

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT IN REPLY

Respondent's argument largely rests on two premises: either that federal statutes never adopt state substantive rules (except, perhaps, for "house-keeping" rules), or, alternatively, that something special about the federal eminent domain power requires ignoring state substantive just-compensation rules when private parties take land. Each one is false.

To begin, this Court has consistently looked to state law to lend substance to federal statutes—originally because it believed this was mandatory, and later because it believed this was wise, but consistently nonetheless. The default rule in 1947, like the default rule today, was that state law would govern unless Congress did something to set it aside.

And nothing about either eminent domain in general or the Natural Gas Act in particular is different. Respondent insists that "the right of eminent domain" was, in 1947, a term of art that incorporated federal just-compensation rules, but this Court's cases directly say otherwise. To be sure, the United States itself is not required to follow state substantive rules when it takes land in its own name, but that is because the United States is sovereign—it is *always* immune from state laws. All of Respondent's eminent-domain cases simply reflect the basic rule that the United States can ignore state law when condemning land just as it can any other time. Respondent has found no case suggesting that private condemnors can do the same, and nothing in the statute purports to implement the federal constitutional floor as a uniform nationwide ceiling on compensation.

With those false premises set aside, Respondent has little to offer, asking this Court to rely on unrelated language in unrelated statutes as a guide to interpreting the statute here, to overread this Court's only decision interpreting this subsection of the statute, or to jettison the question presented altogether. These arguments are wrong as well, and the decision below should be reversed.

A. Unless displaced by Congress, state substantive law ordinarily provides the default rule.

As explained in the opening brief, at the time Congress adopted 15 U.S.C. § 717f(h), the prevailing rule was (and long had been) that state substantive law controlled in federal litigation unless it was expressly or implicitly preempted. Opening Br. 26 (citing *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 158 (1987) (Scalia, J., concurring in the judgment)). In other words, the rule was that state law controlled “in the absence of explicit legislative policy cutting across state interests.” *Bd. of Comm’rs of Jackson Cnty. v. United States*, 308 U.S. 343, 351–52 (1939); see also Br. for Resp. 17–18 & n.5 (citing *Jackson Cnty.*). That tradition was ratified by the Rules of Decision Act. 28 U.S.C. § 1652. And it lives on today in this Court’s decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), which says that courts should look to state law in the absence of an express or implicit requirement to do otherwise. Opening Br. 37. To be sure, state law does not always control because it is often trumped by the Supremacy Clause, which overrides laws that “regulate the Government directly or discriminate against

it . . . [or] conflict with an affirmative command of Congress.” *North Dakota v. United States*, 495 U.S. 423, 434 (1990) (plurality). But without one of those, longstanding tradition points to state law.

Respondent does not deny the existence of this tradition. Instead, it claims (at 41) that the tradition was limited to “housekeeping rules” like statutes of limitations.¹ But that simply isn’t true—to the contrary, by the middle of the 1940s, this Court had already recognized that its “custom of resorting to [state laws] to give meaning and content to federal statutes [was] too old and its use too diversified” to allow concerns for national uniformity to trump state law across the board. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). Perhaps Respondent would say that the law at issue in *Bowles* (the meaning of the term “public utility,” which this Court held was controlled by state law, *id.* at 154) was also a “housekeeping” law, but it’s hard to see why. Indeed, the opinion says otherwise, justifying its rule by reference to traditional state authority over “acquisition, transmission, and transfer of property[.]” *Id.* at 155.²

¹ This Court has not historically divided substantive rules into “housekeeping” and non-“housekeeping” categories. Indeed, to the extent that this Court has a jurisprudence of “housekeeping rules,” its cases suggest that statutes of limitations fall outside that category. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103–04 & n.6 (1971) (applying state statute of limitations in part because “state time limitation[s]” were not “mere ‘housekeeping rules’ embodied in state law”).

² The United States suggests that the Court’s tradition of treating state substantive law as binding had ended by 1946.

Nor do any of Respondent’s cases support its perceived line between “housekeeping” and non-“housekeeping” laws. Many of them are about 42 U.S.C. § 1983, which preempts state remedies law because its whole purpose is to provide “a different remedy” from state tort law. *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). Others simply reflect the modern approach of filling in congressional silence with federal common law—which often calls upon courts to use state law. *Monessen Southwestern Railway Company v. Morgan* (cited at 37, 42), for example, makes clear that “Congress’ silence as to the availability of interest” on a federal award “does not, without more” set aside state laws about interest. 486 U.S. 330, 336 (1988).

