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 THE NATIONAL ASSOCIATION OF REALTORS®, AMERICAN FARM BUREAU FEDERATION, AND REALTORS® LAND INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Ellen Steen
Travis Cushman
Michael D. Thorp
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave. SW
Washington, DC 20024

Sam Spiegelman
Counsel of Record
SPIEGELMAN LAW GROUP
PO Box 1354
New York, NY 10028
201.314.9505
sam@spiegelmanlawgroup.com

Counsel for Amici Curiae

August 20, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The **National Association of REALTORS®** ("NAR") is a national trade association representing over 1.4 million members, including its institutes, societies, and councils involved in all aspects of the residential and commercial real estate industries. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS® and support private property rights, including the right to own, use, and transfer real property.

The **American Farm Bureau Federation** ("AFBF") was formed in 1919 and is the largest nonprofit general farm organization in the United States. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5.5 million member families. AFBF protects, promotes, and represents the interests of American farmers and ranchers. AFBF has participated as an *amicus* in numerous cases before this Court in support of property rights, in particular those of America's farmers.

The **REALTORS® Land Institute** ("RLI") is a nonprofit advocacy organization affiliated with NAR, with a specific focus on developing and advocating on behalf of a network of professionals who broker, lease,

---

[1] Pursuant to Rule 37, counsel for *amici* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *amici*'s intention to file.

develop, and manage open lands, including farms, ranches, recreational, timberland, vineyards, orchards, and undeveloped tracts of land.

As the most prominent voices for the nation's housing and agricultural sectors, *amici* write to impress upon this Court the urgent political, social, and economic stakes lurking behind the legal questions this case presents. If left standing, the Eighth Circuit's ruling will have a chilling effect on inverse condemnation litigation everywhere. Given the stakes for all of their memberships, *amici* will discuss the various ways in which this chill would undermine the constitutional and economic rights of private property owners nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

While North Dakota's definition of "just compensation" aligns with those of many states to include the costs of litigating a private-to-private land transfer under the Natural Gas Act, the federal version—the one the Eighth (but no other Circuits) adopted—pointedly does not. For Natural-Gas-Act condemnees in Arkansas, Iowa, Minnesota, Missouri, Nebraska, and the Dakotas, the ruling means internalizing litigation costs that could erase or even exceed whatever the compensation to which the Takings Clause entitles them. *See* Pet. App. 6a–10a; *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893), which provided that just compensation "is for the property, and not to the owner").

The argument proceeds in two Parts. Part I explains why and how the error below will spread beyond the facts of this case and the walls of the courthouse in which it was made. The Eighth Circuit's presumption—that congressional silence displaces state compensation law—inverts the rule this Court has long applied to statutes that touch core state domains, and it arrives at a moment when advocates are already ascribing "public use" to functions that no court has ever endorsed. The same silence on compensation that the Eighth Circuit construed as embedding the federal formula within the Natural Gas Act (and, by extension, the Federal Power Act) is ripe to appear in countless other potential delegations of federal power.

Part II counts the costs of the Eighth Circuit's error to farmers and property owners, whom *amici* represent. For farmers—whose land is 83 percent of everything the sector owns and whose median farm income is currently in the red—a compensation measure that excludes litigation costs converts almost every meritorious claim for more compensation into a losing trade, and every opening offer into a discount priced accordingly. For real estate professionals and the property owners they represent, the same measure writes a permanent markdown into the value of homes within an existing or potential infrastructural corridor. Both injuries flow from the same source—a definition of "just compensation" that excludes the costs of vindicating one's constitutional rights and thus almost invariably falls well short of making owners whole. The Fifth Amendment's floor was never meant to be the Natural Gas Act's ceiling. This Court should reverse and hold, alongside the four other federal circuits that have considered the issue, that just compensation in private condemnations under the Act and other federal delegations silent on the matter is to be measured not by federal *de facto* rules, but by the *de jure* rules of the state in which the property sits.

