

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**

REPLY BRIEF FOR THE PETITIONERS

DERRICK BRAATEN
BRAATEN LAW FIRM
109 N. 4th St.,
Suite 100
Bismarck, ND 58501
(701) 221-2911
derrick@braatenlawfirm.com

ROBERT J. MCNAMARA
Counsel of Record
MATTHEW LILES
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org
mliles@ij.org

Counsel for Petitioners

TABLE OF CONTENTS

	PAGE
REPLY BRIEF FOR THE PETITIONERS	1
A. There is no need to dispute North Dakota law.....	1
B. Further percolation is neither needed nor likely.	5
C. The holding below is wrong.	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Arneson v. Fargo</i> , 331 N.W.2d 30 (N.D. 1983).....	4
<i>Bismarck v. Thom</i> , 261 N.W.2d 640 (N.D. 1977).....	3, 4
<i>Cass Cnty. Joint Water Res. Dist. v. Erickson</i> , 918 N.W.2d 371 (N.D. 2018).....	3
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	2
<i>Expressions Hair Design v. Schneiderman</i> , 581 U.S. 37 (2017).....	2, 3
<i>Ga. Power Co. v. 138.30 Acres of Land</i> , 617 F.2d 1112 (5th Cir. 1980).....	5
<i>Nat’l R.R. Passenger Corp. v. Two Parcels of Land</i> , 822 F.2d 1261 (2d Cir. 1987)	7
<i>PennEast Pipeline Co. v. New Jersey</i> , 594 U.S. 482 (2021).....	5, 6, 7
<i>Petersburg Sch. Dist. of Nelson Cnty. v. Peterson</i> , 103 N.W. 756 (N.D. 1905).....	3
<i>Sabal Trail Transmission, LLC v. 18.27 Acres of Land</i> , 59 F.4th 1158 (11th Cir. 2023).....	5, 6

<i>Williston Basin Interstate Pipeline Co. v. Dolyniuk Family Tr.,</i> No A1-03-66, 2005 WL 1533129, 2005 U.S. Dist. LEXIS 12832 (D.N.D. June 27, 2005)	4
--	---

STATUTES

15 U.S.C. § 717c(b)	10
---------------------------	----

REPLY BRIEF FOR THE PETITIONERS

The Petition established that there is an acknowledged split of authority over how to measure just compensation in private pipeline condemnations under the Natural Gas Act, that this split was the sole basis for the decision below, and that this case therefore presents a perfect vehicle for resolving the split.

In response, the BIO makes three arguments. It suggests that the petition should be denied because the Eighth Circuit's decision below was wrong about North Dakota law. It suggests that the petition should be denied in the hopes of further percolation in the lower courts. And it argues that the decision below was correct. Each argument is wrong, and none is a reason to deny the petition.

A. There is no need to dispute North Dakota law.

As the Petition explains, the decision below hinges on whether federal or state just-compensation law applies because North Dakota (but not federal) law requires a condemnor to pay a condemnee's reasonable fees. Pet. 6; Pet. App. 3a. The Eighth Circuit (unlike every other court to consider the question) decided that federal law trumps North Dakota law, a holding that both deprives Petitioners of the fees awarded by the district court and creates a circuit split ripe for this Court's review. Pet. 6–11.

Respondent's primary argument is that the Eighth Circuit is wrong about how state law works. The BIO claims that, in fact, fees in North Dakota condemnations are not part of that state's measure of "just compensation" and therefore would not apply in

federal court regardless of what law governs just compensation. Because the Eighth Circuit got the state law wrong, goes the argument, this case doesn't implicate the question presented (BIO 12–17) and the decision below doesn't create a circuit split (17–21) even though the Eighth Circuit says it does. This is all wrong.

