

No. 25-159

In the Supreme Court of the United States

LEONARD W. HOFFMANN, ET AL., PETITIONERS

v.

WBI ENERGY TRANSMISSION, INC.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Fifth Amendment, as opposed to state law, determines the measure of compensation due in a condemnation action brought by a private entity exercising the federal power of eminent domain under the Natural Gas Act, 15 U.S.C. 717f(h).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court’s order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

INTRODUCTION

The Natural Gas Act (NGA or Act), 15 U.S.C. 717 *et seq.*, delegates to certain private entities the federal power of eminent domain to obtain rights-of-way necessary to construct and maintain interstate pipelines. 15 U.S.C. 717f(h). The Act does not specify the measure of compensation owed for such takings, and as the decision below acknowledged, Pet. App. 7a n.2, the courts of appeals are divided over what standard should apply. The court below held that the Fifth Amendment standard of “just compensation” governs. Other circuits, however, have held that the NGA’s failure to specify the appropriate measure of compensation leaves a “gap” to fill

through judicial lawmaking, and that as a matter of federal common law, state law—which sometimes provides for compensation more generous than the Fifth Amendment requires—should be incorporated to fill that gap.

The Eighth Circuit’s approach below is the correct one. The NGA’s delegation of the federal eminent-domain power is “categorical.” *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 498 (2021). When the federal government exercises the federal eminent-domain power, it must pay a property owner “just compensation” under the Fifth Amendment, unless Congress affirmatively adopts state compensation rules or otherwise mandates greater compensation. See *United States v. Miller*, 317 U.S. 369, 380 (1943); *United States v. Bodcaw Co.*, 440 U.S. 202 (1979) (per curiam). The same principles apply where, as here, Congress has delegated to a private party the entire federal eminent-domain power. Because the NGA does not specify a state-law or other heightened measure of compensation, the default Fifth Amendment standard applies. This Court should grant the petition to resolve the conflict among the circuits and affirm the judgment below.

STATEMENT

1. In 1938, Congress enacted the Natural Gas Act to regulate “the transportation of natural gas in interstate commerce.” 15 U.S.C. 717(b). The Act reflects Congress’s determination that “[f]ederal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.” 15 U.S.C. 717(a).

The Act vests the Federal Energy Regulatory Commission (FERC or Commission), formerly the Federal Power Commission, with primary authority to approve the construction and extension of interstate natural-gas

pipelines. See 15 U.S.C. 717f. In order to build or extend an interstate pipeline, a private entity must first obtain from FERC a “certificate of public convenience and necessity” authorizing the project. 15 U.S.C. 717f(c). A company seeking such a certificate must submit to FERC an application that describes the proposed pipeline, 15 U.S.C. 717f(d), and the company must make a “good faith effort to notify all affected landowners” whose property may be crossed by the proposed pipeline or used during construction, 18 C.F.R. 157.6(d). If FERC determines that the proposed interstate pipeline “is or will be required by the present or future public convenience and necessity,” FERC issues a certificate authorizing its construction. 15 U.S.C. 717f(e).

“As originally enacted, the NGA did not identify a mechanism for certificate holders to secure property rights necessary to build pipelines.” *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 489 (2021); see S. Rep. No. 429, 80th Cong., 1st Sess. 1 (1947) (Senate Report). Pipeline companies relied instead on state-law mechanisms to acquire the needed land. Senate Report 1. Under that regime, States could (and did) withhold authority to take land for projects that they disfavored, such as those undertaken by out-of-state corporations. *Id.* at 2-3. “The result was that certificate holders often had only an illusory right to build.” *PennEast*, 594 U.S. at 489.