ARGUMENT

I. THE PRECEDENTIAL DANGERS LURKING IN THE EIGHTH CIRCUIT'S RULING

A. The Error Below Will Not Confine Itself to the Eighth Circuit

The Eighth Circuit's rule—which runs contrary to that of the Third, Fifth, Sixth, and Eleventh Circuits[2]—at once *incentivizes* condemnors to reduce payouts to far below fair-market values while *disincentivizing* condemnees from seeking to vindicate their constitutional rights to the fullest. Left unchecked, the Eighth's ruling will likely begin to inform the meaning of "just compensation" in other areas of federal law within the Circuit and perhaps beyond. Most concerning to REALTORS® and the professionals and property owners they represent is the prospect that the compensation for federal condemnations of residential areas—yes, for pipelines, but more commonly for interstate highways, airports, military installations, and border security—will likewise decline precipitously, artificially depressing sales prices of homes in the planned or potential path of such projects.

[2] *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019); *Miss. River Transmission Corp. v. Tabor*, 757 F.2d 662, 665 n.2 (5th Cir. 1985); *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992); *Sabal Trail Transmission, LLC v. 18.27 Acres of Land*, 59 F.4th 1158 (11th Cir. 2023); *Ga. Power Co. v. 138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980) (en banc) (same rule, but under the Federal Power Act).

These fears are by no means baseless. For years now, advocates for more public control over private interests have been reframing *PennEast* as they have many questionable applications of "public use" since *Kelo*. *See PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482 (2021) (permitting private condemnation under federal auspice); *Kelo v. City of New London*, 545 U.S. 469 (2005) (allowing condemnation and transfer to another private entity for the "public use" of economic development).

One law professor, severely misreading *PennEast* and *Kelo*, recently went so far as to argue that "a taking by the federal government for the purpose of producing affordable housing during today's nationwide housing market failure satisfies the Fifth Amendment's 'public use' requirement." Desiree C. Hensley, *Build, Baby, Build: Federal Takings for Affordable Homes*, 91 Mo. L. Rev. 21, 56 (2026) (ignoring that *PennEast* did not opine on what constitutes a "public use" but only the circumstances under which the federal government can delegate an *established* public use to a private entity for condemnation; forgetting that *Kelo* said New London's specific plan passed the "public use" test, not that anything that plausibly improved economic conditions would).[3] Another misreads *PennEast* spectacularly, certain that because the Court signed off on the Federal Energy Regulatory Commission's ("FERC") authority to delegate a "certificate of public convenience and necessity" to private contractors, the "public use standard" in this context is "simply whether a pipeline was lawfully found to be required by the public convenience and necessity." Alison

---

[3] See *Kelo*, 545 U.S. at 478 (takings "under the mere pretext of a public purpose" remain forbidden).

Gocke, *A Tale of Two Delegations: Some Reflections on* PennEast, 41 Va. Envtl. L. Rev. 62, 72–73 (2023). The author seems to believe that the *name* of FERC's "public-convenience-and-necessity certificate" for what has long been understood as a constitutional "public use" (pipelines and other utilities) somehow qualifies *any* uses that officials deem necessary or even merely convenient to the public. This recursive exercise clearly means to amplify *PennEast* into more than it is—as some federal courts did, and continue to do, for *Kelo*. *See, e.g.*, *Goldstein v. Pataki*, 516 F.3d 50, 58 (2d Cir. 2008) (dismissing a pretext claim at the pleadings). *Cf. Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (offering that a "plausible accusation of impermissible favoritism" deserves serious review). Indeed, *Kelo*'s progeny feature more than a handful of endorsements of "public use" that would not even pass Justice William O. Douglas's notorious "well-nigh conclusive" deference standard. *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations"—a qualifier subsequent courts tend, conveniently, to ignore—"when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

The Eighth Circuit's rule poses a number of serious constitutional and economic dangers, not least of which are the license it grants condemnors to discount every opening offer by the price of resistance, and the invitation it extends to read other, similarly silent federal delegations the same way. None of this requires the Court to revisit *Kelo* or *PennEast*. It only asks that the Court decline to let a compensation rule built by one sovereign supplant that of another, more natural candidate, especially doing so without much, if any, examination into whether federalism actually demands that result.

