IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSOLIDATED CASE NOS.: 21-11995 and 21-11998

SABAL TRAIL TRANSMISSION, LLC, *Plaintiff/Appellant*,

v.

+/- 18.27 ACRES OF LAND IN LEVY COUNTY, et. al, *Defendants/Appellees*.

and

SABAL TRAIL TRANSMISSION, LLC, *Plaintiff/Appellant*,

v.

+/- 2.468 ACRES OF LAND IN LEVY COUNTY, et. al, *Defendants/Appellees*.

APPEALS FROM THE UNITED STATES NORTHERN DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Plaintiff/Appellant, Sabal Trail Transmission, LLC, in accordance with Federal Rule of Appellate Procedure 26.1, submits its Certificate of Interested Persons as follows:

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33. PNC Bank, National Association (Appellee). PNC Bank, National Association is a national banking association and is a wholly-owned subsidiary of PNC Bancorp, Inc., a Delaware Corporation, which is a wholly-owned subsidiary of The PNC Financial Services Group, Inc.,

a Pennsylvania Corporation, which is a publicly-traded corporation (NYSE: PNC). No entity owns more than 10% of the stock of The PNC Financial Services Group, Inc.

34. Sabal Trail Transmission, LLC (Plaintiff/Appellant)

35. Spectra Energy Corp.

36. Spectra Energy Partners Sabal Trail Transmission, LLC

37. Spectra Energy Partners, LP (NYSE: SEP)

38. Thomas, Lee A. (Defendant/Appellee)

39. Thomas, Lee A., as Successor Sole Trustee of the Trust Agreement for Beverly J. Thomas dated October 1, 2003 (Defendants/Appellees)

40. Thomas, Lee A., as Successor Sole Trustee of the Trust Agreement for Lee A. Thomas dated October 1, 2003 (Defendants/Appellees)

41. Thomas, Ryan B. (Defendant/Appellee)

42. Transcontinental Gas Pipe Line Company, LLC

43. True North Law, LLC (Counsel for Defendants/Appellees)

44. U.S. Southeastern Gas Infrastructure, LLC

45. USG Energy Gas Producer Holdings, LLC

46. Walker, The Honorable Mark E. (U.S. District Court Judge)

47. Williams Partners L.P. (NYSE: WPZ)

48. Ziegler, Esq., Felecia G. (Counsel for Plaintiff/Appellant)

STATEMENT REGARDING ORAL ARGUMENT

Sabal Trail Transmission, LLC ("Sabal Trail"), respectfully requests oral argument. The first issue on appeal—whether the Fifth Amendment's "just compensation" standard or a different, state constitutional standard governs in federal Natural Gas Act condemnation cases—is a question of first impression in this Circuit. This issue is novel and complex. Oral argument will aid the Court.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

These consolidated appeals arise from two related condemnation cases. Sabal Trail exercised the federal power of eminent domain delegated to it by Congress pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h), to acquire easements necessary to build an interstate natural gas pipeline. The district court had jurisdiction pursuant to 15 U.S.C. § 717f(h) and 28 U.S.C. § 1331.

After entry of Amended Judgments on the jury awards, (ECF 197),[1] Sabal Trail appealed issues related to the admissibility of testimony, the governing standard of compensation and its effect on both the verdict and entitlement to attorney's fees and costs, and preemption of state laws regarding attorney's fees and costs, (11th Cir. Case Nos. 19-10705, 19-10722). This Court affirmed the jury awards but held the ruling on entitlement to attorney's fees and costs was not final because the district court had not yet set the amount of those awards. *Sabal Trail Transm'n v. 18.27 Acres*, 824 Fed. Appx. 621, 623 (11th Cir. 2020).

Following remand, the parties briefed entitlement to and the amount of attorney's fees and costs. (ECF 283, 290, 296-297.) On May 11, 2021, the district court disposed of all issues related to attorney's fees and costs by entering Orders

[1] All record citations refer to District Case Number 1:16-cv-00093/11th Circuit Case Number 21-11995 unless otherwise provided.

Granting in Part and Denying in Part Defendants' Motion for Attorney's Fees and Costs, (ECF 298), and the Clerk entered Judgments pursuant to those Orders, (ECF 299). On June 9, 2021, Sabal Trail filed Notices of Appeal. (ECF 300.) This Court has jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291. *See Mayer v. Wall Street Equity Group,* 672 F.3d 1222, 1224 (11th Cir. 2012) (stating postjudgment order on attorney's fees that "disposes of all the issues raised in the motion that initially sparked the postjudgment proceeding" is final).