In 1947, Congress amended the NGA to address that impediment by authorizing private certificate holders to exercise the federal power of eminent domain. Act of July 25, 1947, ch. 333, 61 Stat. 459 (15 U.S.C. 717f(h)); see *PennEast*, 594 U.S. at 489. Specifically, Congress provided:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas * * * , it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

15 U.S.C. 717f(h).

Congress further directed that the “practice and procedure” in any such condemnation action brought in federal district court “shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated.” 15 U.S.C. 717f(h). Federal jurisdiction over such actions is limited to cases in which “the amount claimed by the owner of the property to be condemned exceeds \$3,000.” *Ibid.*

2. Respondent is a company that transports and stores natural gas. Pet. App. 2a. In 1985, FERC issued respondent a certificate of public convenience and necessity, authorizing respondent to operate and maintain an interstate pipeline system previously owned by another company. *Williston Basin Interstate Pipeline Co. & Montana-Dakota Utilities Co.*, 30 F.E.R.C. ¶ 61,143, ¶ 61,253 (1985). Respondent also inherited the other company’s “blanket certificate,” which is an authorization to conduct relatively minor pipeline projects pursuant to a streamlined regulatory approval process. *Ibid.*; *Montana Dakota Utilities Co.*, 21 F.E.R.C. ¶ 62,299, ¶ 63,482 (1982); see 18 C.F.R. 157.201-157.218.

In November 2017, respondent requested authorization to construct approximately 12 miles of pipeline in McKenzie County, North Dakota, and to expand certain existing natural-gas facilities in the area. Pet. App. 29a. Pursuant to respondent's blanket certificate, FERC issued a notice of authorization for the project. See 82 Fed. Reg. 60,007 (Dec. 18, 2017).

To construct and maintain the new pipeline, respondent needed to secure several easements and rights-of-way in McKenzie County. See Resp. C.A. Br. 4. Respondent was able to purchase most of the necessary property interests from the local landowners. *Ibid.* But respondent could not reach an agreement with certain landowners, who are petitioners in this Court. Respondent therefore sought to obtain the relevant easements and rights-of-way through eminent domain, pursuant to the NGA.

3. In April 2018, respondent filed a condemnation action in the United States District Court for the District of North Dakota. Compl. 1-2; see Pet. App. 28a. The parties stipulated that respondent could immediately use and possess the relevant easements and rights-of-way, leaving only the amount of compensation to be determined. Pet. App. 29a. After three years of litigation on that issue, the parties reached a settlement on the value of the taken property interests. *Id.* at 29a, 50a. But petitioners reserved the right to move for attorney's fees and expenses, and respondent reserved the right to contest that motion. *Id.* at 50a.

Consistent with the parties' stipulation, petitioners moved for an award of attorney's fees and expenses. Pet. App. 30a. Petitioners argued that state law should determine the compensation owed to them for the taking, and that "just compensation as measured in North

Dakota” “includes” “reasonable fees and expenses.” D. Ct. Doc. 127, at 11 (Oct. 4, 2021); see D. Ct. Doc. 119, at 1-14 (Aug. 12, 2021). Respondent opposed the motion. Respondent argued that “federal law defines just compensation in a federal condemnation” under the NGA, and that “attorney’s fees and other litigation expenses are not included in just compensation under the Fifth Amendment” or otherwise provided for by federal statute. D. Ct. Doc. 120, at 13 (Sept. 2, 2021).

The district court granted petitioners’ motion. Pet. App. 46a. The court observed that the NGA is “silent” as to the applicable law and measure of compensation in a condemnation action brought by a private party, and indeed that the Act does not expressly require “that just compensation be awarded.” *Id.* at 32a. The court concluded that the Act’s silence on that point left a gap to be filled through common lawmaking. *Ibid.* The court then applied the analytical framework of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), to determine whether to adopt state law or instead to fashion a uniform federal rule to fill that asserted gap. Pet. App. 33a-35a. After examining out-of-circuit appellate decisions applying *Kimbell Foods* in the same context, *id.* at 35a-40a, the court chose to “adopt[] state substantive law as the federal standard of just compensation.” *Id.* at 45a. The court concluded that under North Dakota law, attorney’s fees and expenses are a component of just compensation. *Id.* at 45a-46a (citing N.D. Cent. Code Ann. § 32-15-32 (West 2022)).

After further briefing on the appropriate fee award, the district court awarded petitioners \$383,375.76 in attorney’s fees and expenses. Pet. App. 23a.