B. The Error Threatens to Disincentivize Well-Founded Takings Claims

This case does not turn on the proper scope of "public use." Instead, it asks only whether the "just compensation" paid for condemnations for the public's use "be determined by reference to state law."[4] Given the contemporary legal landscape, however, there is a palpable risk that a ruling endorsing the Eighth Circuit's theory of just compensation will add another hurdle to the doctrinal challenges already facing property rights advocates striving to cabin "public use" within its proper constitutional contours. With respect to *amici*, the Eighth Circuit's standalone refusal to apply state rules of just compensation to federal takings, if nationalized, would in one fell swoop effectively close the courthouse doors to countless condemned owners. Research into the behavioral economics of litigation has long noted that artificially reducing the ex-ante odds that a would-be plaintiff—even one with meritorious claims—will obtain judicial relief commensurately disincentivizes their taking legal action in the first place.

This Court has long acknowledged that fee-shifting can affect compliance with the law, including by discouraging private enforcement. In *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews*, 174 U.S. 96 (1899), this Court held that a railroad had to pay the attorney's fees of any successful plaintiff who was injured by a fire caused by the railroad's operation, as Kansas law dictated. The railroad claimed that the statute violated the Fourteenth

---

[4] The question presented reads in full: "In private condemnations under the Natural Gas Act, should just compensation be determined by reference to state law?" Pet. i.

Amendment because it arbitrarily singled out railroads to be penalized for failing to pay debts. This Court responded that the purpose of the statute was to "secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains," and, therefore, the statute was a valid police regulation. *Id.* at 98. There is no reason why just-compensation compliance should be impervious to the same incentive structure.

Kelo created a backlash wave of state legislation aimed at "*Kelo*-proofing" private property rights. Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* 135–65 (2015). But it did not spur the same *federal* response, especially not from the courts. *See generally* Ilya Somin, *The Judicial Reaction to* Kelo, 4 Alb. Govt. L. Rev. 1 (2011) (discussing the very mixed response to *Kelo*, especially as between state and federal courts). Part of the problem in the federal system is that its judges are beholden to more than a century of statute and caselaw that offer the federal government broad latitude to define "public use" as befits the context. *See, e.g.*, 40 U.S.C. §3113 (authorizing condemnation whenever an authorized officer deems it "necessary or advantageous to the Government"). *See also Berman*, 348 U.S. at 32; *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681–82 (1896) (calling the "[v]aluable lessons in the art of war" a "public use" that is "so closely connected with the welfare of the republic itself" to justify the condemnation of private lands for statues, monuments, and other war memorials).

Couple ongoing judicial confusion with a growing chorus of academics, policy thinkers, and commentators from across the ideological spectrum pushing brave new uses of eminent domain to fast-track quick-fix solutions to any number of real and perceived socioeconomic ailments. *See, e.g.,* Hensley, *supra*; Gocke, *supra*; Alexandra B. Klass, *Eminent Domain Law as Climate Policy*, 2020 Wis. L. Rev. 49, 51 (2020) (calling for the use of eminent domain "to slow or halt the continued development of fossil fuel" while permitting it to continue for "clean energy" projects). These are ills that market forces are apparently incapable of addressing—*provided* one effectively ignores the inertial impact of decades of overregulation in nearly every aspect of American life. *See generally* Joseph Gyourko & Jacob Krimmel, *The Impact of Local Residential Land Use Restrictions on Land Values Across and Within Single Family Housing Markets*, 126 J. Urb. Econ. 103374 (2021).

C. How and Why the Eighth Circuit's Rule Will Travel

Statutes like the Federal Power Act's licensee provision, 16 U.S.C. §814, and the government's general condemnation authority, 40 U.S.C. §3113, both permit the federal government to seize or contract for the seizure of private property. But like the Natural Gas Act, both do so without identifying the proper measure(s) for just compensation. *Compare* 15 U.S.C. §717f(h) *and* 16 U.S.C. §814 *with* 33 U.S.C. §532 (expressly borrowing state compensation law), *and* 16 U.S.C. §824p(f)(2) (supplying a federal definition). Congress knows how to choose the measure for compensation. When it does not, the rule defaults to state law. *See, e.g.*, *Ga. Power Co.*, 617 F.2d at 1123.

