No. 25-159

IN THE

Supreme Court of the United States

LEONARD W. HOFFMANN, *et al.*,

Petitioners,

v.

WBI ENERGY TRANSMISSION, INC.,

Respondent.

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

BRIEF OF GARY R. ERB AND LYNDA LIKE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici curiae Gary R. Erb and Lynda Like are Lancaster County, Pennsylvania property owners whose family land was condemned by a private pipeline company under the Natural Gas Act, 15 U.S.C. § 717f(h).[1] Mr. Erb and his family made their home on rural acreage he called a "deer paradise," where he hoped his sons would one day build homes. Ms. Like inherited her land from her father and promised him she would preserve it for her family. In 2017, Transcontinental Gas Pipe Line Company condemned easements across their properties for an interstate pipeline. Transcontinental obtained possession before compensation was determined or paid and completed the pipeline while the owners waited for payment.

Amici have experienced firsthand what it means for a private company to exercise federal eminent-domain authority against an unwilling owner. They previously asked this Court whether the Natural Gas Act's delegation of condemnation authority permits a private pipeline company to seize immediate possession before final judgment and payment. The Court denied their petition. *See Like v. Transcontinental Gas Pipe Line Co.*, 587 U.S. 1035 (2019). That question and the one presented here implicate the same broader issue: whether the delegated power to condemn carries with it every advantage the

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1. In accord with Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae and their counsel made a monetary contribution to its preparation or submission.

sovereign enjoys when it condemns in its own name. Here, the asserted advantage is the Federal Government's narrower measure of compensation. Amici have a direct and informed interest in ensuring that private condemnors receive no greater rights than Congress actually conferred.

SUMMARY OF ARGUMENT

The decision below treated § 717f(h)'s delegation of condemnation authority as resolving two questions the statute never answers: (1) whether a private certificate holder receives every rule that governs when the United States condemns in its own name; and (2) whether the Fifth Amendment displaces state compensation law without the ordinary federal-common-law choice-of-law inquiry. Neither conclusion follows.

First, Section 717f(h) delegates the power to condemn, but it does not thereby transfer every rule or governmental protection that accompanies condemnation by the United States. The Eighth Circuit's reliance on *PennEast* is misplaced. *PennEast* held that state sovereign immunity could not prevent a certificate holder from exercising the delegated power against state-owned property. It did not decide which other incidents accompany that power or how compensation is measured. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 498–99, 507–08 (2021).

The cases applying the NGA confirm the distinction. Certificate holders do not receive the Declaration of Taking Act's quick-take authority, and the Ninth Circuit has explained that a private pipeline company, unlike the United States, "has neither sovereign authority nor the backing of the U.S. Treasury" to assure payment. *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 775 (9th Cir. 2008). Those rules depend on the identity of the condemnor, not merely the source of its condemnation authority. And recently this Court twice reinforced the broader distinction between federal authorization and governmental protection. *See GEO Grp. v. Menocal*, 607 U.S. 438, 449–50 (2026); *Hencely v. Fluor Corp.*, 146 S. Ct. 1086, 1095, 1098–99 (2026).

Bodcaw does not establish otherwise. It held that litigation expenses are generally not part of the "just compensation" required by the Fifth Amendment when the United States condemns. *United States v. Bodcaw Co.*, 440 U.S. 202, 203–04 (1979) (per curiam). It did not decide whether that constitutional floor supplies the exclusive measure of compensation when a private party condemns under a statute silent on the question. The Eighth Circuit itself acknowledged that federal interests are "arguably weightier" when the United States condemns and that imposing fees on a private condemnor does not raise the same concerns about spending federal dollars. *WBI Energy Transmission, Inc. v. 189.9 Rods*, 132 F.4th 1058, 1062 (8th Cir. 2025). The court dismissed those differences as "policy arguments," *id.*, but whether the rationale for a sovereign-specific rule extends to a private delegatee is a legal question.

Second, § 717f(h)'s silence on the measure of compensation does not make the Fifth Amendment the exclusive standard. Under *Wallis* and *Kimbell Foods*, state law is displaced only upon a specific showing of a significant conflict with an identifiable federal policy; generalized appeals to uniformity do not suffice. *Wallis v.*

Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729–30, 739–40 (1979). The Eighth Circuit never undertook that inquiry because it believed there was no gap to fill.

Had it done so, the asserted federal interests would not justify displacement. Higher compensation costs do not themselves establish a significant conflict, and decades of experience under the state-law rule have produced no demonstrated interference with the NGA's operation. The Third, Fifth, Sixth, and Eleventh Circuits have accordingly held that state law supplies the compensation rule in private NGA condemnations. The Court should reach the same conclusion and reverse the judgment below.