4. The court of appeals vacated the fee award. Pet. App. 1a-10a. The court explained that a private entity

exercising the federal power of eminent domain under the NGA “step[s] into the federal government’s shoes” and “inherit[s] all its rights and obligations.” *Id.* at 4a. When the federal government conducts a taking, the court observed, the Just Compensation Clause does not require it to pay attorney’s fees. *Id.* at 6a (citing *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam)). The court further explained that, although some federal statutes mandate compensation above the constitutional floor by requiring attorney’s fees for certain federal takings, the NGA provision at issue does not. *Id.* at 5a-6a.

The court of appeals next rejected the district court’s *Kimbell Foods*-based determination to adopt state law as the applicable rule of decision. Pet. App. 6a-9a. The court of appeals acknowledged that other circuits had taken the district court’s approach, but it concluded that “first principles counsel otherwise.” *Id.* at 7a n.2 (citation omitted). The court of appeals explained that “when it comes to eminent domain, congressional silence leaves no ‘gaps’ to fill” with state law or federal common law on the measure of just compensation. *Id.* at 7a. Instead, “any gaps are filled by the Fifth Amendment itself.” *Id.* at 8a. The court also viewed this Court’s decision in *PennEast* as confirming that the NGA delegates to private entities “the *entire* federal eminent-domain power, not just some diluted form of it.” *Ibid.* And it concluded that petitioners’ policy arguments for applying state law in this context were better directed to Congress. *Id.* at 9a.

DISCUSSION

The Eighth Circuit correctly held that the Fifth Amendment, not state law, supplies the standard for determining the measure of compensation when a private

entity exercises the federal power of eminent domain under the Natural Gas Act. Pet. App. 6a. This Court’s review is nonetheless warranted because other circuits have reached the opposite conclusion. See *id.* at 7a n.2 (acknowledging contrary out-of-circuit decisions). The question presented is important and recurring, and this case is a suitable vehicle to resolve the disagreement among the courts of appeals. The petition for a writ of certiorari therefore should be granted.¹

A. The Fifth Amendment Defines The Measure Of Compensation Owed By A Private Entity That Exercises The Federal Eminent-Domain Power Under The Natural Gas Act

1. a. Under the NGA, the holder of a certificate of public convenience and necessity may obtain the rights-of-way needed to construct and operate an interstate pipeline “by the exercise of the right of eminent domain in the district court.” 15 U.S.C. 717f(h). Section 717f(h) delegates to private certificate holders the “federal eminent domain power” that the federal government pos-

¹ In two petition-stage amicus briefs filed over 45 years ago, the government similarly expressed the view that federal law defines the measure of compensation owed by private entities exercising the federal eminent-domain power under an analogous provision of the Federal Power Act, 16 U.S.C. 814 (1976). See U.S. Amicus Br. at 14-16, *Boswell v. Georgia Power Co.*, No. 77-1866 (Jan. 25, 1979); U.S. & FERC Amici Br. at 8-9, *Georgia Power Co. v. 138.30 Acres of Land*, No. 80-255 (Jan. 13, 1981). Those briefs opined that the issue “appears to have less significance” in the parallel context of the NGA, although they acknowledged that “state rules allowing attorneys’ fees” could affect the cost of pipelines’ acquisitions. U.S. Amicus Br. at 13, *Boswell*, *supra* (No. 77-1866); see U.S. & FERC Amici Br. at 3 n.4, *138.30 Acres of Land*, *supra* (No. 80-255). Since then, a circuit conflict has developed on the NGA issue, and the question presented has become important. See pp. 18-23, *infra*.

sesses. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 489 (2021) (emphasis omitted). That delegation empowers a certificate holder to step into the shoes of the federal government and condemn both private and state-owned property, just as the federal government can. *Id.* at 498.

When the federal government exercises the federal power of eminent domain, the Fifth Amendment requires it to pay “just compensation” to the property owner. U.S. Const. Amend. V. A significant body of case law clarifies the scope of “just compensation” under the Fifth Amendment. In general terms, the Just Compensation Clause entitles a property owner “to the fair market value of his property at the time of the taking.” *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). Just compensation under the Amendment “is for the property, and not to the owner.” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). Accordingly, “indirect costs to the property owner caused by the taking of his land,” such as “attorney’s fees and expenses,” are “generally not part of the just compensation to which he is constitutionally entitled.” *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam) (brackets and citation omitted) (quoting *Dohany v. Rogers*, 281 U.S. 362, 368 (1930)).

