SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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LEONARD W. HOFFMANN, ET AL.,)

Petitioners,)

v.) No. 25-159

WBI ENERGY TRANSMISSION, INC.,)

Respondent.)

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Washington, D.C.

Monday, November 9, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:30 a.m.

APPEARANCES:

ROBERT J. McNAMARA, ESQUIRE, Arlington, Virginia; on behalf of the Petitioners.

PAUL W. HUGHES, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

ZOE A. JACOBY, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(11:30 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 25-159, Hoffmann versus WBI Energy Transmission.

Mr. McNamara.

ORAL ARGUMENT OF ROBERT J. McNAMARA

ON BEHALF OF THE PETITIONERS

MR. McNAMARA: Mr. Chief Justice, and may it please the Court:

The Natural Gas Act authorizes private companies to ask courts to order the forced sale of private property, but it says nothing about the substantive law those courts should use to determine what that property is worth. That silence matters because, on its own, authorizing companies to file condemnations does nothing to preempt state laws defining the measure of compensation.

As this Court held in Jones and as Congress and the courts would have known in 1947, the right of eminent domain is just the power to take property. It's separate from an individual's right to just compensation, which flows from a different source.

North Dakota law provides that source here. On its face, it imposes even-handed obligations on anyone who condemns land in that state, including WBI. The Fifth Amendment places a floor on that compensation but not a ceiling.

Now, to be sure, North Dakota law wouldn't apply to the United States if it took land in its own name, but that's not because of some special trait of the federal eminent domain cause of action. It's because the United States is sovereign. And private companies aren't sovereign. They're private delegees. And this Court has consistently said that distinction matters.

Nothing in the statute extends the United States' sovereign immunity to private companies, and that means they don't have it. That's what Congress would have expected in 1947, which was just three years after this Court in Davies Warehouse reaffirmed its longstanding custom of looking to state law to give meaning and content to federal statutes. Silence meant state law then. Silence means state law today.

North Dakota law controls unless Congress preempts it or the Kimbell Foods factors demand a uniform federal rule. We read this statute to do what Congress meant for it to do, ensure that pipeline companies had access to an eminent domain cause of action in all 50 states. That's all the statute says. That's all contemporaneous courts believed it did, and that's because that's all it does. It delegates the power to take property, but it leaves the law of just compensation where it found it, with the states.

I welcome this Court's questions.

JUSTICE THOMAS: Could you give me some examples of your argument or your approach being applied in recent years?

MR. McNAMARA: I think our approach is exactly the approach this Court took last term in Hencely, Your Honor, which is that even-handed state laws --

JUSTICE THOMAS: In pipeline case -- in eminent domain cases.

MR. McNAMARA: Well, Your Honor, this Court has yet to decide really a private condemnor case, so this Court's cases are all

about the United States as sovereign taking property.

JUSTICE THOMAS: So, if the U.S. delegates its power, its authority to -- of eminent domain, you're saying that it brings with it state law trappings of just compensation?

MR. McNAMARA: I think we're saying it doesn't preempt state just compensation law that would otherwise apply, Your Honor, because --

CHIEF JUSTICE ROBERTS: Let's say you have a case in a -- in a state that would award attorneys' fees. The federal government can take that land and would not have to pay attorneys' fees, right?

MR. McNAMARA: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: And then the federal government can send it to the private party -- sell it to the private party that it wants to, you know, have the land.

In other words, it doesn't take much to avoid your position, and it seems to me it's just a more efficient process to have a private developer get the land under the same terms as

the federal government without having to pay the attorneys' fees that the state wants to insist on.

MR. McNAMARA: I -- I don't think so, Your Honor, for two reasons. One, this distinction between the United States as condemnor and a private party that's been vested with the eminent domain power is a longstanding one, and it goes back -- it's articulated in this Court's decision in United States v. Carmack, but it's a longstanding common-law principle that when Congress delegates the eminent domain power to an arm of the United States Government, that carries with it all of the United States' powers, but when it delegates it to a private party, that's necessarily a grant of limited powers. It doesn't include -- I'll stop.

CHIEF JUSTICE ROBERTS: Well, I'm sorry, I -- I don't see the distinction at all. I mean, the federal government is doing what it wishes to do with the land. It doesn't have to pay attorneys' fees. And then it surely has the authority to sell it to the private -- the private party. There would be no way for the

state to say, no, we're going to find a way to impose our rule about attorneys' fees during -- during that process, would there?

MR. McNAMARA: No, I think that's right, Your Honor, and I think it matters whether the United States is the party or whether this is a delegation of public power into private hands, which this Court has always read more narrowly.

And even in my friend's eminent domain cases, this Court seems to be drawing exactly that distinction. I -- I'd point the Court to 93.97 Acres, which is, I think, the strongest statement of federal law controlling where the government is condemning for important federal interests. But the cases this Court cites in 93.97 are cases where the United States is taking land, and then it cites Clearfield Trust, where the Court said that the federal law merchant controls questions about federal commercial paper, and Parnell for --

CHIEF JUSTICE ROBERTS: I'm sorry, I -- I just don't see the relevance of that distinction. What -- along my hypothetical, where does this -- where does that distinction

come into play? The federal government can condemn land in connection with a pipeline project, right?

MR. McNAMARA: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: So it has the land and it does not pay attorneys' fees for that, right?

MR. McNAMARA: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: Okay. And then it can sell it to the private company that it wants to develop it, right?

MR. McNAMARA: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: And so that private company doesn't have to pay attorneys' fees either. So I don't understand why this isn't an easy case.

MR. McNAMARA: Because I think it matters whether the United States is doing things as sovereign or whether a private delegee is doing it. The -- the same could be said of Hencely last term, Your Honor. If the United States puts itself in charge of base security in war zones, no one thinks that you can use state law to sue the United States for its on-base security. But, in Hencely, this

Court said that state tort law was not preempted.

And I think the same analysis applies here. It matters whether the sovereign is acting. And I think that is throughout this Court's eminent domain cases. It's throughout this Court's preemption cases.

JUSTICE SOTOMAYOR: I -- I'm sorry --

JUSTICE KAVANAUGH: What about --

JUSTICE SOTOMAYOR: Go ahead.

JUSTICE KAVANAUGH: Go ahead.

JUSTICE SOTOMAYOR: There -- your whole theory proceeds on the fact that you're trying to separate the right to eminent domain from the right to compensation, correct?

MR. McNAMARA: Yes, Your Honor.

JUSTICE SOTOMAYOR: All right. How do I deal with a 1893 case, Monongahela versus the United States, in which we said, "It seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of eminent domain and that the one is so inseparably connected with the other that they may be said to exist not as a separate and distinct principle but as parts of

one and the same principle"?

