No. 25-159

In the Supreme Court of the United States

LEONARD W. HOFFMANN, ET AL.,

Petitioners,

v.

WBI ENERGY TRANSMISSION, INC.,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Natural Gas Act authorizes private companies to condemn land in order to build certain natural gas infrastructure, but it says nothing about how to determine the amount of just compensation owed for the property taken. 15 U.S.C. § 717f. The Third, Fifth, Sixth, and Eleventh Circuits have all held that compensation awards in private condemnations under the Natural Gas Act must therefore be determined by reference to state law, which often mandates higher compensation than the floor set by the Fifth Amendment. In this case, the Eighth Circuit expressly split with its sister circuits and instead held that the Natural Gas Act permits only the constitutional minimum of compensation required by the Fifth Amendment. The question presented is:

In private condemnations under the Natural Gas Act, should just compensation be determined by reference to state law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Rules:

Other Authorities:

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit legal organization organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded fifty years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in numerous landmark United States Supreme Court cases generally in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015); *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012).

SUMMARY OF ARGUMENT

WBI Energy, a private pipeline company, condemned the Hoffmanns' land under the Natural Gas Act. The owners spent three years securing just compensation for what was taken, and when the case was over, the district court awarded the Hoffmanns attorneys' fees under North Dakota law as part of just com-

[1] Pursuant to Rule 37.6, Amicus Curiae states that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus curiae made a monetary contribution to fund the preparation or submission of this brief.

pensation. The Eighth Circuit vacated the fee recovery, holding that the Fifth Amendment limits just compensation to the value of the land, and no more.

Deciding between these two approaches demands an inquiry into traditional property law principles and historical practice. *See Tyler*, 598 U.S. at 638-39 (defining property through state law, traditional property principles, historical practice, and precedent); *Cedar Point*, 594 U.S. at 149-50 (tracing the right to exclude through Blackstone and longstanding property-law authorities); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-27 (1893) (deriving "just compensation" from ordinary usage and equitable tradition). If the condemning authority could fix the measure of compensation by its own law alone, a government could "sidestep the Takings Clause by disavowing traditional property interests." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998). But the Eighth Circuit did no such analysis. Instead, it held that the Natural Gas Act's delegation put WBI Energy into the federal government's shoes with all its rights and obligations, thereby relieving WBI Energy of the duty to pay attorneys' fees to the Hoffmanns. *See United States v. Bodcaw Co.*, 440 U.S. 202, 204 (1979) (per curiam) (holding that a landowner's appraisal expenses in a condemnation brought by the United States are not part of the "just compensation" the Fifth Amendment requires).

But historical practice shows that for many years after the founding, the United States acquired land within the states through state condemnation statutes. This practice continued even after this Court confirmed the federal government's independent power to condemn. *Kohl v. United States*, 91 U.S. 367 (1876); *United States v. Jones*, 109 U.S. 513 (1883);

1 Philip Nichols, *The Law of Eminent Domain* § 34, at 107 (2d ed. 1917). The 1888 Act carried this tradition forward, making conformity to state practice the express statutory rule. Act of Aug. 1, 1888, ch. 728, § 2, 25 Stat. 357 (proceedings "shall conform, as near as may be," to state practice). The Natural Gas Act stands in the shoes of this tradition. 15 U.S.C. § 717f(h) (practice and procedure "shall conform as nearly as may be" with state practice).

Furthermore, courts traditionally construed delegations of eminent domain strictly against the grantee. The delegate received only the powers expressed in the grant or necessarily implied by it. *W. Union Tel. Co. v. Pa. R.R.*, 195 U.S. 540, 569 (1904); *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946). The sovereign's immunities were neither. Courts cannot tax litigation costs against the United States unless a statute allows it. *See Bodcaw*, 440 U.S. at 203 n.3. The reason is that this immunity shields the public treasury. But no federal dollars are at stake when a private company condemns for its own profit. *See Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 249 (3d Cir. 2019). A company can build its pipeline without immunity, so a grant of condemnation power does not carry it along by necessary implication. *See Carmack*, 329 U.S. at 243 n.13. Private condemnors were required to make the owner whole, and statutes and charters often conditioned the taking on payment of just compensation and the costs of the proceeding. *See* 2 John Lewis, *A Treatise on the Law of Eminent Domain* § 812, at 1434-35 (3d ed. 1909); Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 761 n.3 (7th ed. 1903).