Congress is free to, and sometimes does, mandate relief that exceeds that constitutional floor. For example, although attorney’s fees are not part of “just compensation” under the Fifth Amendment, the Equal Access to Justice Act requires the federal government to pay such fees in certain condemnation actions that are not resolved “by settlement.” 28 U.S.C. 2412(a)(1) and (d)(2)(H). “[S]uch compensation is a matter of legisla-

tive grace rather than constitutional command.” *Boddaw*, 440 U.S. at 204. But when Congress is silent as to the measure of compensation for a particular class of takings, the default Fifth Amendment “just compensation” standard applies.

Congress may also adopt state-law measures of compensation that exceed the federal constitutional minimum. See Pet. App. 5a. When States exercise the power of eminent domain, they sometimes provide compensation more generous than the Fifth Amendment requires. Such state laws do not apply of their own force to the federal government when it exercises the federal power of eminent domain. See *United States v. Miller*, 317 U.S. 369, 379-380 (1943); *Kohl v. United States*, 91 U.S. 367, 374 (1875). Instead, federal law applies where the “substantive right” to “compensation” is “grounded upon the Constitution of the United States.” *Miller*, 317 U.S. at 380; *United States v. 93.970 Acres of Land*, 360 U.S. 328, 332-333 (1959).

Congress may choose to adopt state substantive law as the federal standard for compensation. The General Bridge Act of 1946, 33 U.S.C. 525 *et seq.*, for example, authorizes certain takings and requires compensation to be “ascertained and paid according to the laws of [the] State” where the condemnation occurs. 33 U.S.C. 532. Federal standards remain the default, however, unless Congress affirmatively “chooses to make state laws applicable.” *93.970 Acres of Land*, 360 U.S. at 332-333.

b. The NGA explicitly authorizes private condemnation actions but does not affirmatively incorporate substantive state-law standards or specify any particular measure of compensation for takings by certificate holders. See 15 U.S.C. 717f(h). In that circumstance, the default Fifth Amendment standard of “just compen-

sation” applies. See *Bodcaw*, 440 U.S. at 203; *Miller*, 317 U.S. at 379-380. That standard does not allow for attorney’s fees. *Bodcaw*, 440 U.S. at 203.

The fact that Section 717f(h) authorizes a private entity to exercise the federal eminent-domain power on the government’s behalf does not change the foregoing analysis. When Congress authorizes an exercise of eminent domain without specifying a measure of compensation, a landowner’s right to compensation is “grounded upon the Constitution of the United States,” *Miller*, 317 U.S. at 380, and therefore is governed by federal law. See *93.970 Acres of Land*, 360 U.S. at 333. That is true regardless of who exercises the federal eminent-domain power. See *Tennessee Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 247-251 (3d Cir. 2019) (Chagares, J., dissenting); *Sabal Trail Transmission, LLC v. 3.921 Acres of Land*, 74 F.4th 1346, 1349 (11th Cir. 2023) (Grant, J., concurring). “[T]he rules of the road do not change, in other words, when the federal government hands the keys over to a private party.” Pet. App. 8a.

This Court’s decision in *PennEast* confirms how completely a certificate holder acting under Section 717f(h) stands in the federal government’s shoes. There, the Court rejected New Jersey’s state-sovereign-immunity defense to a certificate holder’s condemnation of state-owned land, explaining that States had consented in the plan of the Convention to the exercise of the federal eminent-domain power “in its entirety.” *PennEast*, 594 U.S. at 508. The Court held that because “the federal eminent domain power can be delegated,” and Section 717f(h) “speaks with sufficient clarity to delegate th[at] power,” States “have no immunity left to waive or abrogate when it comes to condemnation suits by the Fed-

eral Government and its delegateses.” *Ibid.* *PennEast* thus confirmed that “the gas company received what amounted to the *entire* federal eminent-domain power, not just some diluted form of it.” Pet. App. 8a.