While authorities typically steer pipelines away from residential zones, the same cannot be said for the recent proliferation if data centers that have become a new node of both local and national debate. And as the prospect grows for federal laws to overrule local moratoria on data centers, the question of how—and how fully—to compensate owners in those projects' paths will not stay confined to gas lines for long. *See* Exec. Order No. 14,318, *Accelerating Federal Permitting of Data Center Infrastructure* (July 23, 2025); Good Jobs First, *Data Center Moratorium Bills Are Spreading in 2026* (2026) (tracking moratorium bills in at least a dozen states) (available at: https://tinyurl.com/2j46aejx); S. 4214, 119th Cong. (2026) (proposing the opposite—a federal moratorium).

Utilities in Georgia, Pennsylvania, and elsewhere are already invoking—or threatening—eminent domain to route transmission lines to hyperscale computing campuses, and landowners are contesting whether such takings serve a "public use" at all. Aaron Walayat, *When Can a Power Company Take Your Land for Data Center Infrastructure?*, The Conversation (July 16, 2026) (available at: https://tinyurl.com/mr2ztbys). However those public-use disputes are resolved, the compensation question inevitably follows right behind. And if federal law comes to occupy this field the way the Natural Gas Act occupies pipelines, the decision below supplies the default—that is, the constitutional floor, fees excluded, for every parcel in its path.

This Court knows well that when Congress legislates against the backdrop of state property law and says nothing about the measure of compensation, state law typically fills in the gap. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727–29 (1979) (reasoning that "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision" because the state code "furnish[es] convenient solutions" that are "in no way inconsistent with adequate protection of the federal interests" implicated) (internal citation omitted). The Court should say so plainly here—before the Eighth Circuit's contrary presumption writes itself into the Federal Power Act, the general condemnation statute, and whatever new statutes Congress enacts as the nation's infrastructure continues to evolve.

II. THE ECONOMIC COSTS OF DISINCENTIVIZING TAKINGS CLAIMS ON THOSE ENGAGED IN LAND SALES AND CULTIVATION

At first glance, farmers (and ranchers) and real estate professionals do not have much in common. One cultivates land, the other clientele. The former tends to open fields, the latter open houses. Outside these and a litany of other differences, however, both share a fundamental dependence upon real estate—either the cultivation or purchase and sale thereof—to secure the fruits of their labor and thereby play their part in a functional economy.

Every artificial adjustment to the fair market value of their (or their clients') real estate carries costs. Some are less quantifiable than others. It is difficult (though not impossible) to calculate the dollar value that a new tariff shaves off of the *farmlands* hosting crops and livestock so levied. *See, e.g.*, Stephen Morgan et al., *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture*, ERR-304, U.S. Dep't of Agric., Econ. Res. Serv., at 16–23 (2022) (calculating the costs of retaliatory tariffs on various agricultural items). It is as, if not more difficult to determine what percentage drop in new builds are attributable to the rising cost of drywall. So too is trying to *then* calculate whether that drop in new builds actually raises or reduces existing home prices in one neighborhood over another. *See generally* Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 Hous. Pol'y Debate 25 (2019) (discussing the "ripple effects" of new construction on surrounding areas).

While by no means arithmetical, calculating *just* compensation typically proves far less daunting. In most cases, one looks at the market in comparable properties as it stood *at a fixed point in time*—that is, at the moment of actual or effective condemnation (which carries its own, albeit non-mathematical, challenges). *See Olson v. United States*, 292 U.S. 246, 255 (1934) (market value "at the time of the taking contemporaneously paid in money"). The exercise involves few, if any, of the more dynamic variables that tend to complicate the *ex-post* pricing of macroeconomic trends (whereas *ex-ante* pricing is (relatively) simply a matter of observing real-time, open-market transactions). *Cf. United States v. Miller*, 317 U.S. 369, 376 (1943) (presupposing ease in calculating if an owner should "have the benefit of any increment of value added to the property taken by the action of the public authority in previously condemning adjacent lands"). The smaller the market, the more difficult this task becomes. *Cf. United States v. 564.54 Acres of Land*, 441 U.S. 506, 510–11 (1979) (noting the challenges with determining just compensation when there is no "ready market" for the property seized).