I -- I mean, that -- doesn't that just end your point?

MR. McNAMARA: I don't think so, Your Honor, because the universal principle the Court is talking about is the principle that, of course, some compensation has to be paid. But it doesn't follow that the source of just compensation law comes along with the right of eminent domain because this Court said exactly the opposite in United States --

JUSTICE SOTOMAYOR: But whether it's the United States, the right to eminent domain is the United States. And in PennEast, we said that the -- that the person who brings it brings with it the power of the federal government, all of it.

MR. McNAMARA: Well, I don't think that's --

JUSTICE SOTOMAYOR: I -- I -- I don't understand. We rejected the attempt in PennEast to divorce the eminent -- eminent domain power from the power to bring the compensation actions, and I don't see how your separation of these principles honors that.

MR. McNAMARA: Well, because, in PennEast, Your Honor, this Court refused to divorce the delegation from the ability to file these condemnation actions, which makes sense because the statute explicitly authorizes these companies to file these condemnation actions.

But it doesn't say anything about just compensation. Just compensation is an inherent part of exercising eminent domain, but that doesn't mean it flows from the right of eminent domain.

I think my friends are correct in their instinct that they need the right of eminent domain to be a term of art for the statutory text to do what they need it to do.

But the problem is that's exactly the reading this Court rejected in U.S. v. Jones. In U.S. v. Jones, the Department of Justice came into this Court and made almost exactly the same argument. They said that the ascertainment of compensation is an essential element of the power of appropriation.

And this Court said: No. No, they're not. Those are not flowing from the same source of law, that just compensation is a

condition on the exercise of the sovereign right of eminent domain. But the sovereign right of eminent domain is just the power to take property. And to be sure --

JUSTICE JACKSON: Well, counsel, but, I guess, is that so? It -- it sounds like your argument is assuming that state law, with respect to just compensation, is the default in any situation such that we -- it needed to be ousted by congressional expression. And so we didn't have any statement here. The silence means the state law continues to exist.

But I understood that federal condemnation was a circumstance in which the default was federal law, and that -- that's what I thought 93.97 Acres was giving us, that, you know, that case, the Court explained that federal law rules unless Congress chooses to make state law applicable in the context of condemnation. So what do you do about that?

MR. McNAMARA: So I think, in 93.97, it matters that the condemnor is the United States because --

JUSTICE JACKSON: Only because you're saying that. I mean, reading the case, it

suggests that what is -- what they're doing is setting federal law as the baseline in a way that is the opposite of what you're saying.

MR. McNAMARA: Right.

JUSTICE JACKSON: So, unless Congress says state law is applicable when you have federal condemnation by any actor, you would have federal law be the applicable rule.

MR. McNAMARA: So I -- I don't think so, Your Honor. I think it's important to look at what the Court's citing directly after the sentence Your Honor quoted, and it cites cases in which the United States is a condemnor but then two more.

It cites Clearfield Trust, where the Court says that the federal law merchant controls questions of federal commercial paper where the United States is a party, and then it cites Parnell, about 10 years later, where this Court says: Well, when the United States isn't a party, then the federal law merchant doesn't oust state law.

And I think the only reason to reach for Clearfield Trust and Parnell in support of that statement is to draw exactly the

distinction, the contrast, that's drawn by those two cases.

JUSTICE JACKSON: Well, you're doing it through citation. I mean, clearly, the case doesn't turn on the distinction that you're talking about. And I wonder whether it's what Congress intended.

I mean, we have the -- the General Bridge Act here, which occurred, you know, within a year or so of this particular enactment in which Congress is making the kind of statement that one would expect in a world in which federal law is the default, where Congress says: Just compensation is to be ascertained and paid according to the laws of the state.

What is that doing there if the default with respect to silence is the state law applies?

MR. McNAMARA: So I -- I think the General Bridge Act illustrates why the Court generally doesn't do statutory interpretation by comparing language in disparate, unrelated statutes, because the language about state law in the General Bridge Act wasn't written in

1946.

As we trace in the reply brief, that language originates in the North River Bridge Act of 1890. And two things about that.

One, there's no way, I think, to say that in 1890, Congress is drawing a distinction between state law and federal law because this Court hadn't articulated any federal just compensation law in 1890.

And, two, it's very clear what Congress was worried about in 1890 were disputes between New York and New Jersey about whose law was going to govern this new corporation Congress was creating.

JUSTICE JACKSON: Can I just ask you, I'm sorry, because I'm getting confused about the dates. I don't have the chronology in front of me.

But, in the General Bridge Act, when was that enacted?

MR. McNAMARA: That's 1946, Your Honor.

JUSTICE JACKSON: Okay. And in that statute, did Congress say that just compensation should be ascertained and paid

according to the laws of the state?

MR. McNAMARA: Yes, Your Honor. And it --

JUSTICE JACKSON: All right.

MR. McNAMARA: -- it --

JUSTICE JACKSON: So why is that not relevant to our ascertation of whether or not Congress, when it speaks, it is changing a default rule in which federal law would have otherwise existed or not?

MR. McNAMARA: Because the language in 1946 is drawn from Congress's Forms for Bridge Acts in 1926, and that is drawn from this 1890 --

JUSTICE JACKSON: They didn't have to put it in if they believed, as you do, that fed- -- that state law would have applied.

What I'm trying to do is ascertain what the default is in a world in which Congress is not speaking.

And I took from -- perhaps erroneously -- but from 93.970 that the default in a situation in which you have federal condemnation power being exercised is that unless Congress chooses to make state law

applicable, you're going to have federal law governing just compensation.

MR. McNAMARA: And I don't think that's a reasonable thing to read into the 1946 enactment because Congress had been saying that about bridges since 1890. And in 1890, there was no federal compensation law to distinguish.

I think the actual legislative language we should be looking at is not how Congress talks about bridges but how Congress talks about energy infrastructure condemnations. The language in this statute is drawn not from bridge regulation but from the Federal Power Act.

JUSTICE KAVANAUGH: But it was a year later, right, 1947?

MR. McNAMARA: Yes, Your Honor.

JUSTICE KAVANAUGH: So, in 1946, it puts it in. In 1947, it doesn't.

To pick up on Justice Jackson's point, isn't the side-by-side of that pretty significant?

MR. McNAMARA: Yes, Your Honor, but I think it's important to understand the General Bridge Act as using language that Congress had

been recycling in bridge acts since 1890, and in 1890, it was not drawing this distinction between federal and state compensation law because that distinction did not yet exist in the law.

