9 & n.1. The provision was presumably necessary because, in 1947, there was not yet a uniform set of federal procedures to govern condemnation proceedings—Rule 71.1 was adopted in 1951—and Congress did not want to take on the project of crafting one in its narrow attempt to fix an omission in the NGA. By specifying that state law governs procedure (a requirement superseded by Rule 71.1), Congress implied that substantive matters would *not* be governed by state law. There is nothing counterintuitive about that.

Third, Petitioners misunderstand the history of the federal eminent domain power. Pet. 16. Contrary to Petitioners' telling, the federal government has exercised the *federal* eminent domain power since "[s]hortly after the founding." *PennEast*, 594 U.S. at 494. For more than fifty years before Congress enacted Section 717f(h), the Court had thus held that "the exercise of the federal eminent domain power was

a means that was 'known and appropriate' at the time of the founding." *Id.* at 505 (quoting *Kohl*, 91 U.S. at 372). There was therefore a century and a half of precedent defining the contours of the federal eminent domain power when Congress amended the NGA in 1947. Petitioners' suggestion that Congress in 1947 would have hesitated to rely on this body of law because the federal government had also relied on state eminent domain proceedings in the first half of the nineteenth century is puzzling.

Fourth, Petitioners argue (at 16-17) that Congress legislates against "the general rule" that state law ought to govern the availability of fees. They have the law backwards. Congress legislates against the backdrop of the well-established "American Rule," which states that fee shifting is generally unavailable unless Congress specifies otherwise. See *supra* pages 14-17. Congressional silence on fee shifting is thus not an attempt to rely on state law; it is a determination that fees are unavailable as a matter of federal law.[6]

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[6] Petitioners further suggest (at 17) that the Eighth Circuit's rule would render superfluous a sub-provision of the Federal Power Act that was added in 2005 and specifies a fair-market-value measure of just compensation. See 16 U.S.C. § 824p(f)(2). But legislation frequently involves redundancy and surplusage for the purpose of clarity. See, *e.g.*, *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). And that conclusion is especially justified when related provisions are undoubtedly superfluous. *Ibid.* That is just the case here: The neighboring subsection (f)(1), which provides that "[a]ny right-of-way acquired pursuant to subsection (e) shall be considered a taking of private property," is superfluous under any reading, since "the exercise of eminent domain" (16 U.S.C. § 824p(e)) constitutes a Fifth Amendment taking regardless of whether a statute says so. Because subsection (f)(1) is obviously superfluous, the implication is that

Finally, Petitioners insist that there are crucial differences between cases where Congress exercises its eminent domain authority and those in which it exercises the authority through a private delegee. They fail, however, to explain what those differences actually are. But "[s]ince the founding, the Federal Government has exercised its eminent domain authority through both its own officers and private delegatees." *PennEast*, 594 U.S. at 493. In either case, it is the federal government exercising its authority—the choice of mechanism belongs to Congress alone. There is no reason to impose distinctions between applicable law where Congress has not chosen to do so.

2. Even under Kimbell Foods*, compensation in federal condemnation proceedings should be governed by federal law.*

Petitioners attack the Eighth Circuit's holding that federal law governs the measure of just compensation, but the Petition notably omits the analysis this Court has required to govern choice-of-law questions where Congress leaves gaps in statutes. Though there is no gap to fill here, an application of the *Kimbel Foods* framework shows that federal law should control even if there were. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

First, there is a need for a uniform federal rule to govern the measure of compensation in NGA condemnations. *Kimbell Foods*, 440 U.S. at 728. Section

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Congress here was legislating for clarity rather than independent effect, and the Court should "not [be] overly concerned" if subsection (f)(2) "may be redundant as well." *Marx*, 568 U.S. at 385.

717f(h) was enacted precisely to remedy systemic problems arising from such a lack of uniformity. *Penn-East*, 594 U.S. at 498; S. Rep. No. 429, at 2-4. Prior to the 1947 amendments, states were able to erect barriers to favor parochial interests over critical nationwide infrastructure projects. Congress fixed this problem by enacting a "categorical" delegation of the federal eminent domain power. *PennEast*, 594 U.S. at 498. That delegation swept away state restrictions on the availability of eminent domain. There is no reason to suspect that Congress would have nevertheless sought to maintain state valuation requirements, which could create sufficient legal friction and increase costs such that projects would be frustrated.

Petitioners (citing the Third Circuit) appear to acknowledge that "'crazy state laws' might require so much compensation that pipeline construction would grind to a halt." Pet. 7. That admission is dispositive. The choice-of-law rule that governs here will be agnostic as to the substance of state law in future cases—there is no room in *Kimbell Foods* to determine the wisdom or reasonableness of state law in determining what law applies. If there *could* exist future state laws that would frustrate the federal program embodied in the NGA, then the first factor cuts strongly in favor of a uniform federal rule.

All this is just as applicable to the narrower question of attorneys' fees under Section 717f(h). Congress addressed fees in condemnation proceedings, including those initiated by private delegees, in the *Uniform* Relocation Assistance and Real Property Acquisition Policies Act. 42 U.S.C. § 4654. The URA specifies that Congress intended to "assure consistent treatment for owners in the many Federal programs." 42 U.S.C.

§ 4651. Congress has thus adjudged the fee issue also worthy of national consistency.

Second, reliance on state law would frustrate congressional objectives. *Kimbell Foods*, 440 U.S. at 728. Congress has expressed a need for "consistent treatment for owners" in the URA. 42 U.S.C. § 4651. And the NGA was "framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Sunray Mid-Con. Oil Co.* v. *FPC*, 364 U.S. 137, 147 (1960). Beyond the inconsistency inherent in reliance on state compensation law, increased pipeline construction costs will result in higher rates for consumers.

Third, use of a uniform federal standard would not disrupt commercial relationships based on state law. *Kimbell Foods*, 440 U.S. at 728-729. There exists "an established body of federal law on the issue of just compensation." *Georgia Power*, 617 F.3d at 1123 n.17. There is no dispute that the federal government itself could condemn the same easement at issue here for the same federal purposes. And if it did so, there can be no doubt that federal law would control. Commercial relationships and expectations are formed against the backdrop of that possibility. That Congress exercises its acknowledged authority though a delegee (also a well-established practice) is immaterial.

All three *Kimbell Foods* factors therefore cut in favor of federal law. As a result, the Eighth Circuit's holding would be correct even if there were a gap in the NGA—which there is not.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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