Given the relative ease in calculating the just compensation owed to a condemned or overregulated owner, it is also relatively easy to determine at what precise dollar figure it becomes economically irrational for that owner to pursue a takings claim—as when the likelihood of recovering the legal costs of securing just compensation goes from potentially 100% under state law to somewhere near zero under the federal formulation (and this is *before* one considers their chances of winning at all).

That is the “easy” part. The complexities mount, and begin to rival those of the tariff and drywall examples, if one tries to calculate how the falloff in meritorious takings claims impacts the housing and farmland markets overall (for example).[5] Still, even a partial accounting of the broader economic situation of farmers and property owners reveals some stark realities that *amici* hope will inform the Court’s decisionmaking.

A. Just Compensation and the Economics of Farming

Federal authorities forecast that farm real estate will be worth $3.77 trillion in 2026—83% of all sector assets. U.S. Dep’t of Agric., Econ. Res. Serv., *Farm Sector Income & Finances: Assets, Debt, and Wealth* (Feb. 5, 2026). Much of it is working collateral, with farm real-estate debt projected at $404.3 billion for the same fiscal year. *Id.* Loans these lands collateralize are essential to the regular operations of small- and medium-sized agribusinesses. *Id.* For many farming families, the remainder doubles as retirement funds and *inter vivos* transfers to beneficiaries—mostly children and grandchildren—

---

[5] Whether, for example, systematic under-compensation along certificated corridors depresses land values county-wide, discourages improvements near mapped routes, or tightens agricultural credit—questions the literature has only begun to take up.

who have been preparing for years to assume ownership and control from the eventual decedents. *See* Am. Farmland Tr., *New Land Transfer Program to Help Nation's Farmers Protect and Access Farmland* (Dec. 7, 2023) (nearly 300 million acres of farmland expected to change hands within twenty years) (available at https://tinyurl.com/muu3e56e). In this light, farmers seeking to vindicate the entire value lost as a result of a condemnation underpayment are not haggling at the margins. Awards that markedly undershoot the actual obtainable price tag of lands that have both market and collateral values severely undermine impacted owners' capacities to maintain their farms as going concerns.

For all the wealth tied up in farmland, the median farm household is forecast to *lose* money farming in 2026—roughly $1,200 in farm-sourced income, with wages from outside farming expected to cover some if not most of the shortfall. U.S. Dep't of Agric., Econ. Res. Serv., *Farm Sector Income & Finances: Highlights From the Farm Income Forecast* (2026) (available at: https://tinyurl.com/3bartnur). Most small (and many medium) outfits do not carry cash sufficient to spend—and potentially never recover—on asserting takings claims under the Natural Gas Act or any other federal law. So when a condemnor's opening offer comes in at roughly *half* of fair market value—as it did in this case—the Eighth Circuit's rule leaves the condemnee the Hobson's choice to take the lesser (though certainly sizeable) loss in forfeit sales revenues or roll the dice, sue for closer to the full value, and—win or lose—expend a large if not majority portion of "just" compensation on legal fees. One Petitioner's legal bills exceeded $380,000, whereas under the North Dakota rule that the federal district court applied, *every* such dollar was recoverable. *See* N.D. Cent. Code §32-15-32; Pet. App. 18a.

This case paints a particularly stark picture. North Dakota's rule—the one the district court applied—enables awarding a condemned owner their reasonable costs and "reasonable attorney's fees for all judicial proceedings" related to the vindication of their full constitutional rights. N.D. Cent. Code §32-15-32. Sister states have similar schedules. Minnesota requires fees, litigation expenses, *and* appraisal and expert costs whenever the final award exceeds the condemnor's final written offer by more than 40%. Minn. Stat. §117.031(a). Iowa requires them whenever the commissioners' award exceeds 110% of the final offer. Iowa Code §6B.33.