2. a. The court of appeals correctly applied those principles to vacate the district court’s fee award in this case. See Pet. App. 1a-10a. The court of appeals recognized that the federal eminent-domain power carries with it the obligation to pay “just compensation” within the meaning of the Fifth Amendment, or whatever compensation above that constitutional floor Congress may require. *Id.* at 6a. The court correctly concluded that, because the NGA does not specify any particular measure of compensation for private takings effected under that statute, “the default rule applies: ‘just compensation’ under the Fifth Amendment.” *Ibid.* Because the Fifth Amendment does not confer any right to attorney’s fees incurred in takings litigation, the district court’s fee award could not stand. *Id.* at 8a.

The court of appeals also correctly rejected petitioners’ argument, which the district court had accepted, that state law should be used to determine the measure of compensation owed in private condemnations under the NGA. See Pet. App. 6a-8a. Petitioners and the district court had viewed the NGA’s silence on the measure of compensation as creating a “gap” to be filled through judicial lawmaking. See Pet. C.A. Br. 3-4; Pet. App. 33a. In crafting a rule of federal common law, the district court analyzed the factors outlined in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), to determine whether to adopt state law or to create a uniform federal rule. Those factors include (1) whether the federal program by its nature requires uniformity; (2) whether the application of state law would frustrate specific ob-

jectives of the federal program; and (3) whether a uniform federal rule would disrupt existing commercial relationships predicated on state law. See *id.* at 728-729. Petitioners contended, and the district court agreed, that those factors counsel in favor of incorporating state law, rather than choosing a uniform rule. Pet. App. 40a.

As the court of appeals explained, that argument fails to recognize that “when it comes to eminent domain, congressional silence leaves no ‘gaps’ to fill.” Pet. App. 7a. Because the NGA authorizes certificate holders to “acquire” property rights “by the exercise of the right to eminent domain,” 15 U.S.C. 717f(h), but does not mention “just compensation,” the landowner’s right to such compensation stems from the Fifth Amendment itself. It follows that the Fifth Amendment also supplies the measure of that compensation. See *Miller*, 317 U.S. at 380. Had Congress wished to require greater compensation, or to incorporate state substantive compensation rules, it could have done so—as it has in other statutes. See p. 10, *supra*. But Congress’s failure to mandate an alternative approach to calculating compensation awards for NGA takings did not create a “gap” to be filled through judicial lawmaking. Rather, it left in place the default Fifth Amendment “just compensation” standard.

b. Other considerations reinforce the conclusion that Congress did not leave a gap to be filled by state law. Section 717f(h) provides that condemnation actions may be brought in federal or state court, and that if they are brought in federal court, state-law “practice and procedure” should apply where possible. 15 U.S.C.

717f(h).² By specifying that state *procedural* law should govern, that language implies that state *substantive* law should not apply. State-law rules that define the measure of compensation payable to persons whose property is taken are plainly substantive.

Statutory history points in the same direction. Before Section 717f(h) was enacted, certificate holders could secure rights-of-way only by “rely[ing] on state eminent domain procedures,” and those procedures “were frequently made unavailable to them.” *PennEast*, 594 U.S. at 489. In 1947, Congress addressed that problem by amending the statute to “authorize certificate holders to exercise the *federal* eminent domain power,” thereby ensuring that their certificates “could be given effect.” *Id.* at 489-490. Given the problem that Section 717f(h) was enacted to address, it is implausible that Congress would have chosen to subject certificate holders to disparate and potentially obstructionist state-law compensation regimes. See p. 20, *infra*.

Treating the NGA as creating a gap to be filled through judicial lawmaking would “improperly expand[] federal common law.” *3.921 Acres of Land*, 74 F.4th at 1349 (Grant, J., concurring). Federal courts may make federal common law only in “few and restricted” instances, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citation omitted), including when federal questions “cannot be answered from federal statutes alone,” *City of Milwaukee v. Illinois*, 452 U.S. 304, 314 (1981) (citation omitted). The NGA, how-

² That “practice and procedure” language has effectively been abrogated by Federal Rule of Civil Procedure 71.1, formerly Rule 71A, which establishes uniform rules for federal condemnation actions. See Fed. R. Civ. P. 71.1(a); cf. *93.970 Acres of Land*, 360 U.S. at 333 n.7.

ever, *does* supply an answer to the question of compensation: by delegating the whole of the federal eminent-domain power, without specifying the amount of compensation due, Congress adopted the same standard of compensation that would apply if the federal government itself were taking property. See Pet. App. 7a.