JUSTICE BARRETT: But it was aware of that language when, you know, year by year, it enacted another statute, I mean, and it chose not to use that language.

Sure, it was floating around in the cases in the context of the Bridge Act, but it still chose not to use it after.

MR. McNAMARA: It chose not to use it, Your Honor, because it chose explicitly to borrow language from the Federal Power Act.

And if you look at cases before 1947 interpreting the Federal Power Act, to the extent they talk about whether federal or state compensation laws should be used, they all say state law.

JUSTICE BARRETT: Let me ask you a question that kind of bears on -- on your interchange with Justice Jackson.

Just to clarify, your argument is that state law applies of its own force because it's

a default unless Congress preempts it, as opposed to, in a federal common law/Kimbell Foods kind of way, you're not asking that federal courts adopt state rules as the rules of federal common law. Which is it?

MR. McNAMARA: I think both options are available and both lead to the same conclusion. It's certainly true here that North Dakota law on its face purports to speak to all condemnors. The first public use enumerated in North Dakota's eminent domain laws is --

JUSTICE BARRETT: Yeah, but North Dakota can't say: Hey, we want to control federal law if the Constitution doesn't permit that arrangement.

So, of those two -- state law applies of its own force or federal courts should adopt state law as the rule of federal common law -- what's your stronger argument?

MR. McNAMARA: I -- I think we'd adopt them in that order, Your Honor, because there -- this Court has doctrinal tools for when it tells states: You're not allowed to have your law apply here, and those are

preemption and intergovernmental immunity. Those are the doctrinal tools we would use if North Dakota's purporting to regulate something it's not supposed to be regulating.

JUSTICE KAGAN: Does your argument have any limits? I mean, suppose a state said something like: When a private party condemns land, treble damages apply. What would the result be?

MR. McNAMARA: So what I'd want to know is whether that's an even-handed rule or whether it's a back-door attempt to discriminate against federal rights, Your Honor.

Discrimination against federally created rights falls under McKnett or Felder v. Casey. The state can't do that.

And so, in an even-handed context, where the state is regulating its own condemnors the same way it's regulating any other condemnor --

JUSTICE KAGAN: Okay. It's an even-handed rule.

MR. McNAMARA: Then I -- I think we'd be traveling in some kind of frustration

preemption to see whether it's actually stymieing construction of pipelines.

JUSTICE KAGAN: Well, it's obviously going to stymie construction. I mean, it's going to make construction of pipelines much harder, correct?

MR. McNAMARA: I --

JUSTICE KAGAN: Much harder than Congress thought it would be when Congress passed this Act.

All of a sudden, now the -- the -- the private party is going to have to pay three times what Congress thought it would have to pay and what it would have to pay if the condemnation had been done by federal actors.

MR. McNAMARA: So not -- not to fight the hypo, Your Honor, but I don't know that I agree that that's what Congress would have expected. Congress is very clearly talking about access to a cause of action here.

And I think a useful way to think about that might be to contrast what Congress has done with pipelines and what Congress has done with railroads.

Railroads and pipelines are both

federally regulated engines of interstate commerce, but railroads are common carriers. They had access to a state-law eminent domain cause of action in every state. And so Congress left them alone because it had no objection to state law controlling just compensation.

The problem was that in some states, not all, state law said that a pipeline that didn't serve customers in that state didn't have access to that state's eminent domain cause of action. That's the evil at which this amendment is drawn.

And so Congress is really only talking about access to the cause of action, not trying to change substantive just compensation standards. And, again, it chose language that courts had used to impose substantive state just compensation.

JUSTICE JACKSON: But wasn't -- but wasn't Congress's purpose in doing so to ensure that there was access to natural gas, that these pipelines would be built?

And so, if you take it one step further, I mean, you're talking about what

Congress was trying to do here.

It would seem to me that to allow states to have their own just compensation measures in a way that, say, Justice Kagan was talking about, three times as much, would frustrate the very purposes that Congress intended it was trying to get away from states interfering with the development of pipelines.

MR. McNAMARA: So, Your Honor, I -- I think that argument would sound in frustration preemption. And I think what I would find odd is to have all of these preemption doctrines, frustration and discrimination, and to have those not answer the hypothetical of a state adopting treble damages.

JUSTICE JACKSON: Well, it also sounds in proper interpretation. We're trying to figure out what Congress was doing by not mentioning just compensation in this statute. Yet it was creating a statute that was clearly shifting to private developers' federal eminent domain power.

So the question is, would Congress have intended in such an environment where it was giving federal eminent domain power to

override state concerns and state eminent domain, would Congress have intended for the states to still have control over the degree of compensation that was to be given in the context of that scheme?

MR. McNAMARA: I -- I think so, Your Honor, for a number of reasons. One, Congress was well aware of the distinction between railroads and pipelines. I'd point the Court to the Senate report for this very amendment.

JUSTICE JACKSON: Does that help you or hurt you? We've all agreed that the pipeline they wanted built. And so why would a Congress that wanted the pipeline built still intend for the states to be able to thwart that through excessive just compensation exactions?

MR. McNAMARA: Because Congress also wanted railroads to be built and yet clearly had no objection to state law controlling railroad eminent domain causes of action. This is about getting the companies in the courthouse door. And both the statutory text and the legislative history are very clear about that. They make no mention of compensation as even a potential problem.

JUSTICE GORSUCH: Mr. McNamara, I'm sorry to take you back and redirect you a little bit just to a real question.

In discussing the Bridge Act, you say, oh, we shouldn't look at that because this really came from the Federal Power Act. And did the Federal Power Act that predates the -- the -- the Pipeline Act use state law to determine the measure of compensation?

MR. McNAMARA: So this Court had never construed that language of the Federal Power Act. Lower courts had. There's a series of decisions from the Eighth Circuit, all of which say that under that statutory text, state law would determine compensation.

JUSTICE GORSUCH: Okay. Is the language the same as this?

MR. McNAMARA: Yes, Your Honor, it's identical.

JUSTICE GORSUCH: It's the exact same language?

MR. McNAMARA: Yes.

JUSTICE GORSUCH: Okay. Thank you.

MR. McNAMARA: And I -- sorry, Justice Sotomayor.

JUSTICE SOTOMAYOR: Go ahead. Finish your answer.

MR. McNAMARA: But I also think it's important not just to look at how the language was interpreted before 1947 but to look at state court decisions immediately after this, all of which continued to use state law under this federal cause of action.

The New Mexico Supreme Court actually makes new law as a question of first impression in a Natural Gas Act condemnation because there wasn't a New Mexico case about how to value an easement. There are plenty of federal cases about how to value an easement. And so, if this were the natural reading of the statutory text, I would have expected the lawyers or justices in that New Mexico case to notice that they should be using federal law. No one did.