To start, the Eighth Circuit tells us exactly what the rule of decision was. It begins from the proposition that “[t]he availability of attorney fees [here] depends on whether state or federal law determines the compensation that is due.” Pet. App. 3a. The parties briefed that question below. See, *e.g.*, C.A. Resp. Br. 26 (arguing that “federal law defines just compensation in a federal condemnation”). And the Eighth Circuit answered it in just the way Respondent had urged. Pet. App. 9a. To be sure, Respondent argued in the alternative that fees should be unavailable here *even if* state law controls just compensation, but that was not the basis of the decision below. The fact that a party raised alternative arguments below or might renew those arguments on remand is not a vehicle problem. It's just how litigation works. As a “court of review, not of first view,” this Court should address the outcome-determinative rule below and leave anything else for the lower courts to address in the first instance. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Even if Respondent's state-law arguments were properly before this Court, though, it would take little effort to brush them aside. For one thing, this Court generally declines to entertain the notion that a circuit court has muffed a question of state law within that circuit. After all, “lower federal courts ‘are better schooled in and more able to interpret the laws

of their respective States.” *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017). The Eighth Circuit’s determination that fees are part of the “just compensation” that is due under North Dakota law is therefore entitled to “great deference” and could be set aside only if it was “plain error.” *Ibid.*

The BIO does not explain how its state-law arguments would meet this standard. That’s because the Eighth Circuit did not err, let alone plainly. On Respondent’s telling, fees in North Dakota condemnations are not part of “just compensation” at all and are instead an entirely discretionary fee-shifting procedure that would never apply in federal court. BIO 14–15 & n.2. But the BIO cites no North Dakota case saying this is the law. Indeed, the BIO cites only one North Dakota case—and that one only to claim that the Eighth Circuit misreads it. BIO 15 n.2 (citing *Petersburg Sch. Dist. of Nelson Cnty. v. Peterson*, 103 N.W. 756, 759 (N.D. 1905)).

There are no other North Dakota cases cited in the BIO because North Dakota’s cases don’t say what Respondent needs them to say. Instead, they make clear that fees are part of just compensation because “the purpose of the statute allowing attorney fees in eminent-domain actions was to make certain that the landowner received the full ‘just compensation’ for his land, without diminution by attorney fees.” *Bismarck v. Thom*, 261 N.W.2d 640, 647 (N.D. 1977) (Vogel, J., dissenting).¹ And they make clear that fees are not discretionary. To be sure, trial courts in North Dakota enjoy broad discretion to reject unreasonable or

¹*Thom* was later overruled in part (and Justice Vogel’s dissent vindicated) by *Cass Cnty. Joint Water Res. Dist. v. Erickson*, 918 N.W.2d 371, 379 (N.D. 2018).

unnecessary fees, but the North Dakota Supreme Court has articulated factors courts must use to exercise that discretion. And those factors ask only whether fees are *reasonable*—the “predominant factors” are “[t]he number of hours spent in total and the rate per hour”—not whether they ought to be awarded at all. *Thom*, 251 N.W.2d at 646. To the contrary, fees are presumptively available and it is an abuse of discretion to deny or reduce them “*without providing any explanation or rationale for doing so.*” *Arneson v. Fargo*, 331 N.W.2d 30, 40–41 (N.D. 1983).

That explains why (despite the BIO’s assumptions to the contrary at 15–16) federal courts in North Dakota have applied that state’s fee-shifting rules in condemnations under the Natural Gas Act, both in this case (Pet. App. 44a–45a) and in others. See *Williston Basin Interstate Pipeline Co. v. Dolyniuk Family Tr.* No A1-03-66, 2005 WL 1533129, 2005 U.S. Dist. LEXIS 12832 (D.N.D. June 27, 2005). They are (and have been consistently treated as) part of “state substantive law” (Pet. App. 45a), not as a discretionary procedural step. In short, to accept Respondent’s argument about North Dakota law requires assuming that everyone else—North Dakota state courts, North Dakota federal courts, and the district and appellate courts in this very case—has gotten it wrong. They haven’t.

And setting aside the BIO’s arguments about North Dakota law means setting aside most of the BIO. This case implicates the question presented because the decision below says the deciding legal question was the question presented. And the BIO’s attempts to distinguish the other cases in the split fall apart as well because those cases (like this case)

asked whether federal or state just-compensation laws controlled.²

B. Further percolation is neither needed nor likely.

Respondent’s only other argument against granting certiorari (BIO 19–21) is to suggest the acknowledged circuit split requires further percolation. After all, the argument goes, this Court decided *PennEast Pipeline Company v. New Jersey*, 594 U.S. 482 (2021) only four years ago, and *PennEast* was “central to the Eighth Circuit’s holding” below. BIO 20.