Respondent’s remaining cases are similar. *Dooley v. Korean Air Lines* (cited at 42) is about the Death on the High Seas Act, which this Court had already held preempts state law and which *Dooley* says preempts federal maritime law too. 524 U.S. 116, 120

U.S. Br. 25–26 (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946)). But *Holmberg* holds only that statutes of limitations don’t govern claims for equitable relief. See 327 U.S. at 398 (Rutledge, J., concurring). And even if (in hindsight) it might mark the beginning of this Court’s shift from its original understanding of the role of state law, that shift was only about the *reasons* this Court borrowed state law—whether it was mandatory or discretionary—not about *whether* it did so. There is no question that Congress in 1947 would have known federal courts “resort[ed]” to state law “to give meaning and content to federal statutes” in various contexts. *Davies Warehouse*, 321 U.S. at 155; see also *Burks v. Lasker*, 441 U.S. 471, 477 (1979) (noting that federal law would displace state law only “*where the facts required*”); cf. U.S. Br. 25 (citing *Burks*).

(1998). And *F.D. Rich Co. v. Industrial Lumber Company* (cited at 41) refused to incorporate state law because it found the statute there required a uniform rule for reasons inapplicable here. See 417 U.S. 116, 127 (1974) (“[O]ften, as here, the parties to Miller Act litigation have little or no contact . . . with the State in which the federal project is located.”).

These cases are consistent with the default assumption that state law applies wherever Congress has not displaced it. To be sure, federal causes of action for damages might not incorporate state-law measures of damages. But that is because their context often reveals Congress’s intent not to use state law. That’s true of both § 1983 and the Federal Employers’ Liability Act at issue in *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485 (1916) (cited at 42); cf. *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 150 (1917) (holding that the Act “supplant[s]” state remedies). When Congress chooses to provide a remedy for violations of a particular right, state laws that try to reduce (or expand) that remedy may well be in conflict.

But § 717f(h) doesn’t bestow any federal rights on property owners. Instead, the statute grants pipeline companies a federal right to condemn property. That means the statute would displace any background state rules that would forbid the companies from exercising that federal right. But (as explained below) this Court has always understood the power to take property as different from—and independent of—the Fifth Amendment’s just-compensation requirements. Respondent must therefore point to something about the statute that displaces North

Dakota’s rules about property valuation. As discussed below, it cannot.

The United States takes a different tack, asking this Court to hold that “States may not directly regulate the use of” any “power of the Federal government.” U.S. Br. 15. But that’s not what this Court’s cases say. States may not “regulate the Government directly[.]” *North Dakota*, 495 U.S. at 434. Contractors acting under the government’s orders sometimes share this immunity. See *Hencely v. Fluor Corp.*, 608 U.S. 31, 146 S. Ct. 1086, 1095 (2026). But private delegates under the Natural Gas Act are neither contractors nor acting under orders. They are private companies that have the government’s permission to build private pipelines. No case holds or even suggests that the government’s immunity automatically extends to private entities who exercise power with the government’s mere permission. The government asks this Court to replace the existing rules with one that sweeps aside state authority the moment Congress allows a private entity to exercise any federal legal authority—whether through regulation, law enforcement, or (as here) litigation. The Court should decline.

In short, the default rule is that state law controls unless something in federal law sets it aside. That rule does not change simply because the Constitution imposes a limit on Congress’s power—after all, the Constitution imposes many limits. See *Campbell v. City of Haverhill*, 155 U.S. 610, 615 (1895) (noting that a statute of limitations would be unconstitutional insofar as it failed to afford a “reasonable time to sue”). Instead, like with statutes of limitations or innumerable other legal questions, Respondent must

point to something in either the nature of eminent domain or in the statute itself that requires setting aside state law. It can do neither.

B. This statute does not displace state substantive law as the rule for calculating just compensation.

Respondent insists that § 717f(h) displaces state just-compensation rules, either because “the right of eminent domain” is a term of art encompassing Fifth Amendment just-compensation rules or because the statute itself reflects a policy of displacing state law. Each argument is wrong: This Court has already explained that “the right of eminent domain” is a distinct concept from the Fifth Amendment’s just-compensation requirement, and nothing about the statutory scheme suggests it displaces state just-compensation rules.

