

NO. 20-0393

**In the
Supreme Court of Texas**

JAMES FREDRICK MILES,

Petitioner,

v.

**TEXAS CENTRAL RAILROAD & INFRASTRUCTURE, INC. AND
INTEGRATED TEXAS LOGISTICS, INC.,**

Respondents.

On Petition for Review from the
Thirteenth Court of Appeals
at Corpus Christi–Edinburg, Texas
Cause No. 13-19-00297-CV

**BRIEF OF SNCF AMERICA, INC. AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

SNCF America, Inc. is an indirect U.S. subsidiary of Société Nationale SNCF SA (“SNCF”). SNCF is the French national railway. Founded in 1937, SNCF is now one of the world’s largest operators of high-speed as well as traditional passenger rail services. SNCF has operated France’s high-speed rail network (“Train à Grande Vitesse” or “TGV”) since 1981 and has built more than 1,600 miles of track for high-speed trains. SNCF and its subsidiaries have 260,000 employees worldwide and—before the COVID-19 pandemic—transported by rail approximately 4.5 million passengers on an average day, including more than 360,000 daily passengers on its high-speed trains.

This case concerns whether private companies that have never owned or operated trains anywhere in or outside the United States, have not constructed any rail infrastructure, and have no reasonable probability of being able to do so in the future, nevertheless may declare themselves to be “railroad companies” or “interurban electric railways,” and thus assume all the rights and powers that such entities enjoy under Texas law. SNCF is a global leader in rail transportation committed to delivering sustainable passenger and freight transport services with more than four decades of experience in building and operating high-speed trains and rail infrastructure. As SNCF’s U.S. subsidiary, SNCF America respectfully

¹ SNCF America has paid all costs and fees incurred in the preparation of this brief.

submits that it can provide additional information and context that may assist the Court in understanding the important implications of these issues for the Texas rail industry.²

SUMMARY OF ARGUMENT

This Court has recognized strict limits on the exercise of the extraordinary power of eminent domain. That is particularly so where private entities seek the power to condemn private property, ostensibly for public purposes. While the Texas legislature has authorized certain private entities—such as common carriers and railroad companies—to exercise the power of eminent domain, this Court has made clear that a private company seeking to invoke this statutory power must demonstrate, through objective evidence, a reasonable probability that it will in fact meet the requirements for the exercise of that power. Merely declaring oneself to be the type of entity authorized to exercise eminent domain is not sufficient.

The court of appeals ignored those principles and instead held that Respondents Texas Central Railroad and Infrastructure, Inc. (“TCRI”) and Integrated Texas Logistics, Inc. qualify as railroad companies—even though they presently are not operating a railroad and have never built any actual rail infrastructure—simply because they supposedly have taken “many of the necessary steps in order to be able to create and operate a railroad in the future.” Op. 9. Those

² In 2008 and 2016, SNCF America responded to an RFP from the Federal Railroad Administration for high-speed rail in Texas.

steps may be necessary, but they are not sufficient. The most important step for the creation and operation of a railroad is to obtain financing. To date, Respondents have not shown that they have the necessary funds or financial guarantees to build a high-speed rail system. Over the years, Respondents have asserted time and again that their project will be entirely privately financed, but the history and economics of high-speed rail make plain that Respondents will not be able to secure such financing. Indeed, Drayton McLane, the chairman of TCRI's parent organization, Texas Central Partners LLC, recently stated that they "hope to receive [money] from President Trump's infrastructure stimulus through the Department of Transportation."³ This striking new admission greatly weakens Respondents' oft-repeated claim that they will rely only on private financing, and demonstrates that Respondents have not taken the necessary steps to create and operate a railroad. Accordingly, Respondents cannot demonstrate a possibility, let alone a reasonable probability, that they will in fact operate a railroad at any time in the future. The Court should grant review to correct the court of appeals' erroneous decision.

ARGUMENT

Several years ago, Respondents Texas Central Railroad and Infrastructure, Inc. and Integrated Texas Logistics Inc.—two private companies formed in 2012 and

³ See Letter from Drayton McLane, Jr., McLane Group, to Hon. Robert Nichols (April 8, 2020), <https://bit.ly/2FlhBkk> [hereinafter "April 2020 Letter"]; see Shawn Arrajj, *Texas Central weighing use of federal stimulus money for high-speed rail project*, Community Impact Newspaper (June 12, 2020), <https://bit.ly/3k5jgcM>.