Petitioners' argument is also inconsistent with this Court's repeated admonitions that, under the "American Rule," federal courts may not award attorney's fees to a party in litigation unless "there is express statutory authorization" to do so. *Lackey v. Stinnie*, 604 U.S. 192, 199 (2025) (citations omitted). The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, authorizes fee awards in condemnation proceedings involving delegees, but only in two narrow circumstances: when the final judgment is that the property cannot be acquired by condemnation, and when the proceeding is abandoned. 42 U.S.C. 4654(a). Neither of those circumstances is present here. See Pet. App. 5a n.1. If the NGA in fact were wholly silent on the question of attorney's fees in private condemnation suits brought under the Act, the American Rule would dictate that fees may not be awarded.

3. Petitioners' remaining arguments lack merit. Relying on the Rules of Decision Act, 28 U.S.C. 1652, petitioners contend (Pet. 13) that "the general rule is that federal courts must follow state law unless commanded otherwise." Petitioners' reliance on that statute is misplaced. The Rules of Decision Act requires federal courts to apply state law only where the "Constitution or treaties" or "Acts of Congress" do not "otherwise require or provide." 28 U.S.C. 1652. Here, because the Fifth Amendment itself "provide[s]" the measure of just compensation, state law is inapplicable under the

Rules of Decision Act's plain terms. See pp. 10-12, *supra*. And even if the NGA left a gap to fill, the Rules of Decision Act would not apply. "Since *Erie*, no decision of this Court has held or suggested that the Act requires borrowing state law to fill gaps in federal substantive statutes." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 160 n.13 (1983); see *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-593 (1973).

Petitioners next contend (Pet. 15) that "a delegation of the eminent domain power" does not "necessarily carr[y] with it federal law in every aspect." That argument is difficult to square with *PennEast's* holding that the NGA's delegation is so "categorical" as to encompass the right to condemn state-owned property. 594 U.S. at 498. Petitioners do not explain why Congress would have simultaneously given certificate holders such significant rights against the States but withheld the federal government's ordinary protection from state compensation laws. See *Kohl*, 91 U.S. at 374; *Miller*, 317 U.S. at 380.

Petitioners further contend (Pet. 15-16) that courts should apply state substantive laws that define the scope of available compensation in takings cases because Section 717f(h)'s text expressly contemplates a role for state courts and state law. They emphasize (*ibid.*) the provision's language about applying state "practice and procedure." 15 U.S.C. 717f(h). Petitioners draw the wrong inference from that language. By specifying that state law would govern matters of "practice and procedure," Congress clearly implied that state law would *not* govern substantive matters like the amount of compensation owed. See pp. 13-14, *supra*.

Petitioners also misunderstand (Pet. 16) Section 717f(h)'s historical context. In petitioners' view, Section 717f(h) should not be interpreted to "sweep[] aside all state-law rules about compensation" because the "federal eminent domain power" was not "directly" invoked until "just a few decades prior" to Section 717f(h)'s enactment. *Ibid.* But as the *PennEast* Court recently explained, displacing state eminent-domain law was Congress's very purpose in enacting Section 717f(h). See 594 U.S. at 489; p. 14, *supra*.

Petitioners point (Pet. 16-17) to a Federal Power Act provision that Congress enacted as part of the Energy Policy Act of 2005, which created new eminent-domain proceedings and defined "just compensation" in those proceedings as fair market value (including severance damages). 16 U.S.C. 824p(f). Petitioners ask (Pet. 17) why Congress would "bother adopting a definition that tracks ordinary federal compensation rules" if state-law rules were not the default. But as petitioners point out (*ibid.*), the Fifth Circuit had previously held that a different Federal Power Act provision, which was silent as to the measure of compensation, incorporated state compensation law. See *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1115 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 936 (1981); p. 8 n.1, *supra*. In that circumstance, Congress understandably enacted an express definition of "just compensation" that prevents repetition of the Fifth Circuit's interpretive error.

