

No. 25-159

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**In the Supreme Court of the United States**

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LEONARD W. HOFFMANN, ET AL.,  
*Petitioners,*

v.

WBI ENERGY TRANSMISSION, INC.,  
*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

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**SUPPLEMENTAL BRIEF FOR PETITIONERS**

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**TABLE OF CONTENTS**

	PAGE
TABLE OF AUTHORITIES .....	ii
SUPPLEMENTAL BRIEF FOR PETITIONERS .....	1
A. The Petition should be granted.....	1
B. The decision below was wrong.....	3
CONCLUSION.....	11

## TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>BFP v. Resolution Tr. Corp.</i> , 511 U.S. 531 (1994).....	8
<i>Cass Cnty. Joint Water Res. Dist. v. Erickson</i> , 918 N.W.2d 371 (N.D. 2018) .....	9
<i>City of Bismarck v. Thom</i> , 261 N.W.2d 640 (N.D. 1977).....	8, 9
<i>Georgia Power Co. v. Sanders</i> , 617 F.2d 1112 (5th Cir. 1980).....	10
<i>Humphries v. Williams Nat. Gas Co.</i> , 48 F. Supp. 2d 1276 (D. Kan. 1999) .....	5
<i>Knick v. Twp. of Scott</i> , 588 U.S. 180 (2019).....	4
<i>PennEast Pipeline Co. v. New Jersey</i> , 594 U.S. 482 (2021).....	6
<i>Samantar v. Yousuf</i> , 560 U.S. 305 (2010).....	8
<i>United States v. Miller</i> , 317 U.S. 369 (1943).....	9
<i>Van Scyoc v. Equitrans, L.P.</i> , 255 F. Supp. 3d 636 (W.D. Pa. 2015) .....	5

**STATUTES**

15 U.S.C. § 717f(h) ..... 4, 10

16 U.S.C. § 824p(f) ..... 10, 11

**OTHER AUTHORITIES**

93 Cong. Rec. 9028 (1947)..... 7

*Nichols on Eminent Domain* (3d ed. 2026 update) ... 5

Samuel L. Bray, *The Mischief Rule*,  
109 Geo. L.J. 967 (2021) .....7

## SUPPLEMENTAL BRIEF FOR PETITIONERS

The government’s brief correctly concludes that the Petition should be granted. It errs, however, in urging this Court to adopt a broad view of the Natural Gas Act that would sweep aside state-law protections for property owners with no basis in the text of the statute or the context of its adoption. This Court need not resolve this error at this stage, of course—merits questions are properly addressed in merits briefing—but Petitioners also briefly address each of the government’s merits arguments below.

### **A. The Petition should be granted.**

The government’s brief correctly recognizes that the Petition presents an important question on which the circuits are conflicted. U.S. Br. at 18.

Most importantly, the government correctly recognizes the *scope* of that conflict. While Respondent attempts to cabin this case to a question about whether attorneys’ fees may be awarded in condemnations under the Natural Gas Act (BIO at 11), the government correctly recognizes that the split is more fundamentally about the “broader question” of whether state or federal law governs “just compensation.” U.S. Br. at 19. On that question, the Third, Fifth, Sixth, and Eleventh Circuits (in conflict with the decision below) say that state law, as the traditional source of property rights, must govern. *Id.* at 18–19. And the Second and Fifth say the same thing about a substantively identical provision of the Federal Power Act. *Id.* at 19 n.3. That circuit split warrants this Court’s attention. Accord *id.* at 18–19.

The government errs in its analysis only in its explanation of why the question presented is

important. In the government’s view, this Court should reject the longstanding majority interpretation of the statute because doing otherwise might imperil the construction of pipelines that are “important[t] . . . to the country’s economic competitiveness and national security.” U.S. Br. at 20. Hardly. For one thing, the majority rule has been the majority rule for decades (governing the interpretation of both the Natural Gas Act and the Federal Power Act) without imperiling anything. And that makes sense: After all, states have infrastructure projects of their own and are unlikely to set property rules that make eminent domain for infrastructure impossible.<sup>1</sup> The majority rule might make pipeline condemnations slightly more expensive (or, to the extent that it induces settlements, slightly less expensive), but either way, the question presented is unlikely to transform the “country’s economic competitiveness and national security.” U.S. Br. at 20.