STATEMENT OF THE ISSUES

The district court erred by applying the Florida Constitution's "full compensation" standard instead of the Fifth Amendment's "just compensation" standard. This led to an erroneous finding of entitlement to attorney's fees and costs.

The district court also erred by failing to follow binding caselaw that establish Congress has occupied the field of attorney's fees and costs awards in federal question cases, preempting state law, and federal courts may not award costs based on state law in either federal question or diversity cases.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

The Federal Energy Regulatory Commission ("FERC") issued a Certificate of Public Convenience and Necessity ("FERC Certificate") authorizing Sabal Trail's natural gas pipeline project and determining easements, including the easements here, necessary for the project. (ECF 1-4.) Pursuant to the Natural Gas Act, Congress delegated its federal power of eminent domain to acquire the easements. 15 U.S.C. § 717f(h). Sabal Trail filed its Complaint to condemn the easements, and the district court entered an order condemning the easements and leaving open the issue of compensation. (ECF 1, 38.)

Sabal Trail moved for partial summary judgment that the standard of compensation owed for its exercise of the federal power of eminent domain is "just compensation" pursuant to the Fifth Amendment to the U.S. Constitution. (ECF 225-2.) Defendants argued the district court should instead apply the Florida Constitution's "full compensation" standard. (ECF 225-3.) The important difference between the standards is "just compensation" does not include attorney's fees and costs, while "full compensation" does. The district court viewed the issue as a choice of law question and applied the state "full compensation" standard. (ECF 225-9.) The district court distinguished controlling

Supreme Court precedent because Sabal Trail is a private entity rather than the federal government. (*Id.* at 17-18.)

Following trial and entry of an Amended Judgment, (ECF 197), Defendants filed a Motion for Attorneys' Fees and Costs, (ECF 199). Sabal Trail opposed the motion, again arguing the Fifth Amendment's "just compensation" standard governs and excludes attorney's fees and costs. (ECF 210.) Sabal Trail also argued that, by enacting numerous federal statutes allowing awards of attorney's fees and costs in specified circumstances, Congress has occupied the field of attorney's fees and costs awards in all federal question cases, preempting state law. (*Id*. at 12-14) The district court deferred consideration, recognizing the issue was on appeal in related cases and would be appealed in this case. (ECF 218.)

Sabal Trail filed a Notice of Appeal of the Amended Judgment and certain interlocutory orders. (ECF 228.) This Court affirmed the jury awards but held the ruling on entitlement to attorney's fees and costs was not final because the district court had not yet set the amount of attorney's fees and costs. *18.27 Acres*, 824 Fed. Appx. at 623.

Following remand, the parties briefed entitlement to and the amount of attorney's fees and costs. (ECF 283, 290, 296-297.) Regarding entitlement, Sabal Trail reasserted its prior arguments and further argued that, in both federal question and diversity cases, costs may be awarded only pursuant to federal law. (ECF 290

at 3, 27-29.) The district court entered an Order Granting in Part and Denying in Part Defendants' Motion for Attorney's Fees and Costs, (ECF 298), and the Clerk entered Judgment, (ECF 299). The district court restated its conclusion that "state substantive law governs the measure of compensation in eminent domain cases brought by private parties against private property owners under the Natural Gas Act," (ECF 298 at 1), and awarded over $765,000 in total fees and costs in these two cases, (ECF 299; Case No. 1:16-cv-00095, ECF 258). Sabal Trail timely filed a Notice of Appeal. (ECF 300.)

II. Statement of Facts

The purpose of Sabal Trail's project is to transport natural gas from Alabama through Georgia and into Florida for power plants to generate electricity. (ECF 8 at 5, 10-11.) The Florida Public Service Commission issued an order finding the need for additional natural gas in Florida, (ECF 1-4 at 28), and directing Florida Power & Light to seek proposals for a new pipeline "to accommodate Florida's long-term natural gas needs," (*id.* at 4). Sabal Trail was selected and began FERC proceedings that culminated with FERC issuing a FERC Certificate finding "persuasive evidence of market need for this project." (ECF 1-4 at 29.)

Pursuant to 15 U.S.C. § 717f(h), Congress delegated to Sabal Trail the federal power of eminent domain to acquire the easements necessary for the project. Unable to purchase the necessary easements from Defendants, Sabal Trail exercised the federal power of eminent domain and condemned the easements. (ECF 1 at 3.)