The Eighth Circuit relied on *Bodcaw*, but the Court there decided only what the Fifth Amendment compels. Indeed, its treatment of costs invoked the sovereign immunity of the United States, which WBI lacks. *Bodcaw*, 440 U.S. at 203 n.3 (litigation costs "cannot be assessed against the United States in the absence of statutory authorization") (citing *United States v. Worley*, 281 U.S. 339, 344 (1930)). Further, *Bodcaw*'s concession that fee recovery is a matter of "legislative grace" leaves open the question presented: what law fills the statutory silence? *Id.* at 204.

Every source this Court should consult points the same way. North Dakota law supplies the compensation rule in this private condemnation. The Court should reverse.

ARGUMENT

I. The Meaning of "Just Compensation" Depends upon Traditional Property Principles and Historical Practice

For more than a century, in interpreting the Takings Clause, this Court has consulted state law together with "traditional property law principles," "historical practice[,] and this Court's precedents." *Tyler*, 598 U.S. at 638. The practice long predates *Tyler*, which is only one of this Court's most recent statements. As early as 1893, this Court derived the meaning of "just compensation" from ordinary usage and longstanding tradition. *Monongahela*, 148 U.S. at 325-27. While state law is often an important starting point, it is not the only consideration. After all, if state law were all that mattered, a state could by statute "sidestep the Takings Clause by disavowing traditional property interests." *Tyler*, 598 U.S. at 638 (quoting *Phillips*, 524 U.S. at 167).

The reason is that the Takings Clause restrains the very governments whose positive law defines property and compensation in the first instance. If the Clause's terms meant only what the enacting government said they meant, the restraint would fail; the Clause "would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Ibid.* (quoting *Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022)). *Monongahela* applied the same logic to compensation itself: "The legislature may determine what private property is needed for public purposes[,]" but once "the taking has been ordered, then the question of compensation is judicial[,]" and it "does not rest with the public, taking the property, . . . to say what compensation shall be paid, or even what shall be the rule of compensation." 148 U.S. at 327. Traditional property principles and historical practice supply fixed points of reference that no self-interested definition can move.

Tyler and *Cedar Point* are concrete recent examples of this. In *Tyler*, the Court refused to defer to a 1935 statute that purported to extinguish a homeowner's property right in his or her excess equity after a tax sale. In *Cedar Point*, the Court rejected the argument that a 1975 California regulation could extinguish the traditional right to exclude the public from private property. These cases were consistent with the Court's traditional treatment of property. *See, e.g.*, *Phillips*, 524 U.S. at 165-68 (the traditional rule that "interest follows principal" was one no state could disavow); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (state law defined the trade-secret interest protected by the Takings Clause); *United States v. Causby*, 328 U.S. 256, 260-67 (1946) (common-law tradition shaped the owner's interest in the airspace above his land). A state may not "by ipse dixit" transform private property into public property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

History and tradition thus work alongside state law to define the scope of the Takings Clause. State law identifies the interests at stake, while traditional property principles and historical practice confirm which of those interests the Clause protects and what compensating their loss requires. The same sources supply the answer when, as here, the question is what a private condemnor owes the owner whose land it takes.

II. History and Tradition Answer the Question Presented: State Law Supplies the Compensation Rule

A. For many years after the founding, federal acquisitions within the States proceeded under state statutes and state practice, and § 717f(h)'s conformity clause continues that tradition

Although state law does not by itself control in these situations, here North Dakota law is consistent with the relevant history and tradition. The Condemnation Act of 1888 authorized federal officers to acquire land "by condemnation, under judicial process," in the federal courts. Act of Aug. 1, 1888, ch. 728, § 1, 25 Stat. 357. Section 2 of that Act stated the procedural rules: "The practice, pleadings, forms and modes of proceeding . . . shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State . . . ." *Id.* § 2. That command was later codified at 40 U.S.C. § 258 and governed until Rule 71A superseded it. *See* Fed. R. Civ. P. 71.1 advisory committee's notes (1951).