1. Nothing about “the right of eminent domain” automatically displaces state just-compensation law.

a. Respondent (at 2) insists that “the right of eminent domain” was, in 1947, a “term of art” that inherently required ignoring state laws governing compensation for land. But it cites no case saying that. Indeed, to the extent that the phrase “the right of eminent domain” had a single fixed meaning at the time, it simply meant the “power to take private property for public uses.” *United States v. Jones*, 109 U.S. 513, 518 (1883). But that’s all. In *Jones*, this Court rejected the “assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation.” *Ibid.* The Fifth Amendment’s just-compensation requirement

“is no part of the power itself.” *Ibid.* Instead, the Takings Clause is a “limitation” upon the government’s exercise of its “right of eminent domain.” *Ibid.* It, like the rest of the Bill of Rights, sets a floor below which the federal government cannot go. Respondent asks this Court to assume it (alone among the Bill of Rights) also imposes a ceiling on the rights the citizenry can invoke against private parties. But a limitation on Congress’s power cannot, of its own force, preempt state-law protections.

None of Respondent’s cases say otherwise. Respondent’s eminent-domain cases (with one exception, addressed below) all involve the United States, not a private condemnor. That difference matters because the United States is *always* free to ignore state law. That power is not some special characteristic of eminent domain; it is a characteristic of the United States. As explained in the opening brief, the United States is immune from state law both because states cannot regulate the United States directly and because the United States cannot be forced to pay money without its consent. Opening Br. 15, 28.

And this Court has expressly identified that general immunity as the source of the government’s immunity in eminent-domain cases. In *United States v. Bodcaw Co.*, for example, this Court explained that a lower court that had ordered the United States to pay fees in a condemnation “necessarily rested its decision on constitutional grounds [because it] is settled that litigation costs cannot be assessed against the United States in the absence of statutory authorization.” 440 U.S. 202, 203 n.3 (1979) (per curiam). The rule is not that the United States cannot be forced to

pay *in an eminent domain action* without statutory authorization. It is that the United States *cannot be forced to pay* without statutory (or constitutional) authorization.

Respondent’s repeated invocation of *United States v. Miller* is therefore unavailing because *Miller* simply repeats the baseline rule. That case holds that statutory language about “practice” and “procedure” does not change a condemnee’s substantive right to compensation “grounded upon the Constitution.” 317 U.S. 369, 379–80 & n.24 (1943). Fair enough. But the reason a condemnee’s rights are grounded upon the Constitution in a federal condemnation is still, as *Bodcaw* tells us, the fact that the United States cannot otherwise be made to pay money. See 440 U.S. at 203 n.3. That says nothing about the rule governing private condemnations by “privately owned corporations” for which “the Government [does not] have any ownership interest.” *United States v. New Mexico*, 455 U.S. 720, 740 (1982); see Opening Br. 21–22.

In short, all of Respondent’s eminent-domain cases can be explained by the basic principle that state law can neither force the federal government to pay money nor “regulate [it] directly.” *North Dakota*, 495 U.S. at 434. That explains the outcome in cases like *Miller*, where the United States was the plaintiff and thus presumptively immune from state laws about just compensation.

Resisting this conclusion, Respondent (at 40–41) seeks refuge in *United States v. 93.970 Acres of Land*, which refused to apply Illinois election-of-remedies law because “[c]ondemnation involves essential governmental functions.” 360 U.S. 328, 332 (1959).

And so it does—when the United States condemns land for the Army’s “aerial defense missile” sites. *Id.* at 330. But private pipelines are not even a function of the federal government, let alone an essential one.

And the cases cited in *93.970 Acres* confirm that its rule applies only to the sovereign, not to private companies. As Respondent observes (at 41), that case cites “*Kohl, Miller, and others*” in favor of applying federal law. But those “others” squarely embrace the difference between the United States and a private plaintiff. In the first of the “others,” this Court held that “the federal law merchant” and not state law applies to litigation about “the rights and duties of the United States” regarding federal commercial paper. *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943). But in the second, which was also about federal commercial paper, this Court held otherwise—precisely because the United States was not a party. See *Bank of Am. Nat. Tr. & Sav. Ass’n v. Parnell*, 352 U.S. 29 (1956). Without the United States, the dispute was “purely between private parties and d[id] not touch the rights and duties of the United States.” *Id.* at 33. That meant state law governed. *Ibid.* In other words, *93.970 Acres* stands for the proposition that state law does not apply when the United States sues in its own name—and that it *does* apply when private parties litigate about their own rights and duties.