2017 respectively—embarked on a quest to build and operate an entirely privately financed high-speed rail line connecting the outskirts of Dallas and the outskirts of Houston. Respondents’ ambitious plan contemplates the construction of a 240-mile high-speed route cutting across a vast swath of the State of Texas—an undertaking that will cost at least \$30 billion,⁴ and that would require the permanent acquisition of approximately 1,800 parcels of private land, some from unwilling sellers.⁵

To SNCF America’s knowledge, no such privately financed venture has succeeded anywhere in the world. Respondents’ plan appears no different. To date, Respondents have not secured the private financing necessary to complete a project of this magnitude, and the history of high-speed rail projects in numerous other countries demonstrates that, in all likelihood, Respondents will not be able to secure such financing. Faced with this reality, Respondents have now admitted that they may seek funding from the U.S. Government to finance this project.⁶ There is no evidence that the U.S. Government will provide such financing. In the meantime, Respondents have laid no railroad tracks, built no railroad stations, and own no rolling stock. Moreover, to build and operate a system as complex as high-speed rail requires extensive experience and expertise in an array of technical fields.

⁴ See April 2020 Letter (“The project has turned into a \$30B project and we have certainly hit a snag with all of the difficulties of the Corona Virus.”).

⁵ Dallas to Houston High-Speed Rail, Final Environmental Impact Statement (May 2020), p. ES-35, tbl. ES-12, <https://bit.ly/3bVZ22B> [hereinafter “Final EIS”] (PDF at 43).

⁶ Sofia Krusmark, *Will Stimulus Money Help Put Texas Central’s High-Speed Rail Back on Track?*, Dallas Bus. J. (June 10, 2020), <https://bit.ly/3bJVn7A>.

Respondents do not have such expertise. Respondents may have a cadre of contractors, consultants, and advisors, but it is Respondents themselves who are claiming to be a railroad company or interurban electric railway company, and they have no experience in the railroad or high-speed rail industry. In other words, all indications are that Respondents lack the wherewithal to convert their grand vision into reality.

Nevertheless, Respondents have asserted that they are entitled to enter private property of Texas landowners to survey land along the proposed route, and to exercise the right of eminent domain. This Court's precedents foreclose Respondents' position. This Court has made clear that the delegation of the core sovereign function of eminent domain is not made lightly; it is subject to stringent scrutiny to ensure the proper balance between, on the one hand, the use of land for the public good, and on the other, respect for constitutionally protected private property rights.

The court of appeals ignored this Court's admonition. Instead, in a thinly reasoned memorandum opinion, the court concluded that Respondents are each a "railroad company" entitled under Texas law to exercise the power of eminent domain because they have "taken many of the necessary steps" to be able to operate a railroad in the future. The court also held that Respondents are each an "interurban electric railway company"—which likewise enjoys the power of eminent domain—

simply because they filled out forms stating a “purpose” to build and operate an interurban electric railway. The court never considered whether there is a likelihood that Respondents’ proposed high speed railroad will in fact be constructed and operated. Had it done so, the court would have had to conclude that there is no reasonable probability that Respondents will operate a railroad in the future, and therefore no basis to permit Respondents to exercise the power of eminent domain.

High-speed rail transportation can bring tangible economic and social benefits to local communities. But the mere theoretical possibility of such benefits should not eclipse the importance of ensuring that such projects are properly planned, financed, and executed.

I. The mere intent or desire to operate a railroad or interurban electric railway does not confer a right of eminent domain.

Eminent domain—the right to condemn private property for public purposes—is an “extraordinary power.” *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 195 (Tex. 2012) (“*Texas Rice I*”). “The exercise of such a necessary power, but one which could be exercised very oppressively, ought to be, and is, very strictly regulated.” *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex. Civ. App.—Galveston 1948, writ ref’d). Accordingly, this Court has long recognized the “overriding policy that because the exercise of the power of eminent domain is in derogation of the rights of the citizen ... statutes conferring such power are strictly construed in favor of the landowner and against

those corporations and subdivisions of the State vested therewith.” *Burch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. 1975).