For many years after the founding, whenever the federal government needed to condemn land within a state, it was "the practice for the taking to be made in a state court and by authority of a state statute." 1 Nichols, *supra*, § 34, at 107. The federal government bought what it needed, or a state condemned the land under its own power and conveyed it to the United States. As the Court in *Kohl v. United States* put it in 1876, the federal power "has not heretofore been exercised adversely," and the States themselves "have condemned lands for the use of the general government." 91 U.S. at 373. Direct federal takings occurred only where federal jurisdiction was exclusive, as in the District of Columbia. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 494 (2021) (citing Act of Mar. 3, 1809, 2 Stat. 539, and *Custiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233 (1810)).

Even the first adverse exercise of the federal condemnation power was measured against state practice. In *Kohl*, this Court, "admitting that the court was bound to conform to the practice and proceedings in the State courts in like cases," resolved the owners' demand for a separate trial by construing Ohio's condemnation statute. 91 U.S. at 377-78. And ascertaining compensation is a condition on the exercise of the power that Congress may commit to state tribunals: the proceeding "is merely an inquisition to establish a particular fact as a preliminary to the actual taking[,]" and it "may be prosecuted before commissioners or special boards or the courts," as "the legislative power may designate." *United States v. Jones*, 109 U.S. 513, 519 (1883). From its establishment, the federal government "has been in the habit of using" the states' "officers, tribunals, and institutions as its agents." *Id.* at 519-20. In *Jones* itself, a Wisconsin tribunal fixed the compensation for a federal taking. *Id.* at 518-19.

After the 1888 Act, conformity to state practice was expressly required. In *Chappell v. United States*, state practice governed "as near as may be," yielding only where contradicted by federal legislation. 160 U.S. 499, 512-14 (1896); Henry E. Mills, *A Treatise Upon the Law of Eminent Domain* § 347 (2d ed. 1888) (federal condemnation proceedings "may be had in the courts of the United States, or in the state courts," and the practice "should conform to the practice and proceedings in the state courts in like cases"); *see also id.* § 349.

The Natural Gas Act, as enacted in 1938, continued the practice of proceeding under state law. To build an interstate pipeline, a company needed a federal certificate approving the project, but the certificate carried no power to condemn. *PennEast*, 594 U.S. at 488-89; *see* 15 U.S.C. § 717f(e) (granting of certificates). For the land itself, companies negotiated purchases or invoked state eminent domain law; because many states withheld their eminent domain power from pipelines, companies often had "only an illusory right to build." *PennEast*, 594 U.S. at 489. Congress remedied that defect in 1947. The new § 717f(h) delegated the federal eminent domain power, but it also included a conformity clause nearly identical to the 1888 Act: "The practice and procedure in any action or proceeding for that purpose in the district court of the United States 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). Rule 71A, now Rule 71.1, replaced that clause for federal-court procedure in 1951, though the statute's conformity clause remains. And the statute still sends smaller takings to state courts, a feature the Third Circuit treated as evidence that incorporating state law "would not upset any important interest in national uniformity." § 717f(h); *Tenn. Gas*, 931 F.3d at 243-45, 252.

In sum, history and tradition show that federal takings proceeded under state statutes and state practice. The 1888 Act then made conformity to state practice the express statutory rule. Finally, the Natural Gas Act, through the 1947 addition of § 717f(h), adopted virtually the same conformity rule.

One objection to that history comes from *United States v. Miller*, 317 U.S. 369 (1943), which states that the conformity statutes governed procedure and "do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States." *Id.* at 379-80 & nn.24-25. However, *Miller* was a case involving a taking by the United States, where the Fifth Amendment supplies the substantive measure of just compensation. *Miller* says nothing about what law applies when the condemnor is private.