III. Standard of Review

Whether the district court erred by applying the Florida Constitution's "full compensation" standard instead of the Fifth Amendment's "just compensation" standard is a question of law reviewed *de novo*. *See S. Nat. Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1372 (11th Cir. 1999) ("*Cullman*").

Whether the district court erred by awarding attorney's fees and costs pursuant to state law because Congress has occupied the field of those awards in federal question cases and because federal courts may not award costs based on state law in either federal question or diversity cases is also a question of law reviewed *de novo*. *E.g., Pace v. CSX Transp.,* 613 F.3d 1066, 1068 (11th Cir. 2010); *Kahane v. UNUM Life Ins. Co. of Am.*, 563 F.3d 1210, 1213 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

The Fifth Amendment limits the exercise of the federal power of eminent domain by requiring the payment of "just compensation." Binding Supreme Court decisions establish "just compensation" does not include attorney's fees and costs. The district court incorrectly limited Sabal Trail's exercise of the federal power of eminent domain by imposing the Florida Constitution's more restrictive "full compensation" standard. The award of attorney's fees and costs based on the "full compensation" standard and state laws implementing that standard was error.

By improperly framing the question of the governing standard of compensation as a choice between federal common law or state law, the district court failed to recognize the Fifth Amendment provides the clear rule of decision—when the federal power of eminent domain is exercised, the standard is "just compensation." This clear rule of decision renders a choice of law analysis unnecessary and inappropriate.

Decisions by the Third, Fifth, and Sixth Circuit relied on by the district court and Appellees did not address the governing standard of compensation—all correctly applied the Fifth Amendment's "just compensation" standard. Those Circuit decisions addressed questions related to the "measure" of "just compensation," and after conducting choice-of-law analysis, adopted state law as the rule of decision on the measurement questions presented. But where the

Supreme Court has answered the question in a decision interpreting the Constitution, that precedent is binding on both federal and state courts. A choice of law analysis has no application here because the Fifth Amendment provides the clear rule and the Supreme Court has interpreted the "just compensation" standard and concluded it does not include attorney's fees and costs.

The district court relied on an improper distinction between the federal government and private delegatees to distinguish Supreme Court decisions holding the federal power of eminent domain is not changed by its transfer to another holder and the federal power cannot be enlarged, diminished, or limited by a state. The Supreme Court's recent decision of *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), makes clear a pipeline company exercising the federal power of eminent domain is performing an essential government function, stands in the shoes of the United States, and should be treated no differently than if the United States itself were exercising the power. It is undisputed that the "just compensation" standard applies and excludes attorney's fees and costs when the United States exercises its federal power. The same standard applies to Sabal Trail's exercise of that delegated federal power.

The district court also erred by awarding attorney's fees and costs pursuant to state law in a federal question case without a clear Congressional directive. Congress has "occupied the field" regarding the award of attorney's fees and costs

in all federal question cases, preempting state law. A district court may not award attorney's fees or costs in a federal question case unless a federal statute authorizes the award or shows congressional intent to incorporate state law allowing the award. And a district court may never award costs not authorized by the federal costs statutes.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED BY APPLYING THE FLORIDA CONSTITUTION'S "FULL COMPENSATION" STANDARD.

Congress delegated the federal power of eminent domain to Sabal Trail pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h). Delegation of the federal power of eminent domain to private entities is a long-established practice in furtherance of important public purposes. *See, e.g., PennEast*, 141 S. Ct. at 2254 ("Since the founding, the Federal Government has exercised its eminent domain authority through both its own officers and private delegatees. ... Section 717f(h) is an unexceptional instance of this established practice."); *Thatcher v. Tenn. Gas Trans'n Co.*, 180 F.2d 644, 647 (5th Cir. 1950), *cert. den*. 340 U.S. 829 ("There is no novelty in the proposition that Congress … may delegate the power of eminent domain to a corporation, which though a private one, is … a public utility….").

The Fifth Amendment limits the federal power of eminent domain by requiring the payment of "just compensation." U.S. CONST. amend. V. The Florida Constitution limits Florida's state power of eminent domain by requiring the payment of "full compensation." FLA. CONST. art. X, § 6(a). It is undisputed that Sabal Trail only exercised the federal power of eminent domain. The district court erroneously limited the federal power by applying the "full compensation" standard instead of the "just compensation" standard. The district court's error stems from an improper framing of the question presented as a choice-of-law issue

and the erroneous rejection of on-point Supreme Court decisions based on Sabal Trail's status as a private entity.