Setting aside the government’s hyperbole, the real importance of the question presented comes from interests the government’s brief ignores—those of property owners and the states that set the rules protecting property. Simply put, both Florida and North Dakota have adopted laws that say property owners are entitled to be made whole when their property is

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<sup>1</sup> The government also asserts without citation that requiring condemnors to pay for the costs of the condemnation will “incentivize[] landowners to draw out disputes in order to increase the size of a potential fee award.” U.S. Br. at 21. It does not explain why one would expect the rule to incentivize landowners to run up bills in the hope of having them repaid rather than incentivizing condemnors to avoid taking unreasonable litigation positions like the one that drove this case to litigation in the first place. See Pet. at 2 n.1.

taken from them through eminent domain. Florida property owners continue to enjoy that protection under the Natural Gas Act. North Dakota property owners have had it taken away. See generally *Br. of North Dakota et al.* at 7–11. This case is important, but it is important because property rights and federalism are important, not because treating property owners fairly under state law imperils national security. The petition for certiorari should therefore be granted.

**B. The decision below was wrong.**

One could stop there: The Petition should be granted, and the parties will brief the merits in due course. The government, however, presses this Court to adopt a broad view of the Natural Gas Act’s eminent-domain provisions, sweeping aside the state’s traditional role as guarantors of private property. That would be error.

To begin, the government’s brief makes clear that neither side in this dispute can point to any clear textual command. The statute itself is silent about compensation. In the face of congressional silence, courts have been forced to choose between a uniform federal standard and the traditional state role in defining and protecting property rights. On the merits, this Court will face the same choice.

The government’s primary argument for choosing the federal path is largely the same as Respondent’s, which is that the Fifth Amendment’s just-compensation requirement creates a backstop that necessarily fills the gap in the statute. Respondent starts from the premise that the Natural Gas Act’s text “does not . . . provide that compensation must be paid for taken property *at all.*” BIO at 24. Instead, it says,

private pipeline companies are simply authorized to take property, and only the Fifth Amendment’s Just Compensation Clause requires them to pay for it. *Id.* at 23–24. The government seems to agree, arguing that any “gap” left by the statute’s silence must be filled only with the minimum compensation required to comply with the government’s Fifth Amendment obligations because § 717f(h) delegates “the entire federal eminent-domain power” to private pipeline companies.” U.S. Br. at 2.

The problem with this stance is that it ignores the statutory text. The government repeatedly characterizes the statute as delegating the “federal eminent-domain power.” U.S. Br. at 2, 17–18, 20. That isn’t what it says. Instead, the Natural Gas Act authorizes private pipeline companies to “acquire [property] 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) (emphasis added). The government block-quotes that language exactly once (U.S. Br. at 4) and otherwise studiously ignores the final 23 words.

But those words matter because they mean the statute does not delegate the power to take property. It instead authorizes the filing of a private condemnation lawsuit. The government’s sovereign power of eminent domain, of course, can be exercised in two ways. One is “direct condemnation[, where] the government initiates proceedings to acquire title under its eminent domain authority.” *Knick v. Twp. of Scott*, 588 U.S. 180, 186 (2019). But the government needn’t directly condemn property to lawfully take it: Instead, it can simply seize property, leaving the property

owner to sue in “inverse condemnation” to recover the compensation mandated by the Fifth Amendment. *Ibid.* No one thinks the Natural Gas Act authorizes the second exercise of power: As lower courts consistently recognize, a private pipeline company (even one with a FERC certificate) that intrudes on private property without first condemning it is a trespasser, not a sovereign seizing land as of right. See, e.g., *Van Scyoc v. Equitrans, L.P.*, 255 F. Supp. 3d 636, 639 (W.D. Pa. 2015); *Humphries v. Williams Nat. Gas Co.*, 48 F. Supp. 2d 1276, 1281–82 (D. Kan. 1999). The statutory delegation is therefore, on its face, limited to the power to *file a condemnation suit*.