And a private condemnor is different. What it must pay beyond the Fifth Amendment's own command is a matter of "legislative grace," *Bodcaw*, 440 U.S. at 204, and legislation, including adopted state law, can supply that grace. For a century, federal takings proceeded through state procedures and state courts.

Jones, 109 U.S. at 519-20; *Chappell*, 160 U.S. at 512-14. And federal courts applied state compensation standards where state law supplied the rule. *Searl v. Sch. Dist. No. 2 of Lake Cnty.*, 133 U.S. 553, 565 (1890) (applying Colorado's statutory measure of compensation in a condemnation removed to federal court). That practice was the legal background when Congress did not specify in § 717f(h) whether private condemnors owed attorneys' fees. The sovereign-taking cases never addressed private condemnors. The en banc Fifth Circuit distinguished those cases for that very reason, as in those cases "the United States is the party condemning and paying for the land." *Ga. Power Co. v. Sanders*, 617 F.2d 1112, 1119-20 & n.9 (5th Cir. 1980) (en banc).

B. Courts construed delegations of eminent domain to private grantees strictly, and tradition required the private condemnor to make the owner whole, including the owner's costs

Statutes granting eminent domain to corporations traditionally were construed strictly against the grantee and in favor of the landowner, because the power runs "against common right" and must appear in express terms or by necessary implication. *Western Union*, 195 U.S. at 569. The delegation required "an express warrant from the legislature," because the power "will never pass by implication[;]" even an express grant was strictly construed, and carried only what was necessarily incident to the taking. 2 Philip Nichols, *The Law of Eminent Domain* § 358, at 987 (2d ed. 1917); *see also id.* § 360, at 992-94; 1 John Lewis, *A Treatise on the Law of Eminent Domain* §§ 371, 388, at 679, 708-10 (3d ed. 1909). Grants of power to a corporation are in derogation of common right and strictly construed, "especially" when the power delegated is eminent domain. Cooley, *supra*, at 762. Not only was the delegation of the eminent domain power strictly construed, but provisions for the owner's just compensation were "liberally construed" in the owner's favor. 1 Lewis, *supra*, § 389, at 710.

This Court has drawn the same line between the sovereign and the private delegate. In *Carmack*, this Court declined to apply strict construction to federal officials condemning for the United States itself, stating that an authorization to the sovereign's own officers "carries with it the sovereign's full powers," while grants to others, including "public utilities" authorized to condemn "on behalf of themselves[,]" are "grants of limited powers" that carry only what is expressed or necessarily implied. 329 U.S. at 243 n.13.

A bare grant of condemnation authority conveys the power to take, together with its conditions, and beyond that only what the grant necessarily implies. *See id.*; 2 Nichols, *supra*, § 358, at 987. Nothing about WBI's pipeline certificate "necessarily implies" immunity from North Dakota's imposition of attorneys' fees here. The Eighth Circuit wrote that WBI stepped into the federal government's shoes, but tradition measured that step precisely: the delegate received the power expressed in the grant, and the sovereign kept everything else.

Strict construction governed how the grant was read, but the owner's recovery was protected as well. Just compensation meant indemnity: "a full and perfect equivalent," *Monongahela*, 148 U.S. at 326, that puts the owner "in as good position pecuniarily" as if the property had never been taken, *Miller*, 317 U.S. at 373. Nichols put the measure as "what the owner has lost." 1 Nichols, *supra*, § 208, at 630.

Whether the owner would actually be paid turned on whether it was the United States or a private corporation doing the condemnation. Payment is assured when the United States is the condemnor, as the award is a charge on the public treasury, and power to tax stands behind it. 2 Lewis, *supra*, § 679, at 1166. When a private corporation is the condemnor, however, the owner holds just a money judgment against a corporation that could fail, and that judgment alone is inadequate security for the owner's compensation. 1 Nichols, *supra*, § 211, at 638-39.