A. The district court erred by engaging in a choice-of-law analysis.

The question presented is what standard of compensation governs Sabal Trail's exercise of the federal power of eminent domain. Sabal Trail argued the Fifth Amendment's "just compensation" standard governs. Appellees argued Florida substantive law, including the Florida Constitution's "full compensation" standard, should be adopted.

The district court improperly viewed the question as presenting a "straightforward choice of law question. What substantive law controls the amount of compensation due to a private landowner for the taking of his or her property by a private entity exercising federal eminent-domain authority—federal or state law?" (ECF 225-9 at 2.) The district court then engaged in choice-of-law analysis based on *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (*en banc*). The district court rejected Supreme Court decisions that involved the United States as condemnor because Sabal Trail is a private entity and adopted state substantive law, including the Florida Constitution's "full compensation" standard, as the federal rule. (ECF 225-9 at 5-20.)

But a choice-of-law analysis is appropriate only when the U.S. Constitution, federal statutes, and the Federal Rules are silent on an issue of substantive law and

a conflict exists between federal common law and state law on that issue. Where an issue is expressly governed by the U.S. Constitution, a choice-of-law analysis is not required or appropriate.

The Supremacy Clause provides the "Constitution, and the Law of the United States … shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Rules of Decision Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. And, in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held: "Except in matters governed by the Federal Constitution …, the law to be applied in any case is the law of the state." *Id.* at 78; *see also Clearfield Tr. Co. v. U.S.*, 318 U.S. 363, 367 (1943) ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."); *California v. U.S.*, 457 U.S. 273, 283 (1982) (noting choice-of-law allows state law to be borrowed as the federal rule of decision, but not where an Act of Congress or settled federal law has addressed the issue).

The U.S. Constitution is not silent on the question of what standard of compensation governs an exercise of the federal right of eminent domain. The Fifth Amendment provides a clear "rule of decision" that "just compensation" must

be paid. The Constitution does not limit the "just compensation" standard to the exercise of the federal power of eminent domain only by the United States, itself. The district court effectively read such a limit into the Fifth Amendment by failing to recognize the supremacy of the U.S. Constitution on the question presented.

In *Transcontinental Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1634 (2019)—a condemnation case brought pursuant to the Natural Gas Act, this Court recognized that a choice-of-law analysis like the one undertaken by the district court below is inappropriate where a Federal Rule provides a "clear rule of decision." This Court addressed whether a cash deposit was required for immediate possession of the property by a private condemnor and rejected the landowners' argument that "pre-taking compensation under the Georgia Constitution" was required under *Georgia Power* and the district court's decision below. *Id.* at 1172-73. Identifying Rule 65 of the Federal Rules of Civil Procedure as "the governing rule for determining the amount and type of security required," this Court stated: "Because Rule 65(c) provides a clear rule of decision, we need not decide whether federal common law or state law would provide a contrary rule." *Id.* at 1173.

Just as Rule 65(c) provides "a clear rule of decision" regarding deposits in Natural Gas Act condemnation actions, the Fifth Amendment provides "a clear rule of decision" regarding the standard of compensation to be applied when the

federal power of eminent domain is exercised. As the supreme law of the land, the U.S. Constitution supplies the rule of decision governing this case. A choice-of-law analysis is not required or appropriate to determine the standard of compensation in this or any other proceeding involving the federal power of eminent domain.

In *Transcontinental*, this Court also signaled its agreement in principle that the "just compensation" standard governs the exercise of the federal power of eminent domain pursuant to the Natural Gas Act. Rejecting the landowners' contention that "pre-taking compensation under the Georgia Constitution" was required, this Court referred to "just compensation" as the standard. 910 F. 3d at 1172-73; *see also Cullman*, 197 F.3d at 1372 (11th Cir. 1999) ("The Takings Clause in the Fifth Amendment … prohibits the government, or its agents, from taking private property for 'public use' without 'just compensation' [in a Natural Gas Act case]."); *accord Mountain Valley Pipeline v. 4.31 Acres*, No. 7:19-cv-00679, 2021 WL 2322822, at *1 (W.D. Va. June 7, 2021) (refusing to apply Virginia law to determine the interest award in a federal condemnation case by a pipeline company and stating: "[F]ederal courts apply federal substantive law in condemnation cases."); *Atlantic Coast Pipeline v. 1.51 Acres*, No. 5:18-CV-127, 2021 WL 535469, at *2 (E.D.N.C. Feb. 12, 2021) (refusing to adopt North Carolina's fee-shifting rules because the pipeline company acted "solely under its

authorization to condemn provided by the federal Natural Gas Act" and citing a Third Circuit decision for the proposition that "where 'no substantive provision of [a state's] law was ever pled,' state fee-shifting statutes do not apply") (quoting *Chin v. Chrysler*, LLC, 538 F.3d 272, 277 (3d Cir. 2008)).