Respondent’s argument to the contrary turns centuries of common law on its head. Respondent’s view seems to be that eminent domain is an important sovereign power and therefore its delegation automatically comes with all the trappings of sovereignty.

But it cites no case saying this, and American courts historically say the opposite—that eminent domain is an important sovereign power, and courts must therefore be skeptical of its delegation to private hands, reading that delegation narrowly to include only the powers actually given. Opening Br. 19–20. Because this Court has rightly treated the power to ignore state law (and even the right to compensation itself) as distinct from “the right of eminent domain,” Respondent’s cases about the United States taking land for itself offer no help.

b. Respondent does, however, muster one case involving a private condemnor, *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890). And, understandably, Respondent places great weight on that case, twice arguing (at 20 and 27) that the case answers the question presented here because the Court saw no role for state law there.

But the Court didn’t consider state law in *Cherokee Nation* for a more obvious reason: There was no state law to consider. The statute in that case authorized taking property only “through the Indian Territory.” 135 U.S. at 642; see also *id.* at 642–43 (describing route exclusively within modern-day Oklahoma). The State of Oklahoma did not exist in 1890. See Presidential Proclamation of Nov. 16, 1907, 35 Stat. 2160. *Cherokee Nation* stands, at most, for the proposition that state law does not control where no state has jurisdiction to promulgate laws. It does nothing to answer the question presented.

The dearth of cases supporting Respondent’s position stands in contrast with the cases—both immediately after the adoption of § 717f(h) and, earlier,

interpreting its predecessor in the Federal Power Act—that treat state law as the source of land valuation for private delegees like the one here. Opening Br. 30–31, 34. Respondent’s only answer to these cases (at 18 n.6 and 25 n.10) is to wave them aside as short on analysis. And so they are. But the point of these cases is not their depth of analysis. The point is their uniformity. If Respondent were correct—if “the right of eminent domain” meant ignoring state compensation law—one would expect there to be at least one contemporaneous case saying so. There isn’t.

This is all in line with the fact that a private delegee under the Natural Gas Act is treated differently in all sorts of ways. As explained in the opening brief, easements taken by private delegees are subject to many state laws, including state laws governing disputes about the easements’ scope. Opening Br. 39. Easements taken by the United States, though, would be governed by the Quiet Title Act. 28 U.S.C. § 2409a. Agreements to purchase easements (or settlements of condemnation actions) by private pipeline companies are contracts governed by state law. Opening Br. 39–40. But disputes over otherwise-identical agreements with the federal government are governed by the Tucker Act. 28 U.S.C. § 1491.

That’s because (again) the sovereign is different. The United States routinely authorizes private lawsuits under its Commerce Clause authority without conferring immunity from state laws. Authorizing those lawsuits does not automatically sweep aside state rules like statutes of limitations, so long as the state rules are not inconsistent with the federal objective. The question for Respondent is why the same

should not be so here. It has found no answer in this Court's cases.

c. The role of sovereign immunity in this Court's eminent-domain cases also matters in interpreting the statute through the lens of *Kimbell Foods*. In the lower court's view (and as repeated by Respondent here), § 717f(h)'s silence on just compensation does not leave a "gap" in the statutory scheme because the silence is automatically filled by the Fifth Amendment itself. Pet. App. 6a. That would be true as to the United States because any decision that the United States must pay money in a condemnation action "necessarily rest[s] its decision on constitutional grounds." *Bodcaw*, 440 U.S. at 203 n.3.

But nothing in the opinion below or in Respondent's brief explains why the *Bodcaw* rule applies to private entities. When a statute authorizing a condemnation by the United States is silent as to compensation, that silence is filled by the Fifth Amendment because the Fifth Amendment is the only possible authorization for payment—the United States cannot be made to pay money "in the absence of statutory authorization." *Ibid.* But there is no similar clear-statement rule for requirements that private entities pay money. That means that when a statute authorizing a condemnation by a private entity is silent as to compensation, that silence is silence—and silence, of its own force, cannot displace state law. Respondent musters no case saying otherwise.