This Court’s precedents make clear that the conferral of the right of eminent domain on a private entity requires a searching inquiry into whether the entity in fact meets the requirements to exercise that extraordinary power. In *Texas Rice I*, this Court rejected the notion that a pipeline company enjoyed an irrebuttable presumption that it was a common carrier vested with the power of eminent domain merely because it had reported itself as such to the relevant State authorities. 363 S.W.3d at 199; *see also Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909, 916 (Tex. 2017) (“*Texas Rice II*”) (noting that *Texas Rice I* rejected the notion that “a pipeline owner only needed to assert that it was a common carrier, and it became one”). The Court cautioned that “[p]rivate property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more.” *Texas Rice I*, 363 S.W.3d at 199. Instead, the Court required that the pipeline company demonstrate, with objective evidence, a “reasonable probability”—i.e., that it is “more likely that not”—that the company would, once its proposed pipeline was constructed, meet the statutory definition of a common carrier. *Id.* at 202 & n.29; *see* Tex. Nat. Res. Code § 111.002.

The decision below directly contravenes this Court’s guidance. First, while the court of appeals recognized that this Court had required the pipeline operator in *Texas Rice* to show a “reasonable probability” that it would ultimately meet the statutory definition of a common carrier, Op. 9, the court failed to apply that test. Instead, the court held that Respondents here qualify as “railroad companies” because they “have taken many of the necessary steps in order to be able to create and operate a railroad in the future.” Op. 9; *see also* Op. 10 (concluding that Respondents are railroad companies under § 81.002(2) “considering the legislature’s instruction to view present tense as including future tense in the statute and the actions taken by appellants to begin to operate a railroad”).

That reasoning suffers from obvious logical flaws and falls far short of what is constitutionally required. A particular preliminary step might be a necessary but insufficient condition to “operate a railroad in the future.” Just as the mere fact that a person has taken the step of obtaining a college degree in the hope of becoming a doctor does not mean that there is a reasonable probability that the person will in fact become a doctor, the fact that a company has taken preliminary steps to construct a railroad does not mean that there is a reasonable probability that the railroad will in fact be constructed. Applying for government permits is a necessary step for the operation of a railroad. But even if obtained, such permits will be useless—and the railroad will never be operated—if the aspiring railroad company lacks the financial

ability to actually lay tracks. The court of appeals never conducted this critical inquiry. Had it done so, it would have easily concluded that Respondents here have not secured the requisite financing to build a railroad, despite claiming for more than eight years that they would obtain private financing for the project. *See infra* pp. 10–16.

The court of appeals’ disregard for this Court’s precedents and constitutional protections for private property rights did not end there. The court went on to hold that Respondents are also “interurban electric railway companies,” which enjoy the same powers of eminent domain that Texas law grants to railroad companies. Op. 12; Tex. Transp. Code § 131.012. The court’s conclusion in that respect rested entirely on the fact that Respondents had filed certificates of formation with the Secretary of State indicating that their corporate “purpose” is to build and operate an interurban electric railway. Op. 11. The court did not consider whether there was any reasonable probability that Respondents would ultimately in fact be able to operate an interurban electric railway. Instead, the court simply held that Respondents’ expressed “intent is compliant with the statute”; nothing more was required for them to exercise eminent domain authority. Op. 12.

In other words, the court of appeals permitted Respondents to designate themselves as interurban electric railway companies and to arrogate to themselves the power of eminent domain. That test—which is even more lenient than the flawed

analysis that led the court to hold that Respondents are railroad companies—is impossible to square with *Texas Rice I*. The court of appeals brushed aside *Texas Rice I* on the ground that that case concerned “the pipeline’s *public vs. private use*.” Op. 12 (emphasis in original) (citation omitted). That is a distinction without a difference. The principle animating *Texas Rice I* was that a private entity’s unilateral expression of a desire to operate as a common carrier, absent any inquiry into whether the entity was in fact a bona fide common carrier, does not justify threatening private property. *Texas Rice I*, 363 S.W.3d at 202. That principle applies equally here. Respondents may have articulated an intent or desire to construct and operate an interurban electric railway, but the mere clerical act of filing a form with the Secretary of State, without any indication as to whether they will in fact be able to fulfill that desire, is insufficient to transform them into interurban electric railway companies, with all the rights and powers such designation confers. Bare corporate aspirations do not justify jeopardizing private property rights.

II. There is no reasonable probability that Respondents will be able to create or operate a railroad in the future because they have failed to secure the necessary financing to do so.