JUSTICE SOTOMAYOR: Could I -- in following up on your question, because it was the first question I got when -- the first few pages of this brief, obviously, we -- the brief went in a different direction -- was whether the 17 -- 17f(h) language, state practice and procedures, encompassed state fee-shifting

rules. You didn't make that argument.

MR. McNAMARA: No, Your Honor, because the practice and procedure language in 717f(h) has been superseded by Rule of Civil Procedure 71.1. At the time this was adopted, there weren't federal civil procedure rules about eminent domain actions.

JUSTICE SOTOMAYOR: No, no, no. But I understand that. You're saying it's been superseded. But you didn't make the argument that in the 1940s, everyone understood state practice and procedures. I don't know if they did. They didn't tell me why you didn't make the argument, encompass state fee-shifting rules.

MR. McNAMARA: Ah. I understand the question, Your Honor. And it's because the rule of decision below was about whether substantively state just compensation law or federal just compensation law controls.

The Eighth Circuit held here that fee-shifting isn't procedural. Under North Dakota law, it's a substantive element of just compensation.

JUSTICE GORSUCH: I want to follow up

on that question if I might.

JUSTICE SOTOMAYOR: Mm-hmm.

JUSTICE GORSUCH: Do you think maybe in the 1940s, before Rule 71, that perhaps they thought that practice and procedure language took things like attorneys' fees?

MR. McNAMARA: I think it may well have, Your Honor, and I think it matters that Congress is very clearly not trying to --

JUSTICE GORSUCH: But you -- you would agree, though, today that that is not the case, that practice and procedure means practice and procedure and we look to Rule 41 -- 71?

MR. McNAMARA: Seventy-one, yes, Your Honor. I think that language today is not enforced. But I do think it shows that Congress isn't trying to change anything about how these proceedings go. Congress is trying to change whether you have the right to bring these proceedings.

And I think it's telling that Congress chose not to mention anything about the substantive terms of just compensation, even though Congress would have been well-aware that courts were using this same language to use

state substantive law. And Congress would have been well-aware that after the adoption of this amendment, courts continued to use this language to use substantive state law.

JUSTICE KAVANAUGH: Well, you've mentioned Hencely a couple times.

MR. McNAMARA: Yes, Your Honor.

JUSTICE KAVANAUGH: But that starts from a different baseline or default, arguably, than Miller in the 1943 decision sets out in this particular context as being the baseline or default rule.

So how do you deal with Miller?

MR. McNAMARA: So I think that we deal with Miller by pointing out that in Miller, the United States was the condemnor, and so Miller says that the measure of compensation --

JUSTICE KAVANAUGH: So you're -- keep going.

MR. McNAMARA: Miller says the measure of compensation is grounded upon the Constitution. And in later eminent domain cases like Bodcaw, this Court has made clear that in eminent domain cases, compensation is grounded upon the Constitution because that's

the only mechanism through which the United States can be forced to pay money.

The case I would point to, decided in parallel with Miller, is Carmack, which says things are different when we have a private delegation of eminent domain. Those are read more narrowly.

JUSTICE KAVANAUGH: Well, if you put Miller together with Bodcaw and then PennEast, I think the three of those together are a problem for you. So why don't you address then the PennEast piece of that?

MR. McNAMARA: I -- I think PennEast is using the same definition of eminent domain that we are. The -- the first sentence of PennEast is: "Eminent domain is the power of the government to take property for public use without the consent of the owner." It says nothing about just compensation, nothing about whether it's a term of art that incorporates just compensation.

JUSTICE KAVANAUGH: It uses the word "categorical" in talking about -- and that does seem to be categorical.

MR. McNAMARA: It uses the word

"categorical," but I think we have to understand that as a categorical delegation of the right to take, of the right to maintain a condemnation action.

I don't think anyone reads PennEast to say that these companies have the entirety of the United States' eminent domain power. The United States, if it chooses, can seize our property and build whatever it wants on it as the sovereign. If WBI does that, they're a state law trespasser.

JUSTICE KAGAN: I have to admit --

MR. McNAMARA: And I think that --

JUSTICE KAGAN: I'm sorry. Go ahead.

MR. McNAMARA: No, go ahead, Your Honor.

JUSTICE KAGAN: You sure?

MR. McNAMARA: Yes.

(Laughter.)

JUSTICE KAGAN: I have to admit that before I opened up your brief, if somebody had said to me what's the power of eminent domain, I would have said it's the government's right to take subject to just compensation, that both of those things, the taking and the subject to

just compensation, falls within the power of eminent domain.

And you can call that a term of art, but I might say, like, before I picked up your brief, that's just -- that's what it meant to me. It's both. If you say government has the power of eminent domain, I can -- it means that government can just take your land, I would say, well, no, that's missing half the equation.

So what -- what have I been getting wrong all these years?

MR. McNAMARA: Well, I -- I certainly understand, Your Honor. There is an intuitive appeal to the idea that they go hand in hand. And I think it's the analogy that my friends draw to causes of action for damages, where, in a cause of action for damages, the measure of damages is inseparably connected with the cause of action itself.

But that's not how contemporaneous sources talked about eminent domain, where the power of eminent domain is the sovereign power to just seize property, and a lot of the story of the development of American law is the

attempts of different entities to impose limits on that, through Magna Carta, through the Fifth Amendment.

I see my light is on, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas?

JUSTICE THOMAS: Can you have -- can you have a eminent domain power without just compensation?

MR. McNAMARA: No, Your Honor. I think -- I think, with the United States, the Fifth Amendment undeniably provides a floor. If Congress passed a law that said WBI can seize land and not pay for it, that would violate the Fifth Amendment.

JUSTICE THOMAS: And just -- and just compensation is normally valued in what way?

MR. McNAMARA: Different --

JUSTICE THOMAS: Let's assume it's the government.

MR. McNAMARA: For the United States?

JUSTICE THOMAS: Yeah.

MR. McNAMARA: Traditionally, the United States has to pay fair market value for what it has taken.

JUSTICE THOMAS: So going back to what the Chief Justice asked you, so for the United States, let's say there is a value on the land. How is that value now different if the United States delegates that power to someone else?

MR. McNAMARA: Because the United States is automatically immune from state laws purporting to provide a different value. And it's not just attorneys' fees. I'd point the Court to Missouri's law about heritage property where a homeowner --

JUSTICE THOMAS: So what does that -- what does attorneys' fees have to do with the value of the land itself?