And that matters because filing a condemnation suit necessarily requires payment for the condemned land. It is therefore not true that the only “obligation to pay comes from . . . the federal constitutional minimum of just compensation.” BIO at 24. Instead, the obligation is inherent in the nature of the suit: A condemnation action starts from the premise that a condemnor must pay for the land it wants to take and asks a court to determine what that land is worth. 6 *Nichols on Eminent Domain* § 24.05[1] (3d ed. 2026 update). A plaintiff who files a condemnation action “asks the court to determine the value of the land and to authorize the condemnation thereof upon the payment of the value thus determined.” *Ibid.* In the absence of the Fifth Amendment’s protections, the government could perhaps *seize* property without paying for it, but it is a contradiction in terms to say the government could take land through a condemnation action without paying compensation. Just as authorizing a tort suit logically implies a court can award damages, authorizing a condemnation action

logically implies that a court must determine compensation. But it does not inherently suggest anything about what sources of law a court should look to in so doing.

Nothing in this Court’s decision in *PennEast Pipeline Company v. New Jersey* says otherwise. 594 U.S. 482 (2021). The government, like the court below, reads *PennEast* to confirm that the Natural Gas Act delegates the “entire federal-eminant domain power” to private pipeline companies. U.S. Br. at 12 (emphasis omitted) (quoting Pet. App. 8a). But, as explained above, that simply isn’t true. And it isn’t what *PennEast* holds. 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. In other words, it was a question of whether pipeline companies could file a condemnation lawsuit against a State, and New Jersey’s argument was that it retained sovereign immunity—that it could not be sued. *Ibid.* As the statutory text makes clear, the Natural Gas Act authorizes private condemnation suits. *Supra*, at 4. And, as this Court held in *PennEast*, the States retain no sovereign immunity from federal eminent-domain suits, which meant they were also not immune from suit by federal delegees. 594 U.S. at 488. Nothing in *PennEast* speaks to what substantive law governs the outcome of those suits.

This understanding of the statutory text matches the problem the statutory amendment was meant to solve. Congress adopted Section 717f(h) in 1947 to “provide[] for the exercise of eminent domain . . . , where it does not now obtain, because in certain

States, under their constitutions and statutes, no power of eminent domain is granted except to public service companies who serve the State.” 93 Cong. Rec. 9028 (1947). Before the amendment, federally authorized natural-gas pipelines could file eminent-domain actions in only some states. After the amendment, these pipelines could file actions in all the States. There is no need to read the statutory text to do more than solve the problem it plainly solves. See generally Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967 (2021).

On the government’s view, the statute’s purpose was far broader. Rather than enabling condemnations in the handful of states where they had been forbidden, the government says that “displacing state eminent-domain law was Congress’s very purpose in enacting Section 717f(h).” U.S. Br. at 17. But it’s unclear from where the government derives that broad purpose. It’s not from the text, which simply authorizes the filing of suits (in state or federal court) without expressly displacing anything. Imagine a state-court judge sitting in Iowa, which has long authorized the use of eminent domain for purely interstate projects. In 1946, that judge would have allowed an interstate pipeline’s condemnation suit to go forward using Iowa’s property-valuation law. What clues would tell that same judge to apply different law in 1947? The only change in the governing law was that Congress had authorized the company to file the lawsuit—something that, in Iowa, it had already been allowed to do. The government’s brief simply ignores the fact that, in much of the country, there was no problem to solve, and that nothing in the statute’s

text or the context of its adoption suggests Congress meant to change what was happening in those states.

That is all the more true given the longstanding background presumption that state law, rather than federal, governs real property. “[W]here the intent to override [state law] is doubtful, our federal system demands deference to long-established traditions of state regulation.” *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 546 (1994); see also Br. of North Dakota et al. at 7–11. A similar background principle governs delegations of the eminent domain power, which are uniformly held to be strictly construed against delegation and in favor of property owners. See Pet. at 15. The government’s brief simply ignores these longstanding canons, even though Congress would have been well aware of each background presumption. See, e.g., *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010).