These rules are by no means perfect—especially as they tend to provide for flip-switch rather than graduated relief—but the federal approach pales in comparison. The latter offers only fair market value—"the full monetary equivalent of the property taken," *Almota Farmers Elev. & Whse. Co. v. United States*, 409 U.S. 470, 473 (1973) (internal citation omitted)—with the costs of proving that value excluded outright. *Bodcaw*, 440 U.S. at 203 ("[A]ttorneys' fees and expenses are not embraced within just compensation." (quoting *Dohany v. Rogers*, 281 U.S. 362, 368 (1930))).

Compensation rules are set after FERC certification but long before any condemnation petition is filed. Condemnors who know, *ex ante*, that a would-be condemnee will have to absorb most if not all of their own litigation costs will of course use this asymmetrical leverage to their pecuniary advantage. *Cf. Valley Elec. Ass'n v. Overfield*, 106 P.3d 1198, 1200 (Nev. 2005) (noting fee exposure can force owners "to accept unfair 'low-ball' settlement offers"). Law-and-economics literature is chock-full of research effectively confirming that cost-allocation rules determine whether meritorious claims are brought at all, especially in the takings space. *See, e.g.*, Aaron Bartholomew & Sharon Yamen, *Businesses Beware: The Changing Face of Attorney-Fee Awards in U.S. Courts*, 13 Am. U. Bus. L. Rev. 1, 22–36 (2024) (cataloguing recent changes to fee-shifting regimes to a hybrid of the English and American Rules that tend to favor claimants in order to encourage more, not less, litigation); Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 887–90 (2007) (analyzing empirical research showing the prohibitive impact of litigation costs on inverse condemnation actions, including complaints that "'low-ball' offers have compelled" condemnees "to spend thousands of dollars to get their own appraisals, hire attorneys, and fight for a fair price for land they didn't want to sell") (internal citation omitted); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. Envtl. L.J. 110, 116–17 (2002) (observing that "value is fixed based on an opinion or educated guess about what the negotiated price of the property would have been if, contrary to fact, the owner had sought to sell it and a willing buyer had sought to buy it on the day of the taking . . . using various valuation techniques similar to those used in appraising property in other non-market contexts . . . .").

This Court recognizes that prohibiting transactional asymmetries like excessive fines, for example, "has been a constant shield throughout Anglo-American history." *Timbs v. Indiana*, 586 U.S. 146, 153 (2019). As has just compensation. *See Tyler v. Hennepin Cnty.*, 598 U.S. 631, 642 (2023) ("Our precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed."). While not always correctable—as in cases when the Court finds that lawmakers and regulators made poor but constitutional policy choices—there are cases in which the choice of law is both bad policy and unconstitutional.

The country's gas-transmission network already runs some 300,000 miles. *See* GAO-24-106690, *Gas Pipeline Safety: Better Data and Planning Would Improve Implementation of Regulatory Changes* (2024). Much of it beneath working farms and ranches. What that burial does to the ground above is now well documented. Agronomists in Ohio monitored 29 farms crossed by three new pipelines. They found that corn yields on acreage above the pipeline were between 23.8 and 19.5 percent *below* adjacent, undisturbed grounds—*five years* after installation. Theresa Brehm & Steve Culman, *Soil Degradation and Crop Yield Declines Persist 5 Years After Pipeline Installations*, 87 Soil Sci. Soc'y Am. J. 350, 351 (2023).

Such losses *are* compensable in principle but almost never in practice. See *United States v. Miller*, 317 U.S. at 376–77 (highlighting the confusion: "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, . . . " and so on).

Further difficulties in calculation emerge when one considers the sheer acreage involved. Generally, when a home is taken, it is the entire property at once. In large acreage properties, when only a portion is taken, the direct dollar per acreage value is harder to determine because it significantly affects (and usually diminishes) the overall value and usability of the remaining property. And the larger the property, the harder it is to quantify the proximate costs of an easement—*viz.*, how a pipeline easement over a portion of the property affects value and usability depending upon how far the unburdened acreage. Harder still is predicting how value depreciation will impact long-term utility and marketability. *See generally* Nicole Karwowski, *Estimating the Effect of Easements on Agricultural Production*, Nat'l Bur. Econ. Res., Working Paper No. 30156 (2022) (noting the complex causal relationship between conservation easements and the usability and actual use of the unburdened portion of the property) (available at: https://tinyurl.com/3tk9dbr5).