ARGUMENT

I. The Natural Gas Act Delegates the Condemnation Power, Not Every Rule that Governs Condemnations by the United States.

A. The Act confers a power and says nothing about the measure of compensation.

Section 717f(h) permits a certificate holder that cannot acquire a necessary right-of-way by agreement to "acquire the same by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h). The provision confers condemnation authority. It does not prescribe the measure of compensation.

The Eighth Circuit treated that silence as immaterial. Because WBI received "the *entire* federal eminent-domain power, not just some diluted form of it," the court reasoned that, "[b]y stepping into the federal government's shoes," WBI "inherited all its rights and obligations"—including the Federal Government's compensation rule. *WBI Energy*, 132 F.4th at 1060–62.

That inference is an error. Section 717f(h) delegates authority to condemn. It does not thereby confer every sovereign attribute or litigation advantage the United States possesses when it condemns in its own name. Federal courts repeatedly distinguish the delegated power from those incidents. The Federal Government's compensation rule therefore cannot be treated as part of the delegation without further analysis.

B. *PennEast*'s "categorical" delegation concerns what may be condemned, not which sovereign attributes transfer.

The Eighth Circuit relied on *PennEast*'s description of Section 717f(h)'s delegation as "categorical." But *PennEast* defined the category in the same paragraph: "By its terms, § 717f(h) delegates to certificate holders the power to condemn any necessary rights-of-way, including land in which a State holds an interest." 594 U.S. at 498–99. "Categorical" describes the property reachable through the delegated power, not every rule or sovereign attribute that accompanies a condemnation by the United States.

PennEast itself confirms this principle. The issue, the Court explained, was "whether the United States can delegate its eminent domain power to private parties," not whether it can delegate "its freestanding exemption from state sovereign immunity." *Id.* at 507. The Court expressly left open whether delegation of that exemption "is even permissible." *Id.* at 507–08. The case thus distinguishes the delegated condemnation power from at least one sovereign attribute rather than treating all such attributes as automatic incidents of the delegation.

This Court has since described *PennEast* the same way. *Torres v. Texas Department of Public Safety* read it as "resting on a broader point: The Federal Government's eminent domain power is complete, such that no State may frustrate its exercise by claiming immunity to forestall the transfer of property." 597 U.S. 580, 598 (2022). That gloss concerns the completeness of the power against state resistance, not the compensation owed after the power is exercised. The Eleventh Circuit likewise held that *PennEast* did not displace its compensation precedent because it "was concerned with a state's attempt to deny exercise of the federal power of eminent domain," not whether state or federal law supplies the measure of compensation. *Sabal Trail Transmission, LLC v. 18.27 Acres*, 59 F.4th 1158, 1174 (11th Cir. 2023).

PennEast's references to eminent domain as "inextricably intertwined with the ability to condemn" and to the States' consent to the federal eminent-domain power "in its entirety" likewise arose in resolving whether state immunity could block the condemnation action. 594 U.S. at 503, 508. Neither formulation addressed the measure of compensation.

PennEast rejected a clear-statement requirement for Congress to authorize private parties to exercise the federal eminent-domain power against state-owned property. *Id.* at 507–08. It did not address the distinct question here: whether § 717f(h) also displaces otherwise applicable state compensation law by making the Federal Government's compensation rule part of the delegation. *PennEast* did not decide that question.

C. Federal courts distinguish the delegated condemnation power from the sovereign's collateral privileges.

United States v. Carmack distinguished federal officers acting for the sovereign from private entities authorized to condemn "on behalf of themselves." 329 U.S. 230, 243 n.13 (1946). Grants to the latter, the Court explained, "are, in their very nature, grants of limited powers" that "do not include sovereign powers greater than those expressed or necessarily implied." *Id.* The NGA cases confirm that distinction in practice.