MR. McNAMARA: Oh, what the Eighth Circuit found is that under North Dakota law, the transaction costs of the eminent domain litigation are themselves part of the value of the land. That's -- that was contested below. It could be contested again on remand, but that's the assumption we're traveling under.

CHIEF JUSTICE ROBERTS: I'm sorry. Justice Alito?

JUSTICE ALITO: You said that the Takings Clause provides a floor but not a

ceiling?

MR. McNAMARA: Yes, Your Honor.

JUSTICE ALITO: And what is the basis -- does the -- what is the basis for saying it provides a floor?

MR. McNAMARA: Well, again, Your Honor, I think, if Congress passed a law that said WBI can seize land and needn't pay for it, that would violate the Takings Clause and courts would either engage in constitutional avoidance or enjoin the taking or figure out what the remedy is there, but it's a limitation on Congress's power.

And limitations on Congress's power don't generally oust state law. I think my friends are arguing for sort of an inverted constitutional avoidance where simply because Congress could oust North Dakota law if it chose here, we should assume it did oust North Dakota law. But Congress simply is not authorized to order the taking of property without Fifth Amendment just compensation.

It doesn't follow from that that every time Congress authorizes the private taking of property that it means to oust Fifth Amendment

comp- -- means to oust state law compensation.

JUSTICE ALITO: I mean, suppose there were a state -- and this seems unlikely -- but suppose there were a state that likes pipelines, and so they enacted a law that says, when land is condemned for the purpose of constructing a pipeline, just compensation is one quarter of fair market value.

MR. McNAMARA: So I think there, again, the constitutional floor would come into place. If a state wanted to say pipelines are great, and so pipeline takings take one quarter of fair market value, that violates the Fifth Amendment as it applies through the Fourteenth Amendment but, again, does nothing to how --

JUSTICE ALITO: It applies what part of the Fifth Amendment?

MR. McNAMARA: I'm sorry?

JUSTICE ALITO: Violates what part of the Fifth Amendment?

MR. McNAMARA: The Fifth Amendment's Just Compensation Clause, which applies through the Fourteenth Amendment.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Sotomayor?

Justice Kagan?

Justice Gorsuch, anything further?

JUSTICE GORSUCH: Just the converse of Justice Alito's. If a state says you have to pay 150 percent because it's a heritage site or it's a pipeline, that would be permissible under your view?

MR. McNAMARA: As long as it's even-handed, Your Honor, I think that reflects the sort of state law judgments about property and whether heritage property is more valuable that we traditionally rely on state governments to provide.

JUSTICE GORSUCH: Okay.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: And then how do you address the -- the other side's argument, the SG's argument that that would really frustrate what Congress was trying to do in 1947 and all of what we're talking about here will be passed down to consumers in the form of higher costs for electricity, which is obviously a major concern?

MR. McNAMARA: So I -- I think the best answer, Your Honor -- and I don't mean to fight the hypo -- but is that our rule has been the uniform rule of law in the courts of appeals since 1980, and it hasn't frustrated anything.

One can imagine a -- a state law that would --

JUSTICE KAVANAUGH: Well, costs might be higher than they would otherwise be for electricity. Electricity costs are one -- a major issue around the country, obviously, and they're higher than most people would like them.

MR. McNAMARA: And I just don't --

JUSTICE KAVANAUGH: So, when you say that it's been a uniform rule and hasn't frustrated anything, I think a lot of consumers might disagree with that.

MR. McNAMARA: Well, as -- two responses, Your Honor.

As a practical matter, the acquisition of right-of-way is not a cost driver for building these pipelines. States that want to stymie natural gas pipeline construction have

tools through the Clean Air Act and other regulatory regimes that are much more expensive than acquiring right-of-way.

JUSTICE KAVANAUGH: Well, every little piece matters, and you're talking about adding attorneys' fees on top of the costs, right?

And so, yeah, each little piece disaggregated, you say it's not a big deal. You put them together and people pay more for electricity. What -- what --

MR. McNAMARA: Well, but I think that leads to my second answer, Your Honor, which is, really, Congress is free, if it wants to, to oust state just compensation law, but nothing in the text or legislative history says anything about changing the existing background rule that state compensation law was controlling here.

Now it may be that energy cost concerns have changed in the decades since 1947. I'd certainly concede that. But that seems like a question best addressed to Congress, which very clearly just didn't do anything about compensation when it authorized this cause of action.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: As a practical matter, are the only differences between federal law and state law in attorneys' fees and these heritage sites, or are there other ways in which federal and state law measures of just compensation would differ?

MR. McNAMARA: No, Your Honor. It comes up in a variety of other contexts where states have made nuanced judgments that the fair market value standard isn't meeting the realities in their state.

Some states have different rules about valuing rural property, which the states have determined isn't best value through a pure fair market value analysis. Different states have rules about how you value an ongoing business that's on the land, whether that's a separate piece of property or whether that collapses into the land.

States have innumerable judgments. This really isn't a case about attorneys' fees. It's a case about whether we're going to oust

all of those judgments in private condemnations without a command from Congress.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: Can I just get a clear answer as to why United States versus Miller doesn't sink your argument?

MR. McNAMARA: Because the condemnor in United States versus Miller is the United States. And, again, this Court makes clear in its eminent domain cases that the United States' sovereign immunity is what's doing work in those cases. It's why the only measure of compensation is the constitutional minimum.

And Miller comes out, again, the same term as United States v. Carmack in 1946, where this Court says things are different when Congress delegates eminent domain into private hands. That's a narrower delegation. We're more skeptical of that.

And I would point out that that is a common intuition. It's a common structure in eminent domain regulation at the time. The amicus brief of the Pacific Legal Foundation

points to a number of state laws that work exactly this way, where the state would delegate the power of eminent domain, but the private delegee would have to pay more, would often have to pay attorneys' fees that the state itself would not have had to pay if it condemned a sovereign.

So this is a distinction that was rife in eminent domain law at the time, and that's what Congress would have been aware of.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Hughes.

ORAL ARGUMENT OF PAUL W. HUGHES

ON BEHALF OF THE RESPONDENT

MR. HUGHES: Mr. Chief Justice, and may it please the Court:

As PennEast explained, Congress delegated to pipelines the federal government's eminent domain power. The question here is the remedy.

Did Congress intend the federal remedy that controls when the federal government takes property or the state remedy that governs when

states take property?

It makes most sense to conclude that Congress intended for the federal compensation standard. When Congress enacted 7(h), it resembled the Condemnation Act of 1888, which the Court in Miller had construed just four years earlier as adopting the federal measure of compensation.