Many farmers-turned-condemnees in the Eighth Circuit will in most cases find themselves doubly injured and uncompensated. First, by the underwhelming "purchase" price for a pipeline easement. Second, by the subsequent revenues lost to soil degradation directly attributable to that easement. These can include the costs of paying expert witnesses to collect, analyze, and compare soil samples and yield records (to say nothing of the costs of hiring a forensic accountant and/or an agrarian economist to prove the actual amount of revenues so forfeited). *See, e.g.*, *N.D. Dep't of Transp. v. Rosie Glow, LLC*, 911 N.W.2d 334, 335–37 (N.D. 2018) (district court must account for expert-witness costs under state law). Because of, or despite the fact that pipeline easements keep "taking" long after the compensation stops flowing, the front-end award is a farmer's only likely chance at being made whole—a chance that the Eighth Circuit has rendered cost-prohibitive to most small- and mid-size farmer-condemnees.

For nearly a century, this Court has recited that a condemned owner "is entitled to be put in *as good* a position pecuniarily as if his property had not been taken." *Olson*, 292 U.S. at 255 (emphasis added). A farmer or rancher who winds up with fair market value minus the sizeable—sometimes exceeding—costs of litigating their claims is not made whole. Not by a longshot. Especially accounting for the reduced likelihood of their suing at all, combined with the growing confidence this instills in condemnors to continually lowball their initial and final offers. North Dakota and its neighbors wrote their compensation rules to prevent this exact result, while the Eighth Circuit casts aside a mountain of caselaw and choice-of-law rules in order to erase them.

B. Just Compensation and the Economics of Real Estate

Real estate professionals, in turn, rely on a robust, organic housing market free of as many artificial barriers to dynamic pricing as possible. The potential exercise of eminent domain has long played a role in home-pricing, though this is not to say that it never should. Benjamin Franklin famously limited life's certainties to "death and taxes." Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), *in* 10 The Writings of Benjamin Franklin 68–69 (Albert Henry Smyth ed., 1907). Whether or not it was intentional, Poor Richard[6] forgot to include "regulations"—though, if anything, this likely reflected their virtual nonexistence in his day—at least in their modern forms. Contrary to some scholars, a regulation could work a taking, and did, as early as the mid-nineteenth century, if not earlier. *See, e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177 (1871) ("It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, . . . subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."). *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1553 (2003) (arguing that "modern takings law and scholarship profoundly misunderstand nineteenth-century state regulatory takings law," and that while "[e]arly state eminent-domain opinions did not organize takings cases under the same categories that we apply now, [] it is still possible to identify a series of decisions that closely resemble modern regulatory takings cases").

By the 1920s, the concept of "regulatory takings" had a name, with Justice Oliver Wendell Holmes famously announcing that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This is as true for housing as anything else. Indeed, this Court has made quite clear that most categories of housing regulation

[6] Franklin's *nom de plume* for his *Almanack*, published annually from 1732 to 1758.

are not going away any time soon. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Block v. Hirsh*, 256 U.S. 135 (1921). And while the mere *prospect* of a (more common) regulatory or (less common) physical taking of residential lands for pipeline easements is not itself a taking, depending on its likelihood it can certainly impact what buyers are willing to pay. *See generally*, Julia L. Hansen et al., *Environmental Hazards and Residential Property Values: Evidence from a Major Pipeline Event*, 82 Land Econ. 529 (2006) (finding statistically significant price discounts near a Bellingham, Washington pipeline once buyers repriced its risk).