Petitioners finally argue (Pet. 18) that applying state compensation law to takings by private entities does not raise the same sovereign-immunity and fiscal concerns as applying state law to the federal government. But notwithstanding potential differences between governmental and private takings, Congress "categorical[ly]"

delegated the federal eminent-domain power to certificate holders. *PennEast*, 594 U.S. at 498. The necessary consequence of that delegation is that the same compensation rules will apply regardless of the identity of the condemnor. Petitioners’ policy objections to that choice are best directed to Congress, not this Court. See Pet. App. 9a.

B. The Question Presented Warrants This Court’s Review

Although the decision below is correct, this Court’s review is warranted in light of the conflict among the circuits and the importance of the question presented.

1. The court of appeals acknowledged that its decision conflicts with decisions of other circuits that have considered the question presented, all of which have applied state law to determine the compensation owed in private condemnation actions under the NGA. See Pet. App. 7a n.2. In particular, the Third and Eleventh Circuits have addressed the precise issue that is disputed here and have adopted state law as the measure of just compensation “when deciding whether attorney fees are available under the Natural Gas Act.” *Ibid.*; see *Tennessee Gas Pipeline Co.*, 931 F.3d at 247-251; *Sabal Trail Transmission, LLC v. 18.27 Acres of Land*, 59 F.4th 1158, 1168-1172 (11th Cir. 2023). Those decisions squarely conflict with the holding below that the Fifth Amendment governs the compensation owed in such actions and “provides no right to attorney fees.” Pet. App. 10a.

In cases not involving attorney’s fees, the Fifth and Sixth Circuits have also held that state law supplies the standard for compensation owed in an NGA condemnation suit. See *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662, 665 n.3 (5th Cir. 1985); *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Stor-*

age Easement, 962 F.2d 1192, 1195 (6th Cir.), cert. denied, 506 U.S. 1022 (1992). Respondent views *Tabor* as largely irrelevant on the ground that its reasoning was thin. See Br. in Opp. 19 n.4. But the Fifth Circuit had previously issued a more extensive opinion holding that state law supplied the compensation standard under a parallel provision of the Federal Power Act. See *Georgia Power Co.*, 617 F.2d at 1115; p. 17, *supra*. Although *Georgia Power* involved a different statute, it has had significant “influence” on other courts “interpreting the Natural Gas Act,” *3.921 Acres of Land*, 74 F.4th at 1348 n.2 (Grant, J., concurring), and the Eleventh Circuit held that *Georgia Power* “control[led]” its decision in *Sabal Trail*, 59 F.4th at 1168; see *id.* at 1160 n.1 (explaining that “[d]ecisions of the former Fifth Circuit rendered prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit”).³

Respondent suggests (Br. in Opp. 11) that decisions like *Columbia Gas* and *Tabor* do not directly conflict with the decision below because the compensation disputes in those cases did not “involve[] attorney fees at all.” But the question presented is not limited to issues involving attorney’s fees. Instead, it asks more generally whether “just compensation” should “be determined by reference to state law” in private condemnation actions under the NGA. Pet. i. On that broader question, the Fifth and Sixth Circuits’ approach is

³ The Second Circuit has also adopted *Georgia Power*’s approach to compensation under the Federal Power Act, see *Winooski Hydroelectric Co. v. Five Acres of Land*, 769 F.2d 79, 81-82 (1985), and has applied the same framework to the Rail Passenger Service Act, 45 U.S.C. 545(d)(1)(B) (1982), see *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1265-1267, cert. denied, 484 U.S. 954 (1987).

clearly inconsistent with the Eighth Circuit decision below, which held that the governing standard is “‘just compensation’ under the Fifth Amendment.” Pet. App. 6a (citation omitted).

Absent this Court’s intervention, the conflict among the circuits is unlikely to resolve itself. Respondent predicts (Br. in Opp. 20) that “courts reviewing their precedent” after *PennEast* “will likely conform” to the Eighth Circuit’s view. But the Eleventh Circuit is the sole court of appeals to reconsider the issue after *PennEast*, and it held that *PennEast* did not abrogate its prior precedent. See *Sabal Trail*, 59 F.4th at 1173-1174.