2. Section 717f(h) does not reflect a general federal policy of displacing state just-compensation law.

For all that it argues that preemption is the wrong model, Respondent insists that § 717f(h) reflects a general legislative policy of setting aside the “patchwork” of state eminent-domain laws in favor of uniform federal just-compensation rules. Br. for Resp. 1–2, 10, 13, 28, 47–48. Indeed, it even accepts that state law should be set aside only where congressional policy requires it: In describing this Court’s early-twentieth-century policy of allowing state compensation law to govern even (sometimes) in federal condemnations, Respondent explains that it was consistent with this Court’s tradition of recognizing state law “[i]n the absence of explicit legislative policy cutting across state interests.” *Id.* at 17–18 n.5 (quoting *Jackson Cnty.*, 308 U.S. at 351–52). The difference, says Respondent, is that a legislative policy cutting across state interests “is emphatically not absent here.” *Ibid.*

Except it is absent. As this Court has already explained, the point of § 717f(h) was to “remedy [a] defect” in the Natural Gas Act, which was that “state eminent domain procedures . . . were frequently made unavailable” to the entities authorized to build natural-gas pipelines. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 489 (2021). This Court’s understanding of the law’s purpose is consistent with its plain text and legislative history: It was meant to make eminent domain procedures available, not to change or dictate the compensation rules that would

govern under those procedures. See Opening Br. 2, 31–33.

That means § 717f(h) necessarily displaces state laws that would prevent pipeline companies from condemning land—laws that would mean they once again had “only an illusory right to build.” *PennEast*, 594 U.S. at 489.³ But giving effect to state property law in this context could not plausibly prevent pipeline construction. For one thing, land acquisition simply isn’t a major driver of pipeline costs. Historically, the cost of land acquisition has been a tiny fraction—about seven percent—of overall onshore pipeline construction costs, dwarfed by the cost of labor, material, and even “miscellaneous.” Zhenhua Rui et al., *Historical pipeline construction cost analysis*, 4 Int’l J. Oil, Gas & Coal Tech. 244, 255 (2011). If states may pass laws that “incidentally raise the costs to the military,” *North Dakota*, 495 U.S. at 441, then surely they may use generally applicable laws to strengthen property rights, even if doing so imposes negligible costs on private industry.

As explained in the opening brief, states that want to interfere with pipeline construction have a variety of ways to do so under existing federal law. Opening Br. 39. It makes little sense to worry that states would, in addition, upend their own longstanding valuation rules (upending their own infrastructure projects in the process) in the hopes of affecting

³ Returning to the language of preemption, state laws that forbid certificate holders from taking land would “prevent or frustrate the accomplishment of a federal objective.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

the smallest line on a pipeline company's budget.⁴ And they haven't: Until this case, Petitioners' proposed rule was the unanimous rule in the lower courts. It has not posed any conflicts with federal objectives in practice. It does not pose any conflicts with federal objectives even in theory. Respondent's repeated, unsupported insistence that the statute reflects a legislative policy of setting aside state law reflects a correct intuition that such a policy is a necessary precondition to setting aside state law. But insisting that the policy exists does not mean it does. It does not, and the decision below should therefore be reversed.

C. Respondent's remaining arguments lack merit.

Finally, Respondent offers a handful of other arguments—asking this Court to interpret § 717f(h) by looking only to language in unrelated statutes, asking it to read its decision in *PennEast* to resolve questions that case never addressed, and urging the Court to answer a question other than the question presented. Each is wrong.

⁴ Perhaps for this reason, the States that have filed an amicus brief supporting Petitioners' view are not States with any demonstrated history of seeking to stymie development. See generally Br. for North Dakota, et al. Instead, they are States (like North Dakota or Texas) that are replete with pipelines but also concerned with protecting property rights.