This was in stark contrast to the General Bridge Act enacted a year prior, where Congress explicitly incorporated state compensation law. In 7(h) itself, Congress used state law in one specific way, for practice and procedure. When Congress wanted state law to apply, it said so.

Ultimately, Petitioner's argument requires the Court to conclude that in creating this new federal cause of action for pipelines, Congress explicitly adopted state law for procedure, but it silently adopted state law for remedy.

I want to turn for a moment to my colleague's argument on sovereign immunity because I think that's the linchpin to their argument. They assert that but for sovereign

immunity, state law would govern a federal taking.

That's fundamentally wrong. State law applies to state takings. Federal law governs federal takings. This Court said that clearly in Kohl and in 93.97 Acres. It's just the same that states don't get to regulate the federal government's power of war. The states don't get to regulate the federal government's eminent domain authority. That's the authority that has been delegated to pipelines.

Congress can decide that that authority should be or that measure of compensation should be incorporated into federal law if Congress chooses. It chose to do so in the General Bridge Act. It did not do so, however, in 7(h). That is the choice that should be respected.

I welcome the Court's questions.

JUSTICE THOMAS: I appreciate your argument about sovereign immunity, but I think what he said was that Congress can certainly delegate the power to -- the eminent domain power, but -- the federal government can, but it can't delegate the sovereign immunity that

precludes the attorneys' fees in the valuation process.

Now I know, in your argument, you simply say that -- you -- you argue -- you make the argument, well, state law does not apply. But I think we've got to deal directly with how is it that the sovereign immunity operates to preclude attorneys' fees in the case of the government but not in the case of the delegee?

MR. HUGHES: Your Honor, I think the most simple answer is it is not sovereign immunity that's doing the work for the federal government. My colleague agrees that if the federal government does the taking, there is no state law applying.

That is not because state law would otherwise apply and the federal government is immune. That's because the nature of the power that is being exercised is the federal government's power.

The federal government's power, as this Court said in Kohl and in 93.97 Acres, is not subject to state regulation. So it is simply not a -- a sovereign immunity issue.

Now, if a state says, well, we don't

like how the government is -- is using its federal domain power, the -- the federal government would not say, well, we're immune from the state law. They would say the state law is without force for reasons of the Supremacy Clause, that this is the federal power and states are -- do not have the authority to restrict the state power.

So we are not beginning with a baseline that state law would otherwise apply. Now, to be clear, Congress can make the policy judgment that as the measure of federal just compensation, it wishes to incorporate what state law has decided for just compensation when states have takings. Congress has done that from time to time. That was in the Act of 1875 that was at issue in the Jones case that my friend likes to discuss. That happened in the General Bridge Act and other bridge statutes. But it did not happen in 7(h).

What Congress did in 7(h) was model what Congress had previously done in the Condemnation Act of 1888. And this Court in Miller was pretty clear that, looking at this language of the Condemnation Act, that

incorporated federal law, not state law.

And to Justice Gorsuch's point earlier about, well, what do we think about state practice and procedure, the -- the -- the -- the Act that Miller was construing, the Condemnation Act, had the exact same terms that practice and procedure in 1888 would also govern the Condemnation Act, but that didn't factor into the Court's analysis that, sure, procedure will -- will follow state law, but the compensation, this critical compensation question, is a matter solely of federal law.

JUSTICE GORSUCH: On that --

MR. HUGHES: Thank you.

JUSTICE GORSUCH: -- a small question, and I don't -- it's a real question. How do you explain what Mr. McNamara describes as state decisions around the time of the Natural Gas Act, before and after, that did apply a state measure of -- of compensation?

MR. HUGHES: So, to start with, the relevance would be, was there some uniform, well-understood background against which Congress was legislating in 1947? And I think the answer to that is clearly no.

I -- I recognize the Feltz case of the Eighth Circuit out of 1942, and then another case decided by the same panel with the same dispute a couple weeks later in Fairchild has a single sentence that says Nebraska law applies. It was not disputed. It does not appear that it had any dispositive outcome. It was a simple sentence that I don't think was -- there was no reasoning. My -- my friends in the yellow brief agree there was no reasoning.

So, to start with, that's not the kind of universal consensus in the lower courts that we think, well, Congress must have been aware of this and incorporated it.

But I think there's much better evidence, which is what Congress was aware of, is what this Court did in 1943, construing the Condemnation Act of 1888. I've talked about that. And then there were at least six courts of appeals cases between 1943 and when Congress acted in 1947 understanding the implications of Miller.

So I think, if we're trying to -- to use that frame of analysis as to what the state of judicial affairs was in 1947 and what

Congress would have understood, Congress would have known that if it did the same thing it did in the 1888 Act in the 1947 amendment, it would have a clear conclusion, the conclusion this Court had already drawn for it in 1943.

And, again, I don't think there's much of a surprise because, just the year prior, Congress wanted a different result in the General Bridge Act, and it had the language at hand. I don't think it matters that the General Bridge Act had a pedigree going back decades. It just means that Congress had two different mechanisms to choose from.

It had one set of language when it felt like in its policy judgment that the compensation measure should model state law. It had language for that. It had other language that this Court had already construed to say when we want the just -- the federal just compensation standard, that's the one that we're going to use. And -- and Congress made that choice.

JUSTICE BARRETT: Can I ask you a question? You concede, don't you, that standing in the shoes of the United States does

not give you all the immunities of the United States?

MR. HUGHES: Yes, Your Honor. And that's why I don't think immunity is doing the work. We -- we resemble the United States. The Eighth Circuit said we stood in their shoes, and the federal government does. I don't think there -- there's -- that term of phrase is critical. We don't have all of the immunities other state laws apply to us where they apply out of their own force.

My point, though, is we stand in the shoes insofar as we are exercising the federal eminent domain power because the sort of, I think, mismatch that's happening here is the states want us to apply state law, but this is not your usual case where there's some body of state common law that just out there sort of generally governs.

For a taking, there has to be an exercise of either a sovereign authority or a sovereign's delegated authority. Only the federal government or states have the ability to take.

So what they're suggesting, though, is

that the law that has been developed when a state exercises its taking authority somehow is governing us when nobody would suggest that we're author -- that we're exercising North Dakota's law to -- sovereign power to take. We are necessarily exercising the federal government.

And that's what this Court in PennEast said. We are acting pursuant to the federal government's power, not pursuant to state authority.

JUSTICE JACKSON: Do you think that Kimbell Foods has any relevance to this at all? Are we talking about a gap in the statute?