The clearest example is the Declaration of Taking Act's quick-take authority. The DTA permits title to vest upon filing a declaration and depositing estimated compensation, but it applies only to proceedings "brought by and in the name of the United States"; § 717f(h) grants no comparable power. *See* 40 U.S.C. § 3114; *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 822–23 (4th Cir. 2004). A certificate holder that has established its right to condemn may in some circumstances obtain immediate possession by preliminary injunction, but that equitable remedy is distinct from the DTA's quick-take authority. *See Sage*, 361 F.3d at 824–25; *Transcontinental Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 736 (3d Cir. 2018). As the Ninth Circuit put it, the "additional [quick-take] right conferred" by Congress is “missing from § 717f(h).” *Transwestern Pipeline*, 550 F.3d at 774–75.[2]

Transwestern illustrates that point. The United States may proceed without security because its constitutional obligation to pay just compensation functions as an implied promise backed by the sovereign. 550 F.3d at 775. A private pipeline company, by contrast, “has neither sovereign authority nor the backing of the U.S. Treasury to assure adequate provision of payment.” *Id.* Some rules governing federal condemnations thus follow from the identity of the condemnor, not from the eminent-domain power itself.

Quick-take alone exposes the problem in the Eighth Circuit’s premise that WBI “inherited all [the sovereign’s] rights and obligations.” 132 F.4th at 1060. If the delegation of “the *entire* federal eminent-domain power” automatically carried every rule that governs a condemnation by the United States, the DTA’s authority to take title and possession by deposit would be one of the most plausible incidents to come with it. Yet courts have held that § 717f(h) confers no such power. Quick-take was not at issue below, so the point goes to the breadth of the

2. Other incidents likewise do not transfer automatically. *See Vector Pipeline, L.P. v. 68.55 Acres*, 157 F. Supp. 2d 949, 960 (N.D. Ill. 2001) (DTA’s deposit-based interest limitation governs takings by the United States and neither Rule 71.1 nor the NGA contains a counterpart applicable to a private NGA condemnor); *Maritimes & Ne. Pipeline, L.L.C. v. 16.66 Acres*, 190 F.R.D. 15, 17 n.1 (D. Me. 1999) (private NGA condemnor cannot invoke the United States’ sovereign immunity to bar a counterclaim); *Equitrans, L.P. v. 0.56 Acres*, 145 F. Supp. 3d 622, 633–34 (N.D.W. Va. 2015) (Rule 71.1(e) independently limits counterclaims as a procedural matter).

panel's rationale, not its holding. But that is exactly the problem: "inherited all" cannot itself answer whether the Federal Government's compensation rule travels with the delegated power when other rules governing federal condemnations demonstrably do not.

D. Federal authorization does not automatically confer governmental protections on private actors.

Recent decisions outside the eminent-domain context reinforce the same principle: private actors do not automatically acquire governmental protections merely because they perform federally authorized work.

In *GEO Group v. Menocal*, the Court held that a private contractor performing federal work does not enjoy the Government's "derivative sovereign immunity." 607 U.S. 438, 449–50 (2026). Sovereign immunity, the Court explained, "is not transferrable to agents, including contractors, of a government," and "belongs alone to the Government." *Id.*

Hencely made the related point in rejecting federal-common-law preemption of state tort claims. The Court explained that *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), addresses "a special circumstance" in which "the government has directed a contractor to do the very thing that is the subject of the claim." *Hencely*, 146 S. Ct. at 1095 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001)). Absent a contrary statute, States may regulate or tax federal contractors "on the same terms as any private company." *Id.* at 1098–99.

Neither decision concerns eminent domain nor resolves the compensation question. Their narrower relevance is that federal authorization does not itself confer governmental protections on a private actor. That principle reinforces—but does not drive—the eminent-domain authorities above.

E. ***Bodcaw* defines the constitutional minimum but does not answer the choice-of-law question here.**

The Eighth Circuit also relied on *Bodcaw*, but *Bodcaw*'s holding is narrower than the court supposed. *Bodcaw* held that a landowner's appraisal and other litigation expenses are generally not part of the "just compensation" required by the Fifth Amendment when the United States condemns property. 440 U.S. at 203–04. That establishes the constitutional minimum on that point. It does not establish that the Fifth Amendment supplies the exclusive measure whenever a private party exercises federally delegated condemnation authority.

Bodcaw's separate rule that "litigation costs cannot be assessed against the United States in the absence of statutory authorization," *id.* at 203 n.3, is likewise specific to the sovereign. As the Third Circuit observed, nothing in *United States v. Miller*, 317 U.S. 369 (1943), or its progeny "expands its reach to condemnations by private entities." *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 248 (3d Cir. 2019). Those decisions fix the measure of compensation for property condemned "by the United States." *Id.*

The Eighth Circuit itself acknowledged the difference. When the United States condemns, the court acknowledged, the "powerful federal interests at play" are "arguably weightier than when a private company like WBI is acting on its own," and requiring a private condemnor to pay attorney's fees and other indirect costs "does not raise the same fiscal 'concerns about the spending of federal dollars' that exist when the United States does the taking." *WBI Energy*, 132 F.4th at 1062. The court dismissed those differences as "policy arguments better addressed to Congress." *Id.* But whether the rationale for a rule governing the sovereign extends to a private delegatee is a legal question, not a policy question. And where Congress has not answered it, the displacement principles that govern, addressed below, point to state law.