Georgia Power does not compel application of Florida's full compensation standard to this case. In *Georgia Power*, this Court's predecessor weighed whether to "choose federal common law or state law as the applicable federal rule" to "measure" the compensation owed in a condemnation case under Section 21 of the Federal Power Act. 617 F.2d at 1115, 1113. In adopting Georgia's substantive law, the court did not displace the Fifth Amendment's "just compensation" standard with the Georgia Constitution's "just and adequate compensation" standard. In fact, the *Georgia Power* court acknowledged the governing standard was "just compensation" regardless of whether state or federal law applied. *Id.* at 1114-15. The question in *Georgia Power* was what law should be applied to "measure" the "just compensation" standard. Thus, even if the holding of *Georgia Power* were extended to Natural Gas Act condemnation cases (which it should not), the Fifth Amendment would still provide the "rule of decision" regarding the standard of compensation and Florida substantive law could only guide how "just compensation" is "measured."

The "measure" of compensation means how the value of the property taken

is calculated in light of various facts and interpretations of law under the governing standard. The correct analytical framework was used by the district court in *Rover Pipeline v. 10.55 Acres,* No. 5:17-cv-239, 2018 WL 4386024 (N.D. Ohio Sept. 14, 2018). The *Rover* court correctly applied the federal "just compensation" standard because the condemnor was a natural gas pipeline company exercising the federal power of eminent domain. *Id.* at 3-4. After outlining the "guiding principles" of "just compensation" under the Fifth Amendment, the *Rover* court noted: "Federal courts [in the Sixth Circuit] apply 'the law of the state in which the condemned property is located in determining the amount of compensation due.'" *Id.* (citations omitted). The *Rover* court did not adopt the standard of compensation guaranteed by the Ohio Constitution. Rather, it adopted Ohio substantive law to measure the "just compensation" due under the Fifth Amendment. *Id*.

Under Florida substantive law, "full compensation" includes attorney's fees and costs. But Florida substantive law does not and cannot interpret the Fifth Amendment's "just compensation" standard as including attorney's fees and costs because the Supreme Court has held it does not. *See Dohany v. Rogers*, 281 U.S. 362, 368 (1930) (holding "attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain"); *U.S. v. Bodcaw Co.,* 440 U.S. 202, 203 (1979) ("This Court has often faced the problem of defining just compensation. One principle from which it has not deviated is that just

compensation 'is for the property, and not to the owner.' As a result, indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled. Thus, [a]ttorneys' fees and expenses are not embraced within just compensation….").

The Supreme Court's interpretation of the U.S. Constitution is binding on state courts. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on [its own] police activity than those this Court holds to be necessary upon federal constitutional standards. … But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.") (emphasis in original); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) ("[T]he Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon v. Hass*….").

The authority of the Supreme Court's interpretation of the federal Constitution is absolute. *Pennekamp v. Fla.,* 328 U.S. 331, 335 (1946) ("The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues."); *Minnesota v. Nat'l Tea Co*., 309 U.S. 551, 557 (1940) ("state courts [are]

left free and unfettered by us in interpreting their state constitutions" but "will not be the final arbiters of important issues under the federal constitution");

Supreme Court decisions interpreting "just compensation" under the Fifth Amendment, such as *Dohany* and *Bodcaw*, must be followed here even if Florida substantive law were adopted to "measure" the "just compensation" standard. To Sabal Trail's knowledge, this argument—that Supreme Court decisions interpreting the U.S. Constitution control even where a state's substantive law is adopted through a choice-of-law analysis—was not made in the cases on which Appellees will most rely, i.e., *Georgia Power*, *Tennessee Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 242 (3d Cir. 2019), as amended (July 25, 2019), and *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992).