Had the court of appeals conducted the proper analysis, it would have been compelled to conclude that there is no reasonable probability that Respondents would be able to build and operate a railroad or interurban electric railway in the future. That is so because Respondents’ infrastructure project—which they now

estimate to cost \$30 billion—is presently unfinanced. Obtaining financing is the most important and necessary step for constructing and operating a railroad. Because Respondents have failed to obtain the financing necessary to proceed with building their proposed high-speed railroad, there is no basis to hold that Respondents are railroad companies or interurban electric railway companies entitled to exercise the power of eminent domain.

The court of appeals observed that Respondents engaged in certain activities regulated by the Texas Transportation Code, such as “coordinat[ing] with regulatory agencies concerning the Project, beg[inning] design, construction, and management operations, conduct[ing] land surveys, and enter[ing] into purchase agreements.” Op. 10. Such preliminary actions are necessary but insufficient steps for an undertaking of the magnitude that Respondents are envisioning. The mere fact that a company with no railroad or high-speed rail experience has unilaterally decided to seek access to private property in order to conduct surveys, begin drawing up designs, or apply for permits does not give rise to a reasonable probability that a railroad will ultimately be built and operated.

In reality, Respondents’ proposal suffers from fundamental weaknesses that are all but certain to prevent their high-speed rail project from coming to fruition. For one, significant technical challenges are unresolved. It remains to be demonstrated that the existing power grid in Texas is capable of delivering, all along

the planned corridor, the enormous amounts of power that high-speed electric engines require. The operation of Respondents' proposed high-speed rail would require, in more than one place, substantial modifications to the electric utility infrastructure, which would each require individual environmental clearances as well as approval by the utility providers. *See* Final EIS § 3.9.5.2.1.⁷

Most importantly, even if such technical challenges could ultimately be overcome, it is highly doubtful that Respondents will obtain the financing necessary to complete construction. High-speed rail requires enormous upfront capital expenditures, especially where, as here, the project contemplates new rights of way. In such situations, the construction costs for high-speed rail projects can easily exceed \$50 million per mile. *See* U.S. Gov't Accountability Office, *High Speed Passenger Rail: Future Development Will Depend on Addressing Financial and Other Challenges and Establishing a Clear Federal Role* (March 2009), at 23-24, <https://bit.ly/3k5isVi> [hereinafter "GAO Report"]. That accords with the experience in France, where the construction costs of TGV lines have now reached €26 million per kilometer, or \$49.5 million per mile. *See* Court of Audit, *Rapport public thématique – Synthèse* (October 2014), at 21, <https://bit.ly/3m83EqK>.

Indeed, while Respondents originally claimed that their proposed high-speed rail line would cost \$10 billion to build (\$41.7 million per mile of track), their cost

⁷ *See supra* note 4.

estimate has now ballooned to three times that amount—roughly \$125 million per mile of track. *Compare, e.g.,* CR105 (“This state of the art Project is expected to cost over 10 billion dollars to construct”), *with* April 2020 Letter (acknowledging that the 240-mile “project has turned into a \$30 billion project”).

Since Texas Central’s creation in 2012, Respondents have repeatedly touted the fact that they intend their high-speed rail project to be entirely privately financed and have declared that they “will not seek grants from the US Government or the State of Texas, nor any operational subsidy once operation begins.” Texas Central, FAQ, <https://www.texascentral.com/facts/> (scroll to subsection labeled “FINANCE” and click the “+” symbol to the right of “Who is funding the project?”).⁸ But to SNCF America’s knowledge, no fully privately-financed high-speed rail infrastructure exists anywhere in the world. The revenue generated by high-speed rail is frequently sufficient to sustain the railway’s operation and the very expensive

⁸ *See also, e.g.,* Aman Batheja, *Private Firm Aims for Bullet Trains from Dallas to Houston by 2020*, Texas Tribune (Aug. 15, 2012), <https://bit.ly/3kh8wZd> (quoting Texas Central president’s statement that “[i]f we start taking the federal money, it takes twice as long, costs twice as much. . . . My guess is we’d end up pulling the plug on it.”); Ryan Holeywell, *Texas and Calif.’s Contrasting High-Speed Rail Attempts*, Governing (Sept. 6, 2012), <https://bit.ly/3k8lIngb> (quoting Texas Central president as stating, “We’re not looking for a big chunk of cash from the state of Texas or the federal government,” and that “[w]e will have a project that makes sense and is viable. We are not looking for a subsidized operation.”); Rodger Jones, *Texas bullet train company responds to naysayer Bernard Weinstein*, Dallas Morning News (April 4, 2014), <https://bit.ly/2ZqRM9D> (“We are privately funded, and are utilizing a market-driven approach to bring this bullet train to Texas.”); *Sen. Birdwell authors rider to bar state funds from high-speed rail, Texas Central responds*, Corsicana Daily Sun (April 5, 2019), <https://bit.ly/3m7WTFx> (“Texas Central remains committed to our pledge not to take state appropriations or federal grants to build or operate the high-speed train.”).