II. Section 717f(h)'s Silence Does Not Make the Fifth Amendment the Exclusive Measure of Compensation.

A. Section 717f(h)'s text does not displace state compensation law.

Petitioners' opening brief explains in detail why ordinary statutory interpretation points to state compensation law. Pet'rs Br. 12–37. But even if the Court instead reads § 717f(h)'s silence as leaving a choice-of-law gap, neither the Act nor the Fifth Amendment supplies an exclusive federal rule. The question would then become whether federal law displaces the otherwise applicable state law or adopts it as the federal rule of decision. What the Act *does* say confirms that Congress did not affirmatively displace state law.

Section 717f(h)'s forum and procedural provisions point, if anything, toward the States. A certificate holder may proceed "in the district court of the United States for the district in which such property may be located, or in the State courts." 15 U.S.C. § 717f(h). And, as enacted, a federal action's "practice and procedure . . . shall conform as nearly as may be" to those of the state where the property sits. *Id.* That conformity requirement governed "procedural matters only." *United States v. 93.970 Acres*, 360 U.S. 328, 333 n.7 (1959). Rule 71.1 has since superseded it in federal court without supplying any measure of compensation. *See* Fed. R. Civ. P. 71.1. Any suggestion that specifying state procedure silently commands federal substance is thus an argument from congressional silence rather than statutory command, and Petitioners explain why it would also create an incoherent regime in which federal courts apply a federal rule while state courts apply their own. Pet'rs Br. 48.

The 1947 amendment's history confirms the point. Congress supplied a federal power to condemn because certificate holders had been "left to rely on state eminent domain procedures, which were frequently made unavailable to them." *PennEast*, 594 U.S. at 489. That history explains the grant of a power, not the displacement of the law governing what a private condemnor must pay.

Further, *93.970 Acres* does not dictate otherwise. There, the United States itself condemned a leasehold needed for a military installation and applying the State's election-of-remedies doctrine would have forced the Government to surrender either its contractual right of revocation or its right to immediate possession. 360 U.S. at 332. In that setting, the Court said "[c]ondemnation involves essential governmental functions" and that federal law governs where "essential interests of the Federal Government" are concerned. *Id.* at 332–33. But the case did not involve compensation owed by a private delegatee, nor did it ask whether state law should supply the federal rule where Congress has left that question unanswered. Those are the questions to which *Wallis* and *Kimbell Foods* speak.

B. *Wallis* and *Kimbell Foods* make displacement, not borrowing, the exceptional step.

The governing framework begins with *Wallis*. Before a federal court fashions a federal rule, "a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." 384 U.S. at 68. It is not enough that Congress could have enacted a complete federal regime: "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress," which legislates "against the background of the total corpus juris of the states." *Id. Kimbell Foods* applies the same allocation. It "reject[ed] generalized pleas for uniformity as substitutes for concrete evidence" of impairment and held that, absent such reasons, "the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." 440 U.S. at 729–30, 739–40.

The decision below inverted that framework. It treated § 717f(h)'s silence as eliminating any choice-of-law inquiry and making the constitutional minimum the exclusive rule, while dismissing the reasons for applying state law as "policy arguments better addressed to Congress."

WBI Energy, 132 F.4th at 1062–63. But *Wallis* assigns the decision in precisely the opposite direction. It is the displacement of state law that is "primarily a decision for Congress." 384 U.S. at 68. Congressional silence itself does not displace state law. Absent a demonstrated conflict with federal policy, *Kimbell Foods* points to the ready-made law of the state where the property lies.[3]

C. *Georgia Power* applied this framework to the model federal statute and declined to displace state law.

The same framework has already been applied to the closely parallel delegation in Section 21 of the Federal Power Act. In *Georgia Power Co. v. 138.30 Acres*, the en banc Fifth Circuit began "with the premise that state law should supply the federal rule" absent contrary congressional intent or a significant conflict with federal interests. 617 F.2d 1112, 1115–16 (5th Cir. 1980) (en banc). Because the condemnation involved a private licensee using private funds to acquire private property, the federal interests were "not sufficient to warrant displacement of state law" governing compensation. *Id.* at 1118.