B. The district court erred by distinguishing *Kohl* and *Miller* based on Sabal Trail's status as a private party.

The district court incorrectly distinguished the on-point Supreme Court decisions of *Kohl v. U.S.*, 91 U.S. 367 (1875), and *U.S. v. Miller*, 317 U.S. 369 (1943), based on Sabal Trail's status as a private entity. The Supreme Court's recent *PennEast* makes clear a pipeline company exercising the federal power of eminent domain delegated to it by Congress under the Natural Gas Act is performing an essential governmental function, stands in the shoes of the United

States, and should be treated no differently than if the United States itself were exercising the power.

In *Kohl*, the Supreme Court confirmed the existence of a federal power of eminent domain separate from the States' power. 91 U.S. at 371-72. The district court treated *Kohl* as providing nothing further. (ECF 225-9 at 18-19.) But the Supreme Court declared two additional principles in *Kohl* which are important here. First, the federal "power is not changed by its transfer to another holder." 91 U.S. at 372. Second, the federal power is "complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised." *Id.* at 374.

Without expressly citing *Kohl*, the Supreme Court reaffirmed the second principle in *Miller,* where the Supreme Court rejected the application of California substantive law to measure "just compensation" in a federal condemnation case. The California law would have allowed landowners to benefit from an increase in land value resulting from the project. 317 U.S. at 379. The Supreme Court held: "[State laws] do not and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States." *Id*. at 380; *see also Nebraska v. U.S.*, 164 F.2d 866, 868 (8th Cir. 1947) ("[T]he question of what is just compensation under the Fifth Amendment … does

not turn in any manner upon the compensation standards or prescriptions of state law."), *cert denied,* 334 U.S. 815.

The Supreme Court reiterated and explained the same principle a third time in *U.S. v. 93.970 Acres*, 360 U.S. 328 (1959). Citing both *Kohl* and *Miller*, the Court held: "Condemnation involves essential governmental functions. … [W]here essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable." *Id*. at 332-33; *see also U.S. v. Certain Interests in Prop. in Champaign Cty.*, 271 F.2d 379, 383-84 (7th Cir. 1959) ("[N]owhere in the [authorizing] statute does Congress expressly choose to make state laws applicable. … [T]he Supreme Court … has made it abundantly clear that federal law rather than state law governs in federal eminent domain cases."), *cert denied,* 362 U.S. 974; *U.S. v. Crary*, 2 F. Supp. 870, 874 (W.D. Va. 1932) (distinguishing takings by state agencies that implicate state constitutional rights from takings by the federal government that implicate Fifth Amendment rights and stating: "To hold otherwise is to hold that the federal government is bound by state constitutions and statutes, without a federal statute so declaring.") (citing *Kohl*); *City of Pleasant Ridge v. Romney*, 169 N.W. 2d 625, 634 (Mich. 1969) ("To consider the power of the Federal right of eminent domain to be any less than a full and supreme power would subvert the United States Constitution by enabling the constitutional powers of Congress to be subordinated to the will of a

state. … [T]he federal power of eminent domain] cannot, absent some specific statutory limitation in the Federal act itself, be conditioned by any State….").

Relying on *Georgia Power*, the district court deemed *Miller* inapplicable because the condemnor in *Miller* was the United States, while Sabal Trail is a private entity. (ECF 225-9 at 17-18.) In *Georgia Power*, before the Circuit split, the Fifth Circuit considered whether *Miller* applied when a private party exercised the federal power of eminent domain pursuant to Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1976). 617 F.2d at 1115.[2] The *Georgia Power* court distinguished *Miller* on the basis that the United States, rather than a private entity, exercised the federal power in *Miller*. 617 F.2d 1119, n.9. But as the Supreme Court held in *Kohl* long ago and reaffirmed in its recent *PennEast* decision addressing condemnation pursuant to the Natural Gas Act, the federal power of eminent domain "is not changed by its transfer to another holder," *Kohl*, 91 U.S. at 372, and can "'neither be enlarged nor diminished by a State,'" *PennEast*, 141 S. Ct. at 2260 (quoting *Kohl*, 91 U.S. at 374).

In *PennEast*, the State of New Jersey argued sovereign immunity barred a federal condemnation action by a natural gas company exercising the federal power of eminent domain pursuant to the Natural Gas Act. 141 S. Ct. at 2253. The

[2] The *en banc Georgia Power* court overruled a panel decision that relied on *Miller* to determine federal substantive law applied. 617 F.2d at 1113 (overruling *Georgia Power Co. v. 54.20 Acres*, 563 F.2d 1178, 1186 (5th Cir. 1977)).