MR. HUGHES: Well, Your Honor, I don't think we have a gap. And this goes back to the colloquy that my colleague had with the Court earlier, which is take the hypothetical that was posited where a state says you only have to pay a quarter of fair market value. I think it's established that everyone understands the Fifth Amendment just compensation is at least a baseline. There's no world in which the pipelines could pay less than that.

So we're not in a scenario, like, for

example, some of the statute of limitations cases, where you know there has to be law, but the law is silent and we have to go about figuring out how we deduce what that law is.

In this case, everyone agrees that there is necessarily the federal standard of compensation. The only question is should we go above that. So, essentially, there's the election of, is it better for the landowner to be in -- in the state law bucket or -- or the federal bucket?

So I don't think we get into Kimbell Foods, Your Honor, but if we do, I still think those factors are -- are helpful for us. They go to the underlying policy issues here that what Congress sought to do was displace a patchwork of 50 state laws in order to have a uniform approach.

And I think it's really difficult to disaggregate the distinction between the taking and the compensation that is due. I mean, my friend points to the Jones case. I think, when we look to the Jones case and understand what's happening in that context, it makes quite a bit more sense. The Jones case dealt with an Act

of 1875, which said we are going to authorize federal takings for canals in Wisconsin, but we're going to assign the mechanism for figuring out compensation to Wisconsin law. And Wisconsin law said we're going to have a panel of three commissioners, and that can go to state court.

Well, the argument that came to this Court was the Solicitor General had made the contention that this statute was unconstitutional, that the -- the act of assessing compensation could not be assigned to a state because that was inherently part of the federal function and that the Act was unconstitutional by allowing state procedure.

This Court had no problem rejecting that argument on the basis of it is wholly appropriate to assign federal functions to state courts. The Court pointed to the nation's tradition of having local magistrates at times in the early history decide federal criminal issues or federal naturalization issues.

And what the Court said, as long as there's not a commandeering of the states, it

is appropriate to have state adjudication. That's why federal causes of action like 1983 or FELA or 7(h) itself are allowed to be in state court. That is a permissible choice for Congress to make.

That's all that's happening in Jones. Jones does not say that you can sever the taking from the -- the compensation. The only question is, where does that determination of compensation occur?

As I mentioned, I think our rule is necessary to effectuate the underlying fundamental purpose to avoid the -- otherwise what would be a -- a -- a piecemeal approach.

And I think there's an easy way just to understand this case, which is the text of the statute made pretty clear that Congress was thinking about where state law applies and where state law doesn't apply. Congress was -- was quite acutely aware of the role that's -- that it wanted state law to play, and it incorporated it specifically for practice and procedure.

I think there is a compelling position to draw that when Congress adopted that for

purposes of procedure, it brings with it there wasn't some silent adoption for substance.

And just to add, when you back out for a second, if -- I think eminent domain law squarely resolves this case. But, if there's any question about that, and you expand the lens a bit, this Court's precedent has been clear that when we're dealing with federal causes of action, while you may borrow from time to time statute of limitations from states or other issues, that when you're assessing the remedy for a federal cause of action, you always bring with the federal cause of action the federal remedy.

So this Court in Kelly back in 1916 said that with respect to the FELA cause of action. The same accords for 1983 for the Miller Act. The Court has been clear that we are not going to say that state remedies attach when there is a distinct federal cause of action.

I don't think the Court has to look at that to resolve this case, but if we start turning to more background principles, as Petitioners suggest, they squarely support

the -- the same outcome that we advance here.

JUSTICE KAGAN: Do you have an explanation, Mr. Hughes, for why so many federal courts have gotten this, in your view, wrong for so long?

MR. HUGHES: Well, first, Your Honor, when you look at the record, there are 11 different court of appeals judges who agree with us, so -- and virtually all of those cases, they were pretty hotly contested. So I wouldn't suggest that there was some uniform view. There are an assortment of 11 judges who have looked and agreed.

But what I think happened in -- in 1980 in -- in Georgia Power that pulled forward was a look to Kimbell Food. I think there was perhaps a faster trigger to find that there was some statutory gap and that a -- a easier resort to what is termed judicial lawmaking that existed in Kimbell Foods.

I -- I mean, I note, Your Honor, that of all of the decisions in the lower courts that are adverse to us, they are decided on the grounds of Kimbell Food.

And by the time we're here now, if you

look at the yellow brief, I don't think Petitioners really advance a Kimbell Food argument at this point. So I don't think Petitioners are even really endorsing the grounds on which their side had prevailed in -- in the lower courts.

So, at the end of the day, this was hotly disputed. The 11 judges who disagreed with that approach uniformly agreed with the arguments that we're advancing.

And the -- the courts that prevailed are -- advanced an argument that has kind of fallen out of the case at this point.

JUSTICE KAGAN: And in -- in the cases in the circuits that follow Petitioners' rule, are we really only talking about attorneys' fees? Has any state tried to do anything else?

MR. HUGHES: Your Honor, I think there were two about attorneys' fees. There were one or two that have a different measure of compensation because you can also see differences in consequential damages that say --

JUSTICE KAGAN: Consequential damages.

MR. HUGHES: -- if there's a -- a -- a

business on a piece of land and you want to advance an argument, not just injury to land but there was consequential damages, that would be another way that this could potentially be distinguished.

CHIEF JUSTICE ROBERTS: Anything further, Justice Thomas?

Justice Alito?

Justice Sotomayor?

Justice Kagan?

Justice Gorsuch?

Thank you, counsel.

Ms. Jacoby.

ORAL ARGUMENT OF ZOE A. JACOBY

FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MS. JACOBY: Mr. Chief Justice, and may it please the Court:

When the federal government takes land, it must pay just compensation under the Fifth Amendment unless Congress affirmatively requires more. When the federal government exercises its eminent domain power through a delegee, the same default rule applies.

That rule resolves this case because

the Natural Gas Act does not require compensation above the Fifth Amendment standard.

Petitioners' contrary default rule makes little sense. State compensation laws do not apply of their own force in federal condemnation actions, so Congress had no need to expressly displace them in the NGA. Nor did Congress silently adopt state compensation laws in granting pipelines the federal power of eminent domain.

That kind of mismatch is especially implausible for this delegation, whose very purpose was to make interstate pipelines less dependent on state eminent domain laws.

Finally, the statute leaves no gap to fill through judicial lawmaking. But, even if it did, the Court should choose the Fifth Amendment's standard.

I welcome the Court's questions.

JUSTICE THOMAS: Would you directly address Petitioners' sovereign immunity argument with respect to the fees?

MS. JACOBY: Yes. I agree completely with my friend that sovereign immunity is not

what's doing the work here. When the United States does a taking, it's not even what's -- what's doing the work.