1. Respondent’s collection of disparate statutes sheds no light on the best interpretation of this statute.

As explained in the opening brief, Congress directly borrowed the language of § 717f(h) from the Federal Power Act, under which lower courts had applied state just-compensation law. And this Court has held that when “Congress copie[s]” language from one statute, lower-court decisions about that other statute are relevant to interpreting the new one. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 588–89 (2010). Even where lower-court decisions “may not have ‘settled’ the meaning” of the language, this Court has given weight to those decisions where there is “no reason to suppose that Congress disagreed with those interpretations when it enacted the” new law. *Id.* at 590. Respondent (at 18 & n.6) insists the early Federal Power Act cases were either undermined by *Miller* or else are too thinly reasoned to warrant this Court’s attention. But *Miller*, again, only addressed condemnations by the sovereign, and the lower-court interpretations of the Federal Power Act still present unrebutted evidence of how Congress would have viewed the language it was borrowing.

Rather than looking to the Federal Power Act, Respondent invokes various other statutes, ranging from the General Bridge Act to the Equal Access to Justice Act, in an effort to show that congressional silence necessarily means using federal just-compensation law. But, in the absence of express borrowing, this Court has repeatedly rejected this approach. “Language in one statute usually sheds little light

upon the meaning of different language in another statute, even when the two are enacted at or about the same time.” *Russello v. United States*, 464 U.S. 16, 24–25 (1983); see also *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–75 (2009) (“When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.” (cleaned up)); *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (“[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.”).

The other statutes Respondent invokes illustrate why this Court generally rejects this sort of loose comparative approach. Take the General Bridge Act of 1946, which authorizes condemnations for bridges over federal navigable waters and provides that compensation for any land taken should be “ascertained and paid according to the laws” of the state where the property sits. 33 U.S.C. § 532. That language reflects the peculiarities of interstate tensions unique to the historical regulation of bridges, not a rejection of state law. Both the General Bridge Act and the Natural Gas Act reflect the same intuition that state law should govern compensation. The difference is that (in the bridge context) it originally made sense for Congress to specify *which* state’s law controlled.

History explains why. The “ascertained” language in the General Bridge Act mirrors the language of the North River Bridge Act of 1890. 26 Stat. 268.

While Congress had authorized bridges before 1890, it had done so only through “license acts from Congress” because the bridges themselves were constructed under “the general railroad laws of the States.” H.R. Rep. No. 51-928, at 33 (1890). In 1890, however, Congress sought to authorize the construction of a bridge over the Hudson River, which required it to create a new corporation to govern the project, lest legal disputes between New York and New Jersey make it impossible to raise capital for the project. *Ibid.* (expressing concern about “conflict and disagreement between the States, arising out of the operation, regulation, and control of the legal affairs of the company”). Nothing in the statute’s structure or history suggests that the “ascertained” language was intended to distinguish between state just-compensation law and federal just-compensation law (which, in 1890, had yet to be articulated). Instead, Congress was concerned with forestalling disputes between New York and New Jersey about whose law would govern the newly created entity.

When Congress later tried to standardize the language used to authorize bridges over navigable waters, it looked to the North River Bridge Act as a precedent and incorporated its “ascertained” language into several of the forms adopted. See Forms for Bridge Bills, U.S. Congressional Serial Set 8558 (1926); 67 Cong. Rec. 8533 (1926) (statement of Rep. Denison). And that carried forward into the 1946 General Bridge Act, seemingly without any substantive discussion at all. This sort of historically contingent drafting is why this Court declines to use one statute’s language to interpret another unrelated statute, no matter when the laws were enacted.

Respondent's other statutory analogies are even less help because they speak to the obligations of the United States. The Uniform Relocation Assistance Act and the Equal Access to Justice Act (invoked by Respondent at 23) both speak to the United States' obligation to pay fees when it (respectively) abandons a condemnation or takes unreasonable litigation positions. 42 U.S.C. § 4654(a)(2); 28 U.S.C. § 2412. But those are specifically obligations imposed on "the United States" (§ 4654(a)(2)) or one of its "agenc[ies] or . . . official[s]" (§ 2412(a)(1)) that say nothing about private actors' rights or obligations. Respondent (at 23) cites *Transwestern Pipeline Co. v. 17.19 Acres*, 627 F.3d 1268 (9th Cir. 2010), for the proposition that this fee-shifting provision of the URA "applies to NGA proceedings." But that case says the opposite. It holds that where § 4654(a)(2) says "the United States" it means "the United States" and does not apply to private condemnors under the Natural Gas Act. *Id.* at 1270. In other words, it holds that private condemnors are *different from* the United States, in that as in so many other ways. Respondent's position here seems to be that it is vested with all of the sovereign's powers, but only some of the sovereign's responsibilities.