Third Circuit held, even though Congress delegated the federal power of eminent domain to PennEast, Congress had not delegated its exemption from state sovereign immunity provided in the Eleventh Amendment. *Id.* The Supreme Court reversed, finding the States surrendered their immunity when they ratified the Constitution and holding: "Because the Natural Gas Act delegates the federal eminent domain power to private parties, those parties can initiate condemnation proceedings, including against state-owned property [in federal court]." *Id*. at 2151-52.

The *PennEast* Court observed: "For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties." *Id*. at 2255. Against a backdrop of historical cases confirming the power of private delegatees to condemn property, the Supreme Court stated: "[These cases] paint a clear picture: Since its inception, the Federal Government has wielded the power of eminent domain, and it has delegated that power to private parties. We have observed and approved of that practice." *Id*. at 2257.

The *PennEast* Court then rejected New Jersey's argument that the Natural Gas Act does not authorize federal condemnation suits by private parties against non-consenting states with requisite clarity to overcome the Eleventh Amendment, deeming clear authorization unnecessary:

> The respondents do not dispute that the federal eminent domain power can be delegated, or that § 717f(h) speaks with sufficient clarity to

> delegate the power to condemn privately owned land. They argue only that § 717f(h) fails to delegate the power to condemn States' property interests. But the federal eminent domain power is "complete in itself," *Kohl,* 91 U.S. at 374**,** and the States consented to the exercise of that power—in its entirety—in the plan of the Convention. The States thus have no immunity left to waive or abrogate when it comes to condemnation suits by the Federal Government and its delegatees.

141 S. Ct. at 2263. The *PennEast* Court also stated:

> Separating the eminent domain power from the power to condemn—when exercised by a delegatee of the Federal Government—would violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign. *See Kohl*, 91 U.S., at 374 ('If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State.').

141 S. Ct. at 2260.

The Supreme Court's view of the issue in *PennEast* is important: Just as the federal government's power of eminent domain is "complete in itself," so is the federal power of a private entity when Congress chooses to delegate it. Regardless of who exercises the federal power, "[i]t can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised." *Kohl*, 91 U.S. at 374. *PennEast* confirms both the statement in *Kohl* that the federal power of eminent domain "is not changed by its transfer to another holder," 91 U.S. at 372, even a private party, and the principle stated in *Miller* that state laws "do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States," 317 U.S.

at 380. *PennEast* makes clear that the district court erred in distinguishing *Miller* on the basis that Sabal Trail is a private entity.

Even before the Supreme Court issued *PennEast*, numerous courts rejected attempts to distinguish condemnation cases brought by the United States from those brought by private parties under the Natural Gas Act. *See Guardian Pipeline v. 950.80 Acres*, No. 01-C-4696, 2002 WL 1160939, at *1 (N.D. Ill. May 30, 2002) (deeming "dubious" any distinction between the government and a private party exercising the federal power of eminent domain under the Natural Gas Act.); *Kern River Gas Trans'n Co. v. 8.47 Acres*, No. 2:02-cv-694, 2006 WL 1472602, at *4 (D. Utah May 23, 2006) ("The fact that Kern River acquires its eminent domain authority from the [Natural Gas Act] rather than the statutes by which the United States government exercises its eminent domain power is of no consequence."); *Tenn. Gas Pipeline Co. v. Perm. Easement for 1.7320 Acres*, No. 3:cv-11-028, 2014 WL 690700, at *10 (M.D. Pa. Feb. 24, 2014) ("*Fox Hollow*")[3] ("I fail to see a good reason to differentiate between condemnation proceedings brought by the

[3] The *Fox Hollow* court later re-visited the issue, noting a split of authority, including the district court's ruling in this case. *See Tenn. Gas Pipeline Co. v. Perm. Easement for 7.053 Acres*, No. 3:12-cv-01477, 2017 WL 3727449, at *4 (M.D. Pa. Aug. 30, 2017), amended, 2017 WL 4954093, at *1 (M.D. Pa. Nov. 1, 2017). But the court "remained of the view that compensation in just compensation proceedings under the [Natural Gas Act] should be determined by federal law." *Id.* at *1. The Third Circuit reversed that decision in *Tennessee Gas*, 2019 WL 3296581, at *12. The Third Circuit's decision is addressed in detail below.