2. The existing circuit conflict warrants this Court’s review. The NGA reflects Congress’s determination that the interstate transportation of natural gas “is affected with a public interest.” 15 U.S.C. 717(a). The Executive Branch has also emphasized the importance of interstate pipelines to the country’s economic competitiveness and national security. See Exec. Order No. 14,154, *Unleashing American Energy*, 90 Fed. Reg. 8353, 8353-8354 (Jan. 29, 2025); Exec. Order No. 14,156, *Declaring a National Energy Emergency*, 90 Fed. Reg. 8433, 8433 (Jan. 29, 2025). Petitioners appear to acknowledge that, under the majority rule in the circuits, States could enact and enforce laws that “require so much compensation that pipeline construction would grind to a halt.” Pet. 7. Petitioners assert that no such extreme state laws “exist in reality,” and that actual state laws do “not frustrate any federal policy.” *Ibid.* But Congress delegated the federal eminent-domain power in its entirety to ensure that pipeline certificate holders need not depend on States’ voluntary forbearance.

Treating state law as determinative with respect to the proper measure of compensation would conflict with

the NGA's general purpose of ensuring a reliable and affordable interstate supply of natural gas. See p. 14, *supra*; cf. Exec. Order No. 14,260, *Protecting American Energy from State Overreach*, 90 Fed. Reg. 15,513 (Apr. 14, 2025). And in States that define just compensation to include attorney's fees, the majority rule incentivizes landowners to draw out disputes in order to increase the size of a potential fee award. That too would impede achievement of the NGA's objectives.

3. This case is a suitable vehicle to resolve the circuit conflict. Both of the courts below squarely addressed and resolved the question presented, which they understood to be outcome-determinative as to petitioners' entitlement to attorney's fees. The court of appeals explained that "[t]he availability of attorney fees depends on whether state or federal law determines the compensation that is due." Pet. App. 3a. The district court likewise characterized "the precise issue before the Court" as "whether state law or federal law governs the measure of just compensation in condemnation proceedings brought by a private entity under the Natural Gas Act." *Id.* at 30a (emphasis omitted).

Respondent contends (Br. in Opp. 12-21) that this case does not actually present any issue concerning the role of state law in calculating just compensation in a private NGA condemnation action. Respondent argues that, contrary to the understanding of the courts below, North Dakota makes attorney's fees available on a discretionary basis in condemnation actions but does not treat such fees as part of just compensation. See *id.* at 13-16. Respondent contends (*id.* at 15-16) that attorney's fees therefore are unavailable here regardless of whether state law governs the measure of just compensation in private NGA suits. In respondent's view (*id.*

at 18-19), that feature of North Dakota law distinguishes this case from other cases in the asserted split, in which “[d]etermining which measure of just compensation applied” was “crucial.”

Respondent’s interpretation of North Dakota law poses no barrier to this Court’s resolution of the question presented. Both of the courts below decided this case on the explicit understanding that in takings cases North Dakota law treats attorney’s fees as part of just compensation. See Pet. App. 3a; *id.* at 30a, 45a. This Court “rarely reviews a construction of state law agreed upon by the two lower federal courts.” *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000) (citation omitted). Instead, it has a “settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law,” *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988), unless that construction is “clearly erroneous,” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (citation omitted).

The Court should apply that settled policy here. Although respondent raises (Br. in Opp. 13-16) reasonable arguments about North Dakota law, the lower courts’ interpretation finds support in *Petersburg School District v. Peterson*, 103 N.W. 756 (N.D. 1905), which held that requiring a landowner to pay his “taxable costs” in “resisting attempts to take his land against his consent” would “result in giving him less than just compensation for his property.” *Id.* at 759; see Pet. App. 3a (citing *Petersburg School District, supra*). The Court may therefore assume without deciding that the two courts below correctly applied North Dakota law here, and resolve the question presented on that assumption. Cf. *Ellingburg v. United States*, 146 S. Ct.

564, 567 n.2 (2026) (declining to disturb the “understanding” on which “the Eighth Circuit decided this case”).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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