The government’s other arguments are similarly unavailing. It invokes the “American Rule” that parties must bear their own attorneys’ fees, U.S. Br. at 15, but forgets that this is not a case about fee shifting—it is, as the government itself recognizes, about “just compensation.” *Id.* at 19. States like Florida and North Dakota do not award costs and fees in condemnation cases as a way of deterring litigation misbehavior. They award costs and fees to “make certain that the landowner received the full ‘just compensation’ for his land, without diminution by attorney fees.” *City of Bismarck v. Thom*, 261 N.W.2d 640, 647

(N.D. 1977) (Vogel, J., dissenting).<sup>2</sup> A property owner whose \$100,000 property is condemned is not made whole by an award of \$100,000 if it costs him \$20,000 to secure that award.<sup>3</sup>

The government does no better with its treatment of the statute’s requirement that district courts “conform as nearly as may be with the practice and procedure of similar” condemnations in state court. U.S. Br. at 14. To Petitioners (and the State amici) that language suggests that, to the extent that Congress thought at all about state law, it meant to embrace it rather than sweep it aside. Pet. at 16. The government disagrees, suggesting a negative implication: by ordering district courts to apply state “practice and procedure,” it says, Congress was implicitly telling them to disregard state *substantive* law. U.S. Br. at 13–14.

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<sup>2</sup> *Thom* was overruled (and Justice Vogel’s dissent vindicated) in relevant part by *Cass County Joint Water Resource District v. Erickson*, 918 N.W.2d 371, 380 (N.D. 2018).

<sup>3</sup> This Court’s just-compensation jurisprudence, like the jurisprudence of the states that require a condemnor to cover the condemnee’s litigation costs, holds that just compensation requires an “owner to be put in as good position pecuniarily as he would have occupied if his property had not been taken.” *United States v. Miller*, 317 U.S. 369, 373 (1943). To be sure, this Court has also held that property owners may be required to bear the costs of their own condemnation—undeniably placing them in a worse position pecuniarily than they would have been had their property not been taken. But it has never explained why, and it has only done so in the context of statutes authorizing condemnation by the federal government itself, where sovereign-immunity concerns may counter some of the background principles discussed above. See Pet. at 18.

But the government’s reading makes no sense. The quoted language applies only to actions filed in “district court,” not those filed in state court. 15 U.S.C. § 717f(h). On the government’s reading, then, Congress was directing federal courts—but only federal courts—to apply federal substantive law in these condemnations while leaving state courts to apply their own laws. Given that many condemnations under the statute would proceed in state court (and that some *must* proceed in state court), it would be odd for Congress to adopt such a two-track system of substantive law—and far odder for it to do so by negative implication.

Finally, the government draws the wrong inference from Congress’s enactment of 16 U.S.C. § 824p(f), a subsection of the Federal Power Act dealing with condemnations for certain interstate power utilities. U.S. Br. at 17. As explained in the petition, since at least 1980, lower courts had uniformly held that state law controls compensation questions when Congress delegates the power to initiate a condemnation action to private parties (as it has in the Federal Power Act). Pet. at 6–11 (citing, among others, *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (en banc)). When Congress enacted § 824p(f) in 2005, it authorized private condemnations but also specified a standard of compensation—one that matches the bare minimum required by the Fifth Amendment. Pet. at 17. On Petitioner’s view, this represents Congress’s understanding of lower courts’ statutory interpretation: Since silence meant incorporating state law, Congress specified the federal standard when it wanted courts to use that instead. *Ibid.* To the government, though, this represents a

thorough repudiation of the lower courts' consistent interpretation: The government insists that, in § 824p(f), "Congress understandably enacted an express definition of 'just compensation' that prevents repetition of the Fifth Circuit's interpretive error." U.S. Br. at 17. But surely if Congress thought lower courts had been getting the Federal Power Act wrong for decades, it would have repudiated that interpretation by amending the part of the Federal Power Act the courts were getting wrong, not by expressly departing from the prevailing interpretation only in a different part of the statute. This piece of evidence favors Petitioners' view, not the government's.

And ultimately, that's all either side in this dispute can offer: pieces of evidence. The lower courts are divided on this question because the statutory text fails to answer it. The petition should be granted so this Court can conclusively resolve that split.

#### CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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