costs of maintaining the infrastructure, but it often falls short of what is needed to cover the initial capital investment. “In Japan, while two early lines developed in the 1960s and 1970s may have fully repaid the initial investment and debt related to their construction, three of the high speed rail lines built since the 1987 privatization have been able to recover 10 percent, 52 percent, and 63 percent of their construction costs through ticket revenues.” GAO Report, at 32. To date and to SNCF America’s knowledge, only two high-speed routes in the world—the Shinkansen line between Tokyo and Osaka, and the TGV line operated by SNCF between Paris and Lyon, which are among the oldest high-speed routes in the world—have managed to break even, when accounting for initial infrastructure construction costs. *See* Victoria Burnett, *Spain’s High-Speed Rail Offers Guideposts for U.S.*, N.Y. Times (May 29, 2009), <https://nyti.ms/2R92e18>.

As such, even high-speed rail projects that were originally intended to be privately financed—such as the High Speed 1 line in the U.K. and the high-speed rail system in Taiwan—have ultimately required substantial government investment. Liesel Henn et al., *European case study on the financing of high speed rail*, Australasian Transport Research Forum 2013 Proceedings, at 7-8, <https://bit.ly/2ZnJzTR>. In light of the experiences of numerous high-speed rail ventures in countries around the world, it is widely accepted that fully private high-speed rail systems are all but impossible to achieve, not least because “[t]he full

acquisition and construction cost risks, including unexpected litigation delays, are too high for any private entity to handle without some form of public guarantee.”

Louis S. Thompson & Yuki Tanaka, *High Speed Rail Passenger Services: World Experience and U.S. Applications* (Sept. 20, 2011), p. 31, <https://bit.ly/2Zsoh7A>.

It is therefore unsurprising that private financing for Respondent’s proposed project has not materialized. Respondents have recently suggested that—contrary to their original plan to pursue only private financing—they now “hope to receive [money] from President Trump’s infrastructure stimulus through the Department of Transportation.” April 2020 Letter; *see also* Evan Hoopfer, *Texas Central’s high-speed rail project ‘could require some stimulus money,’ CEO says*, Dallas Bus. J. (June 5, 2020), <https://bit.ly/2FgNQ11>. There is no evidence that the federal government is prepared to provide such funding. In any event, to date, Respondents have not shown that they have cash on hand, loans from the private sector, or guarantees from the federal or state government that would enable them to build and operate \$30 billion worth of infrastructure and rolling stock.

The current precarious economic climate further diminishes the project’s financial viability. In late March this year, Respondents—citing unspecified impacts from the COVID-19 pandemic—laid off 28 employees. *See* Michael Oder, *Texas Central lays off staff, project impacted by COVID-19 pandemic*, KBTX-TV (March 27, 2020), <https://bit.ly/2R9LneF>. It is unclear how Respondents could have been

affected by the COVID-19 pandemic, given that they have no railroad operations to begin with. Regardless, these layoffs call into question whether Respondents have the resources necessary to proceed with building and operating high-speed rail infrastructure. Respondents have also publicly acknowledged that the company’s “ability to begin construction will be contingent upon financial entities in the United States, Europe and Japan, all of which are dealing with urgent priorities generated by COVID-19, completing their due diligence process.” David Burroughs, *Texas Central: COVID-19 Could Impact Project Delivery*, *Railway Age* (April 2, 2020), <https://bit.ly/2Zsombo>. With national economies sliding into the worst recession in decades, it is far from clear that this contingency will actually materialize.

PRAYER

For the foregoing reasons, the Court should grant Petitioner’s petition for review.

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/s/ Christopher M. Odell

Christopher M. Odell

Dated: September 16, 2020

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| Danica L.Milinos | | dmilinos@jw.com | 9/16/2020 3:11:21 PM | ERROR |
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Associated Case Party: Texas Farm Bureau

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