The City of Buffalo spent much of the 1960s threatening to condemn a printing plant within its borders. The New York Court of Appeals held that the owner could recover (should they prove) the dollar amount of condemnor's "affirmative value-depressing acts." *City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895, 905 (N.Y. 1971) (internal citations omitted). While not a common outcome (nor is it uncommon so much as it is rarely broached at all), the ruling shows a court willing to recognize what economists have proven time and again—that the mere *threat* of condemnation or overregulation indeed distorts market prices. This creates a self-fulfilling prophecy in which the *fear* of condemnation or overregulation reduces the very price tag that the condemnor must later offer in order to meet the Fifth Amendment's "just compensation" requirement.

Notice the similarities with the situation in which many farmers find themselves. For them, point-in-time valuation fails to capture the *subsequent* losses resulting from soil degradation, etc. For property owners (and the real estate professionals who facilitate their sales and purchases), point-in-time valuation likewise ignores the *antecedent* losses attributable to the prospect of condemnation or overregulation.

Homes also hold “dignitary” and “sentimentality” premiums for many owners that are not captured in “just” compensation calculus. *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich. L. Rev. 101, 107–110, 127 (2006) (discussing subjective valuation of residents rooted in emotional attachment to their own homes and the “indignan[ce] when faced with the loss of autonomy that the threatened eminent domain action represents” and “their anger at the amount of money that the government offers them”).

The empirical research reveals that the threat of litigation, combined with the plausible costs of fighting and losing such claims, “should help deter government from responding” to underdevelopment, for example, “with inefficient takings”—of residential neighborhoods, say. *Id.* at 140 (discussing other studies). This disincentive diminishes substantially when the condemnor has the influence and funding of a more powerful patron behind it, as is often the case for private pipeline operators armed with a FERC license. *Id.* at 141 (“When the funding for a project comes from a higher level of government . . .,” condemnors “have little incentive to consider whether the economic benefits of a proposed project will ultimately materialize.”). As Professor Garnett notes, all of these transactional asymmetries compound in private takings, again, as here. “[O]wners may take an additional ‘dignitary’ hit because private beneficiaries frequently receive a windfall from the transaction.” *Id.* at 145. All the more reason to integrate the costs of litigation into the ultimate pay package a condemnee can expect or even merely hope to obtain. As one California appellate court observed: "[O]ne would expect a prudent condemnor to offer its best estimate of fair market value plus some reflection of its own savings from avoiding trial, with a further upward adjustment for elimination of potential liability for the condemnee's litigation expenses." *Emeryville Redev. Agency v. Harcros Pigments, Inc.*, 125 Cal. Rptr. 2d 12, 29 (Ct. App. 2002).

Fair market value was always the *conservative* measure of "just" compensation—even before takings caselaw began integrating more economic calculus than Justice Holmes's "gone-too-far" "formula," for example. *See 564.54 Acres*, 441 U.S. at 510–11; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (noting that "this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values" without compensating for every single dollar lost).

Fee- and cost-shifting rules are one way state legislatures keep almost inevitable shortfalls from swallowing much if not all of the "just" compensation owed in a given case. Strip them out—as the decision below does for every Natural Gas Act condemnation—and the discount becomes a feature rather than a bug. And the more courts endorse it, the greater the power balance grows in condemnors' favor. A compensation rule that lets condemnors buy at values they know they can set artificially low will not stay caged in the Eighth Circuit forever. Sooner or later, as with any rule that favors condemnors—who have the built-in advantage of choosing when and how to initiate a takings dispute—others will continue to push at its outer limits. Without this Court's definitive word, some will, regrettably, succeed.

CONCLUSION

For the foregoing reasons, and those set forth by Petitioners, the Court should reverse the Eighth Circuit ruling below and rule in favor of a state-law theory of just compensation.

Respectfully submitted,

Ellen Steen	Sam Spiegelman
Travis Cushman	*Counsel of Record*
Michael D. Thorp	SPIEGELMAN LAW GROUP
AMERICAN FARM	PO Box 1354
BUREAU FEDERATION	New York, NY 10028
600 Maryland Ave. SW	201.314.9505
Washington, DC 20024	sam@spiegelmanlawgroup.com
August 20, 2026	*Counsel for Amici Curiae*