Georgia Power's approach became the prevailing rule under the Natural Gas Act, as Petitioners recount. Pet'rs Br. 3–4, 35. What makes that Federal Power Act

3. To the extent that a party or the United States invokes the American Rule, that rule does not resolve the antecedent choice-of-law question whether state law should be incorporated as the federal rule under *Kimbell Foods*. Amici curiae do not ask this Court to determine the ultimate operation of N.D. Cent. Code § 32-15-32. That state-law issue may be addressed on remand.

precedent decisive here is that Congress "intended the eminent-domain right to be coextensive under the Federal Power Act and the Natural Gas Act," and that under both statutes courts "must apply the same substantive law on what 'compensation' includes." *Sabal Trail*, 59 F.4th at 1169–70. The choice-of-law analysis *Georgia Power* performed under the model statute therefore governs the same question under § 717f(h).

D. No significant conflict has been shown, and formal symmetry, higher costs, and hypothetical future state laws do not supply one.

The decision below reduced the question to a metaphor: the "rules of the road do not change," it reasoned, when the Government "hands the keys over to a private party like WBI." 132 F.4th at 1062. But *Atherton v. FDIC* rejected the same move: a federal charter, standing alone, "shows no conflict, threat, or need for 'federal common law'" and "does not answer the critical question." 519 U.S. 213, 223 (1997). A court may not "substitute analogy or formal symmetry for the controlling legal requirement," which is the existence of a significant conflict or threat to a federal interest. *Id.* at 224. WBI's exercise of federally delegated condemnation authority therefore identifies a federal interest. It does not establish that state compensation law significantly conflicts with that interest.

Increased cost does not supply the required conflict. In *O'Melveny & Myers v. FDIC*, the FDIC argued that state law might "deplet[e] the deposit insurance fund," but the Court rejected a theory resting on "the forgoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund." 512 U.S. 79, 88 (1994) (alteration and emphasis in original). "[T]here is no federal policy that the fund should always win," the Court explained, and its cases have "previously rejected 'more money' arguments." *Id. Georgia Power* reached the same conclusion in the parallel condemnation context. Although the utility argued that state law would increase acquisition costs passed on to consumers, the en banc court refused to make Georgia landowners "partially . . . subsidize a private Georgia utility and consumers of electric power" absent evidence that Congress had struck that balance. 617 F.2d at 1123–24. The possibility that state law may require a private pipeline company to pay more likewise does not establish a significant conflict with federal policy.

The rule does not require borrowing state law when an actual conflict exists. *National Railroad Passenger Corp. v. Two Parcels* applied the *Georgia Power* framework but declined to borrow a Connecticut rule that would have forced Amtrak either to pursue local variance proceedings or to pay for entire parcels irrespective of their nexus to the project, contrary to an express statutory limit on Amtrak's condemnation authority. 822 F.2d 1261, 1265–67 (2d Cir. 1987). That was concrete interference with the operation of a national federal program. By contrast, the court distinguished *Georgia Power* precisely because the state rule there "resulted solely in higher condemnation costs." *Id.* at 1267. That is the only concrete consequence identified here. *Two Parcels* therefore illustrates the significant-conflict exception rather than undermining the borrowing framework.

Experience under the state-law rule confirms the absence of any demonstrated conflict here.[4] The Sixth Circuit identified the "only conceivable effect" of borrowing state law as the possibility that condemnors "might be required to pay more or less than under an alternative federal common-law rule," a variation "far too speculative to warrant displacing state law." *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1198 (6th Cir. 1992). The Third Circuit tested the concern more concretely. Although recognizing that a state rule could theoretically be "so far out of step with federal law as to create a significant conflict," the court noted that, "[p]ressed at length for other examples of 'crazy state laws,'" counsel for the pipeline company "could not produce any," and the court was "unpersuaded by the theoretical possibility that some others may exist." *Tenn. Gas*, 931 F.3d at 253–54. *Kimbell Foods* leaves room to except a state law that actually prejudices federal interests. What it does not permit is displacement of state law across the board based on a conflict that remains hypothetical.

4. Indeed, the district court here reached the same conclusion. Applying the *Kimbell Foods* factors, it found that an award of attorney's fees would not frustrate the objectives of the Natural Gas Act. *WBI Energy Transmission, Inc. v. Easement & Right-of-Way Across*, No. 1:18-cv-78, 2022 WL 22649232, at *5–7 (D.N.D. Nov. 1, 2022).

CONCLUSION

For the foregoing reasons, the Court should hold that just compensation is determined by reference to state law when a private party condemns under the Natural Gas Act and reverse the judgment below.

Respectfully submitted,

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