Against that background, statutes and charters often made the private condemnor bear the costs of the condemnation proceeding, including commissioners' fees, appraisers' fees, court costs, and attorneys' fees. *See, e.g.*, Cooley, *supra*, at 761 n.3 (Vermont statute, construed in *Stacy v. Vermont Central R.R. Co.*, 27 Vt. 39 (1854), required the railroad to pay the commissioners' award "together with the costs and charges accruing thereon" before entering); 2 Lewis, *supra*, § 816, at 1442-43 (Wisconsin required the condemnor to pay "the cost and expense of the proceeding," which its courts held to include attorneys' fees); 2 Nichols, *supra*, § 348, at 965-66 (New Hampshire required payment of the damages assessed plus fifty percent, a condition the courts, this Court among them, sustained against a grantee who accepted it); *Dohany v. Rogers*, 281 U.S. 362, 368-69 (1930) (recognizing that a State may allow attorneys' fees in condemnations by railroad condemnors while denying them when the State condemns). The duty of ascertaining compensation "is necessarily cast upon the party seeking to condemn," which "should pay all the expenses which attach to the process"; a law casting that burden on the owner, "should . . . be held to be unconstitutional and void." 2 Lewis, *supra*, § 812, at 1434-35; *see* Mills, *supra*, § 335; 2 Nichols, *supra*, § 343, at 951 ("there would be no justice in making the owner pay the costs of determining the compensation to which he is entitled by the constitution").

These cost rules did not come from the Fifth Amendment. They were state law, and this Court upheld them without any suggestion that federal law displaced them. In *Dohany*, this Court sustained Michigan's scheme, which allowed attorneys' fees in condemnations brought by railroad companies while denying them when the state itself condemned. 281 U.S. at 368-69. What *Joslin* called "extra-constitutional compensation" was the legislature's to grant and to classify. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 675-77 (1923). And by analogy, a special assessment exacting from the owner substantially more than the benefit conferred was itself "a taking, under the guise of taxation." *Village of Norwood v. Baker*, 172 U.S. 269, 277-79 (1898). North Dakota's law was settled four decades before Congress wrote § 717f(h): forcing the owner to bear the taxable costs of the proceeding "would nullify to a certain extent" the constitutional guaranty. *Petersburg Sch. Dist. of Nelson Cnty. v. Peterson*, 103 N.W. 756, 759 (N.D. 1905).

The question presented asks which law fills § 717f(h)'s silence. History and tradition show that state law supplied these cost rules for a century and continues to supply them until Congress displaces it, and § 717f(h) displaces nothing. *Ga. Power*, 617 F.2d at 1115-16 (holding that state law supplies the federal rule absent contrary legislative intent or significant conflict).

C. This Court's cases, including *Bodcaw*, concern only takings by the sovereign and say nothing about the compensation a private condemnor owes

History and tradition answer the question presented. This Court's cases have never said otherwise, including *Bodcaw*, which is a case about appraisal fees in a condemnation by the United States, and its reasoning repeatedly reflects the identity of the condemnor. 440 U.S. at 202-03.

In *Bodcaw*, the United States condemned a permanent easement across Bodcaw Company's land. After a jury decided the value of just compensation, the district court added $20,512.50 for the owner's fees for appraisals and expert witnesses. *Id.* at 202. The Fifth Circuit upheld the appraisal-fee portion of the award, though not the expert witness fees, stating that the owner had not been "made whole" without the appraisal fees. *Id.* at 202-03 (quoting *United States v. 1,380.09 Acres of Land*, 574 F.2d 238, 241 (5th Cir. 1978)). This Court reversed without argument, holding that the owner's appraisal expenses "were not part of the 'just compensation' required by the Fifth Amendment." *Id.* at 204.

The Court, quoting the dissenting judge below, called the dispute "the rather typical, oft-recurring situation where the landowner is dissatisfied with the Government's valuation." *Id.* at 203 (quoting 574 F.2d at 242). Yet it acknowledged that "[t]here may be exceptions to this general rule[,]" *ibid.*, and that "[p]erhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action." *Id.* at 204. Three things stand out from that opinion in a way that matters here.