The problem, again, is that the Eighth Circuit disagrees. The opinion below does not say *PennEast* is central to its holding: It simply says *PennEast* “confirms” a conclusion it reached on other grounds. Pet. App. 8a. And one of the decisions on the other side of the split has also already considered *PennEast* and similarly found that it is not dispositive. *Sabal Trail Transmission, LLC v. 18.27 Acres of Land*, 59 F.4th 1158, 1174 (11th Cir. 2023). Even judges who

² Two of the cases on the other side of the split are specifically about attorney fees. See *Sabal Trail Transmission, LLC v. 18.27 Acres of Land*, 59 F.4th 1158 (11th Cir. 2023); *Ga. Power Co. v. 138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980). Respondent tries to distinguish each on the grounds that the fee-shifting there was constitutional, not statutory. BIO 18–19. Setting aside that the Eighth Circuit rightly says North Dakota’s fee shifting is *also* constitutionally required (Pet App. 3a), it is unclear why a constitutional component of just compensation would be treated differently from a statutory component. And, as discussed above, North Dakota’s federal courts—at least until the decision below—did in fact treat the fee-shifting requirement as a substantive rule that applied in federal court.

agree with the outcome of the opinion below do not believe *PennEast* changes the analysis. See *Sabal Trail Trans.*, 59 F.4th at 1175 (Jordan, J., concurring) (agreeing that prior circuit precedent was not abrogated by *PennEast* but arguing that prior precedent was wrong on the merits).

The reason no judge has said *PennEast* is controlling here is that it isn't. The question in *PennEast* was "whether the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest." 594 U.S. at 488. The answer to that constitutional question was yes. *Ibid.* And since the case was about constitutional power, this Court's analysis largely focused on whether New Jersey, as part of the plan of the Convention, had relinquished its immunity from federal condemnation suits. *Id.* at 493–506. The only statutory question was whether Congress had spoken with sufficient clarity to authorize private condemnation suits against the states. And of course it had. Congress must make a clear statement to abrogate sovereign immunity, but since the states had no immunity from federal condemnation suits in the first place, there was "no immunity left to waive or abrogate[.]" *Id.* at 508.

The question here is different. The circuits are not split about *whether* Congress can authorize these private suits. They are simply split about what to do when Congress authorizes a private condemnation but says nothing about the measure of compensation. Some courts think the starting presumption is that state law controls (as it would in other sorts of cases). The court below thinks the starting presumption is that federal law controls. Whatever the answer is, the

question does not implicate any of the concerns animating this Court’s *PennEast* decision. It could not “require the consent of the state in almost every case of an interstate line of communication[.]” *Id.* at 496. It could not empower “a State [to] diminish the eminent domain authority of the federal sovereign.” 594 U.S. at 503. And because the question here does not implicate any of the concerns discussed in *PennEast*, its outcome cannot be controlled by *PennEast*.

Since *PennEast* doesn’t answer the question, this Court should. Four circuits—the Third, Fifth, Sixth, and Eleventh—all answer it by starting with state law. Pet. 7–11. One more—the Second—similarly starts from the presumption that “the value of property rights is ordinarily best determined according to state law” when federal delegees take property, though it has yet to formally apply that rule to the Natural Gas Act. *Nat’l R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1267 (2d Cir. 1987). And a final circuit—the Eighth, below—disagrees and starts with federal law. That is not a “shallow” split. BIO 12. It is, of course, a lopsided one, but it is firmly entrenched and covers the vast majority of the states where natural-gas pipelines are actually built. Absent this Court’s intervention, that split is therefore unlikely to percolate at all, and the petition for certiorari should therefore be granted.

C. The holding below is wrong.

The only other argument Respondent offers is to claim the decision below was correct. BIO 21–31. As an initial matter, this is no reason to deny the petition. To the contrary, if Respondent is correct,

then most of the circuits to consider this question (covering most of the states where natural-gas pipelines are likely to be built) are currently, routinely, getting it wrong. And they are getting it wrong in a context where, according to Respondent, “there is a need for a uniform rule to govern the measure of compensation in [Natural Gas Act] condemnations[.]” BIO 29. Whichever side is right—and Petitioners will happily provide a full discussion of the merits should this Court decide to hear this case—this is an important question that requires resolution.