To be sure, a different subsection of the URA sweeps broadly enough to require all federal condemnors—government actors and delegees alike—to pay fees when courts rule that they lack the legal right to take the underlying land. 42 U.S.C. § 4654(a)(1).⁵ But

⁵ And even that much seems inadvertent. The URA as a whole originally applied only to "*the government*." *Transwestern*

that is a *procedural* requirement (which is why it applies only in “Federal court,” *ibid.*) and tells us nothing about the underlying substantive law of just compensation. Indeed, a property owner who defeats a condemnation does not receive any just compensation because nothing gets taken. That Congress has subsequently imposed a blanket procedural requirement that the losing condemnor pay fees in those circumstances tells us nothing about how to measure just compensation in takings that succeed.

2. *PennEast* sheds no light on the question presented.

As explained in the opening brief, this Court’s decision in *PennEast* concerned only whether private pipeline companies are vested with the power to *acquire* property. It says nothing about the measure of just compensation. Opening Br. 44–46. Respondent insists otherwise. Br. for Resp. 1, 3–5, 8, 11, 26–28, 33–36, 38, 40–41, 43, 47. But Respondent’s argument rests entirely on the idea that “the right of eminent domain” carries with it Fifth Amendment just-compensation rules. As explained above, this Court has already said that the power and the required payment are two distinct concepts. *Supra* 7–8.

Pipeline Co., 627 F.3d at 1271 (quoting legislative history from 1970 enactment). The portion of the statute that shifts fees for disallowed condemnations also applied only to federal agencies until 1987, when Congress amended a separate portion of the URA to include private entities in the definition of “federal agency,” for what appear to be unrelated reasons. See H.R. Conf. Rep. 100-27, at 244–45 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 121, 228–29. That history reflects no consideration of—let alone a determination to reject—substantive state laws.

If more is needed, one need look no further than the analysis in *PennEast* itself, which holds that states surrendered their sovereign immunity from federally authorized eminent-domain lawsuits in “the plan of the Convention.” 594 U.S. at 501. But, at the risk of stating the obvious, the Fifth Amendment (ratified in 1791) was not part of the plan of the Convention of 1787. The particular “just compensation” principles incorporated in the later-adopted amendment therefore play no part in *PennEast*’s analysis. That case stands only for the proposition that § 717f(h) does what Congress wanted it to do (and what its text commands): ensure that federally authorized natural-gas pipelines have what *Jones* called the “power to take private property[.]” 109 U.S. at 518. The statute’s delegation of the power to take is, as the *PennEast* Court said, “categorical,” 594 U.S. at 498, but it is only a delegation of the power to take. It says nothing at all about the measure of compensation.

3. Respondent’s bid to reformulate the question presented is unfounded.

As a last-ditch effort, Respondent (at 43–45) asks the Court to hold that even if state just-compensation rules generally control, fee-shifting rules should be treated differently. But that argument was not addressed below (or, seemingly, by any other appellate court). As a “court of review, not of first view,” this Court need not reach Respondent’s alternative question presented. *E.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In any event, the argument fails. If the Fifth Amendment’s constitutional floor supplies § 717f(h)’s measure of just compensation, then the reason

attorneys' fees are unavailable is not because of the American Rule. It's because this Court has held that forcing property owners to bear the costs of condemning their property does not fall beneath that constitutional floor. *Bodcaw*, 440 U.S. at 203–04 & n.3. And if state law controls the measure of just compensation, the availability of attorneys' fees likewise does not turn on the American Rule but on whether state law says the fair value of land encompasses transaction costs (just as different jurisdictions may have different customs for who bears the cost of a real-estate agent's commission). See Opening Br. 47. Either way, the answer turns on how to measure just compensation, not on the American Rule.

* * *

For decades, lower courts have applied state-law compensation rules in private condemnations under the Natural Gas Act. Rather than ask Congress to change the status quo, Respondent asks this Court to do it. But there is no need for a change. North Dakota has adopted a broad law that purports to govern property valuation whenever land is taken through force of law. Congress has said nothing to displace that law here. That means North Dakota's law governs, and the decision below should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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