First, *Bodcaw* borrowed its rule from a case that distinguishes private condemnors. *Bodcaw*'s key sentence, that such expenses are "not embraced within just compensation," quotes *Dohany*. 440 U.S. at 203 (quoting 281 U.S. at 368). In *Dohany*, the Court sustained Michigan's scheme "allowing attorneys' fees in condemnation proceedings brought by railroad companies and denying them when brought by the state." 281 U.S. at 368-69. The sentence *Bodcaw* borrowed from *Dohany* states what the Fifth Amendment compels; the decision it came from upheld a state fee rule that turned on who condemned. *Bodcaw*, 440 U.S. at 203; *Dohany*, 281 U.S. at 368-69. *Dohany* in turn cited *Joslin*, which treats compensation beyond the Fifth Amendment's command as "extra-constitutional compensation" that the legislature may grant to some and withhold from others. 262 U.S. at 675-77. The remaining case in *Bodcaw*'s string cite is a sovereign taking. *See Mitchell v. United States*, 267 U.S. 341, 343-45 (1925).

Second, *Bodcaw*'s treatment of costs invoked sovereign immunity, which made the constitutional question the only question. Footnote 3 explains that the court of appeals "necessarily rested its decision on constitutional grounds" because litigation costs "cannot be assessed against the United States in the absence of statutory authorization," citing *Worley*, 281 U.S. at 344, a war-risk insurance case, along with 28 U.S.C. § 2412's and Rule 71A(*l*)'s exclusion of condemnation cases. 440 U.S. at 203 n.3. WBI has no such immunity.

Third, *Bodcaw* concedes that the answer can come from legislation: fee recovery is "a matter of legislative grace rather than constitutional command." 440 U.S. at 204. *Bodcaw* itself cited an example of that grace. Under the Uniform Relocation Assistance Act, the United States must pay an owner's litigation expenses, including attorneys' fees, when a condemnation proves unauthorized, when the government abandons it, or when the owner prevails in inverse condemnation. *Ibid.* (citing 42 U.S.C. § 4654). Even in sovereign takings, then, fee recovery comes from legislation; the only dispute here is which legislation.

Thus, *Bodcaw* decides only what the Constitution commands in a taking by the United States. It never asks what law governs when a statute like § 717f(h) is silent, and that is the question presented. North Dakota supplied the grace. Whether the Fifth Amendment of its own force requires a private condemnor to bear these costs is a question the Court need not reach, because North Dakota law supplies them regardless. The courts of appeals resolve the resulting choice of law under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); this history shows that the state-law answer those courts reach is the traditional one. *See Tenn. Gas*, 931 F.3d at 245-46, 250-54; *Ga. Power*, 617 F.2d at 1115-16; *Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy Cnty.*, 59 F.4th 1158, 1165-66, 1175 (11th Cir. 2023); *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1199 (6th Cir. 1992).

Judge Grant's concurrence, on which the Eighth Circuit leaned, states that the statute authorizing "the exercise of the right of eminent domain," without more, authorizes only the compensation the Fifth Amendment commands, "regardless of whether the

United States or a private licensee exercises that power." *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County*, 74 F.4th 1346, 1349 (11th Cir. 2023) (Grant, J., concurring). The compensation authorities the concurrence cites are sovereign-condemnor cases. *See Miller*, 317 U.S. at 370 ("The United States condemned a strip across the respondents' lands . . . ."); *Bodcaw*, 440 U.S. at 202 ("The United States brought this condemnation action . . . ."). *PennEast*, *Miller*, and *Bodcaw* say nothing about whether sovereign immunity passes to a private condemnor. But in *Carmack*, this Court held that officials condemning for the sovereign wield the sovereign's full powers, while private grantees condemning "on behalf of themselves" take what is expressed or necessarily implied. 329 U.S. at 243 n.13.