But the sketch of Respondent’s merits arguments is also unavailing. The BIO claims that there is “no rational basis for any substantive distinction between condemnation proceedings” by the United States and condemnations by a private delegee. BIO 22. But of course there is. The United States is cloaked in sovereign immunity, and federal courts will ordinarily not order it to pay money out of the public fisc without statutory authorization. Pet. 18. Private pipeline companies have neither immunity nor public funds. The United States, as sovereign, may use eminent domain for any public use. By contrast, private delegations of that power are disfavored and narrowly construed. Pet. 15. Condemnations by the United States involve the United States as a party, and the United States may therefore have an interest in being treated uniformly across the nation. Private pipeline condemnations, by contrast, are lawsuits between private parties about a project happening in a particular jurisdiction, which makes it easier to apply state substantive law (as federal courts would in any analogous private civil

action). These distinctions are not just rational. They are obvious (and have been identified repeatedly by the lower courts on the majority side of the split). But Respondent waves them aside.

This refusal to countenance that the government of the United States might be different in certain respects from a private company infects the rest of Respondent's argument. It relies heavily on cases in which the *United States* condemned land to establish the proposition that federal law controls. BIO 23. And it insists throughout that this dispute is only about *fees*, not the measure of just compensation. BIO 21. Each of these errors allows it to side-step the core truth at the heart of the majority rule below: that *state law* traditionally defines the contours of property rights and that Congress should not lightly be assumed to have authorized private entities to set those contours aside in private condemnations. See *Br. of North Dakota, et al., as Amicus Curiae* 7–11.

Nor can much be made from the BIO's invocation of a handful of other statutes authorizing more than the federal constitutional minimum of just compensation in other contexts. BIO 24–25. No one disputes that other statutes are more specific: Some dictate using the federal standard; others require going above it.³ See *Pet.* 17. The question is what courts should do when Congress is silent.

³ That said, Respondent's treatment of one of those laws—a provision of the Federal Power Act that specifies fair-market value as the measure of compensation—is odd. BIO 28 n.6. That provision, says the BIO, is mere surplusage. But of course it isn't. The Federal Power Act was authoritatively

Finally, Respondent’s insistence that the Natural Gas Act either assumes or (as a matter of policy) requires a uniform national rule about just compensation (BIO 29) is at odds with the statute’s structure. The Act authorizes regulated entities to accommodate “reasonable differences in rates, charges, service, facilities, or in any other respect . . . as between localities.” 15 U.S.C. § 717c(b). In other words, Congress understood that a natural-gas provider’s costs and rates and services might vary from state to state depending on local conditions and local laws. There is no reason to believe (as Respondent insists it does) that Congress simultaneously intended those same local laws to be swept aside when it came to compensating property owners for their losses. If state law may be a factor in what a natural-gas provider may charge, surely it may also be a factor in what that provider must pay.

All that said, the place for merits arguments is merits briefing. The Petition establishes that there is an acknowledged circuit split on a question that even Respondent concedes is important. The only arguments the BIO offers as grounds for denying the petition are either (1) an interpretation of North Dakota law that has never been accepted by any court (including the court below) and (2) a plea to let this

construed by the Fifth Circuit, sitting en banc in 1980, as requiring just compensation to be determined by reference to state law. Pet. 17. Congress then amended that act to require only fair-market-value compensation *but only in some circumstances*. Language that contradicts the circuit courts’ interpretation of a statute is not surplusage. It is deliberately displacing the prevailing interpretation of the text—and leaving it in place for other provisions.

circuit split (where most of the relevant circuits have already committed to a position) percolate still more, in the hopes that some of them might change their mind based on a decision of this Court that no judge, anywhere, has said should change the analysis. In other words, they provide the Court with no reason at all.

In short, there is an acknowledged circuit split about how to interpret an important federal statute. There are thorough, deeply reasoned appellate opinions on both sides of this split, and further significant developments in the lower courts are unlikely. The BIO cannot persuasively say otherwise, and the Petition should therefore be granted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

DERRICK BRAATEN
BRAATEN LAW FIRM
109 N. 4th St.,
Suite 100
Bismarck, ND 58501
(701) 221-2911
derrick@braatenlawfirm.com

ROBERT J. MCNAMARA
Counsel of Record
MATTHEW LILES
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org
mliles@ij.org

Counsel for Petitioners

OCTOBER 24, 2025