The reason that Bodcaw and other cases have said that attorneys' fees are not included is based on an interpretation of the Fifth Amendment Just Compensation Clause to cover only, you know, compensation for the property and not the property owner. So I don't think it comes into play, really, for us.

And then it doesn't come into play, I think, for -- for the pipelines either because the reason that -- that states can't dictate the terms on which pipelines exercise the federal eminent domain power is a Supremacy Clause matter, not a -- not a sovereign immunity matter.

JUSTICE BARRETT: Ms. Jacoby, is there still judgment required in determining how to figure out just compensation?

In other words, does the Fifth Amendment just solve that question on its own, or do federal courts have to develop some sort of common law or flesh out what it means for fair market value? How do you know what the

fair market value is?

Because, presumably, there will be some times, even putting aside special rules for heritage sites, et cetera, there are presumably going to be some times where states say this is how you figure out what fair market value is.

MS. JACOBY: Yes. So this Court obviously has expounded on what kinds of things are -- are in and out, but then, even in terms of determining fair market value, there is a pretty robust body of federal law and guidance in terms of, you know, do you look at the before-and-after value, do you look at comparisons to other arm's-length transactions. There is something called the Yellow Book, it's kind of a -- a -- a guidance document for -- for federal takings.

And, obviously, these takings come up in the Court of Federal Claims when -- when the United States takes land and -- and we litigate those issues. So there is a whole kind of ready-made body of law here. I think that's actually another reason why resorting to state law doesn't make a lot of sense.

My friends have talked in their briefs about instances in which the court will kind of borrow state law when it comes to interpreting statutes that have to do with property, and that's often because there is a ready-made body of state property law and there isn't really the same kind of thing for federal property rules. And so judicial humility sort of counsels in favor of -- of borrowing the ready-made law rather than just making something up.

But that's not a situation we have here because the Fifth Amendment standard is -- is a well-developed standard. And federal, you know, land valuation standards exist and all the rest.

JUSTICE BARRETT: Do you have a theory that would answer Justice Kagan's question of why were federal courts getting this wrong before?

MS. JACOBY: Yeah, I -- I agree with my friend. I think Georgia Power was too quick to jump to the use of judicial lawmaking. These days, courts would exhaust the tools of statutory construction before just finding it

kind of an excuse to -- to make judge-made law. And then other courts followed suit.

I would also point out that some of the courts might not have appreciated the extent to which this is a categorical delegation. A lot of these cases were decided before PennEast.

The Eleventh Circuit revisited this case after PennEast but -- but felt bound by prior Fifth Circuit precedent.

And then the Eighth Circuit considers this issue afresh after PennEast and I think appreciates the -- the categorical nature of the delegation.

JUSTICE KAVANAUGH: Can you connect the dots between the issue presented and the cost issue that your brief identifies, the cost for consumers?

MS. JACOBY: Yes. I mean, we -- we touch on the cost issue briefly. FERC -- sorry -- FERC rate-setting is a complicated endeavor, but it is the case that land acquisition costs are a factor in rate base, which goes into the calculation of what -- what a -- a ratepayer would pay. So we do think

that's a consideration.

I mean, we're also more concerned about obstruction and delay and excess litigation. And we think that Congress was concerned about those things too when it wanted a uniform federal eminent domain standard so that pipelines were not having to rely on state eminent domain laws.

JUSTICE KAVANAUGH: Has that been a real problem in the areas governed by different circuit precedent?

MS. JACOBY: So I definitely don't want to say that we think the sky is falling in those circuits. I don't think we've seen state compensation laws yet be able to thwart construction of a pipeline. But, of course, Congress didn't want pipelines to have to rely on state grace in that way.

I will say, just stepping back, we do see other types of obstruction and delay from -- from states and other entities, and FERC does have a concern that if Petitioners' rule would be -- were to be adopted nationwide that obstructionists would -- would try to seize on that.

CHIEF JUSTICE ROBERTS: Is there any reason that you're aware of that in a situation -- well, even if -- if you -- you should not prevail here, that the federal government can't just buy -- condemn the property itself, get it without having to pay any attorneys' fees, and then sell it to the private entity?

MS. JACOBY: Well, just as a general matter, we tend to look for a delegation from Congress, and Congress here has made that delegation to the pipelines directly rather than to FERC. So I -- I think that we would -- we would want Congress to affirmatively tell FERC that it can do the delegating itself.

And I think that the -- as you pointed out in your -- your first questions, the statute that Congress chose is more efficient to just let the pipelines do that delegation itself, and I think that decision should be respected.

CHIEF JUSTICE ROBERTS: Anyone, anything further?

Thank you, counsel.

Rebuttal, Mr. McNamara?

REBUTTAL ARGUMENT OF ROBERT J. McNAMARA
ON BEHALF OF THE PETITIONERS

MR. McNAMARA: Just three points in rebuttal, Your Honor.

First, on the constitutional status of the United States as condemnor, I don't think Bodcaw could be clearer when it said that a decision saying the United States had to pay fees in a condemnation case 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. The presence of the United States as condemnor matters.

Second, a quick word on Kimbell Foods. I think this Court in Hencely correctly placed Kimbell Foods as another stream of this Court's preemption precedents. It starts from the presumption that state law controls unless something in the statutory scheme ousts it.

And, finally, just as a simple practical point, I think it's worth remembering that in 1947, when Congress adopted this statute, interstate pipeline companies could

exercise eminent domain in a number of states, in states like Iowa and North Dakota. And I think it's worth imagining a state court judge sitting in Iowa who in 1946 could hear a condemnation case brought by an interstate natural gas pipeline and would use state just compensation law and ask if that same judge hears the same condemnation in 1948, when Congress has now announced that that pipeline company has an eminent domain cause of action. Well, from that judge's perspective, they had an eminent domain cause of action before. What has changed for that judge? What clue in the statute tells that judge that his approach in 1946 has been ousted and that he should now be applying federal rather than state just compensation law?

We find no clue in the statute, and that's because Congress wasn't concerned about just compensation, which is why railroads to this day are relegated to state eminent domain causes of action. It was concerned about the availability of a cause of action. That's the evil they remedied. That's what the statutory text talks about.

It does not speak about just compensation because just compensation, even in the cases my friend cites, even in Kohl, where the Court says states can't interfere with the exercise of the federal eminent domain power, it goes on to say in Kohl: And this statute says nothing about the measure of just compensation.

They're distinct legal concepts flowing from distinct sources. That's how they were talked about at the time. And Congress didn't mention the one because it was only concerned about the other. That's the correct reading of the statute.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:29 p.m., the case was submitted.)

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