Immunity from the owner's costs is neither. It appears nowhere in § 717f(h). Nor does necessary implication supply it, because the immunity exists for the sovereign's own sake: it guards the treasury that pays the award in a federal condemnation. *See Bodcaw*, 440 U.S. at 203 n.3; 2 Lewis, *supra*, § 679, at 1166. A certificated company can still condemn land and build its pipeline while paying the ordinary costs that state law assigns to condemnors.

Miller also says nothing about a private condemnor. There, the United States condemned land for a federal reclamation project and paid the award from the treasury. 317 U.S. at 370. When the landowners invoked California law through the conformity statutes, the Court explained that those statutes supply only state "forms and methods of procedure" and cannot reach questions of substantive right, such as the measure of compensation "grounded upon the Constitution." *Id.* at 379-80.

For that reason, the en banc Fifth Circuit limited *Miller* to cases where the United States condemns and pays. The national interest behind a uniform federal measure is weaker when the condemnor is a private company seeking profit and no federal money is at risk. *Ga. Power*, 617 F.2d at 1118-20 & n.9. The Third Circuit agreed that *Miller* concerned a taking by the federal government and that nothing in it or its progeny extends the federal measure to private condemnors. *Tenn. Gas*, 931 F.3d at 248-49.

Lastly, *PennEast* decides a different question entirely: whom the delegate may sue. 594 U.S. at 488, 501. In *PennEast*, the state of New Jersey asserted sovereign immunity from a certificate holder's condemnation suit, and this Court held that the States consented in the plan of the Convention to the federal eminent domain power, regardless of who is using the power. *Id.* at 500-08. Below, the Eighth Circuit stressed the Court's description of § 717f(h)'s delegation as "categorical," but that word measures the delegation's scope, reaching any necessary rights-of-way including land in which a State holds an interest. *Id.* at 498-99. It says nothing about what the delegate owes.

On compensation, *PennEast* helps the Hoffmanns. The Court let the delegate sue a State because the eminent domain power is "inextricably intertwined" with the ability to condemn and authorization to take property interests "impl[ies] a means through which those interests can be peaceably transferred." *Id.* at 503-04. A bare delegation carries with it what is essential to exercising the power. *See Carmack*, 329 U.S. at 243 n.13 (explaining that delegations of the condemnation power are grants of limited powers, carrying only what is expressed or necessarily implied); *W. Union*

Tel. Co., 195 U.S. at 569. A forum is essential because the power cannot be exercised without one. *PennEast*, 594 U.S. at 503-04. Immunity from the owner's costs is not necessary. WBI could take the land, litigate its value, and pay the fees North Dakota imposes. Private condemnors did so for a century, *supra* Part II.B; Cooley, *supra*, at 761 n.3; 2 Lewis, *supra*, § 816, at 1442-43, and the state-law rule of four circuits requires it, *Ga. Power*, 617 F.2d at 1115-16; *Tenn. Gas*, 931 F.3d at 254-55; *18.27 Acres*, 59 F.4th at 1175; *Columbia Gas*, 962 F.2d at 1199. What the delegate owes in just compensation was never before the Court. *PennEast*, 594 U.S. at 488. And the history *PennEast* recounted, of delegations to build mills, roads, and bridges, *id.* at 493-97, is the same tradition in which state law fixed what those grantees paid. *Supra* Part II.

Nor does state-by-state variation pose a problem. Congress built that variation into the Act itself. Section 717f(h) sends takings of $3,000 or less to state courts, and the Third Circuit read that provision as evidence that incorporating state law "would not upset any important interest in national uniformity." 15 U.S.C. § 717f(h); *Tenn. Gas*, 931 F.3d at 252. A statute that already sorts cases by forum and dollar amount can tolerate cost rules that turn on who the condemnor is.

History, tradition, state law, and this Court's precedent point the same way. The Hoffmanns spent three years litigating to secure the compensation the Constitution promises. Under North Dakota law, the condemnor pays for that fight. Only the sovereign's immunity could excuse WBI from paying, and WBI is not the sovereign.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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