United States and those in which the United States authorizes its condemnation power to be used by a private entity under the [Natural Gas Act].”); *Texas Eastern Trans’n v. A Perm. Easement of 0.5 Acres,* No. 1:14-cv-354, 2019 WL 1437871, at *10 (M.D. Pa. Apr. 1, 2019) (“Regardless of whether the United States or an authorized entity executes the taking, either is obliged by the Fifth Amendment to provide ‘just compensation to the owner thereof.’”); *see also Columbia Gas Trans’n v. 252.071 Acres*, No. ELH-15-3462, 2016 WL 7167979, at *3 (D. Md. Dec. 8, 2016) (rejecting adoption of state law in Natural Gas Act case, stating: “Unless otherwise proscribed by Congress, federal law governs ‘questions of substantive right, such as the measure of compensation’ for federal courts in condemnation proceedings.”).[4]

In fact, a district court recently rejected any such distinction when holding a pipeline company, just like the federal government, is responsible for certain litigation expenses under the Uniform Relocation Act if it abandons its project. *See*

[4] Other district courts have ruled to the contrary, in relatively summary fashions. *See Equitrans, L.P. v. 0.56 Acres*, No. 1:15-cv-106, 2017 WL 1455023, at *1 (N.D.W. Va. Apr. 21, 2017); *Rockies Exp. Pipeline v. 77.620 Acres*, No. 08-cv-3127, 2010 WL 3034879, at *2 (C.D. Ill. Aug. 3, 2010). Although it could appear the Southern District of Florida previously determined that Florida substantive law would control the determination of compensation in a Natural Gas Act case, *see FGT v. Approx. 9.854 Acre Nat. Gas Trans’n Pipeline Easement*, 96-14083-CIV, 1999 WL 33487958, at *1 (S.D. Fla. May 27, 1999), the condemnor in that case stipulated to application of Florida substantive law, *see FGT v. Approx. 9.854 Acre Nat. Gas Trans’n Pipeline Easement*, No. 96-14083-CIV, 2000 WL 33712491, at *1 (S.D. Fla. Aug. 25, 2000).

Atlantic Coast Pipeline v. 0.47 Acres, No. 4:18-CV-36, 2020 WL 7439835 (E.D.N.C. Dec. 18, 2020). The pipeline company argued the Act did not apply to it as a private company. *See id*. at *2. But the court noted the pipeline company "has absolutely no authority to condemn property absent express statutory authorization" and "having been granted such an authorization, the private company in essence stands in the shoes of a federal agency, or in other words, the United States government." *Id.* at *3.

Similarly, the Fifth Circuit, in another decision before the Circuit split, recognized the public nature of pipeline companies condemning property under the Natural Gas Act, stating: "There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is … a public utility…." *Thatcher*, 180 F.2d at 647. The Fifth Circuit emphasized the public nature of FERC-certificated natural gas companies, declaring: "This is, in fact and in law, as by the Natural Gas Act declared, a public business.…" *Id.* at 648; *see also Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) ("[T]he power of appropriating [property] may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested."); *Cherokee Nation v. Southern Kan. Ry. Co.,* 135 U.S. 641, 658 (1890) (quoting Cooley on Constitutional Limitations: "[W]hile there are unquestionably some

objections to compelling a citizen to surrender his property to a corporation … influenced by motives of private gain and emolument, so that to them the purpose of the appropriation is altogether private, yet, conceding it to be settled that these facilities for travel and commerce are a public necessity [and] the legislature [may] decide that this general benefit is better promoted by their construction through individuals or corporations than by the state itself.…").

By exercising the federal power of eminent domain delegated to it by Congress, Sabal Trail "in essence stands in the shoes" of the federal government. *Atlantic Coast Pipeline*, 2020 WL 7439835, at *3. Regardless of whether the federal government or its private delegatee exercises the federal power, the constitutional standard of compensation is "just compensation" under the Fifth Amendment, not any different standard imposed on the state power of eminent domain under that state's constitution. The law governing an exercise of the federal power of eminent domain must depend on the source of the power, not the holder of the power. *See Kohl,* 91 U.S. at 372; *PennEast*, 141 S. Ct. at 2263 ("Over the course of the Nation's history, the Federal Government and its delegatees have exercised the eminent domain power to give effect to [the Framers'] vision [of a cohesive national sovereign], connecting our country through turnpikes, bridges, and railroads—and more recently pipelines, telecommunications infrastructure, and electric transmission facilities. And we have repeatedly upheld these exercises of

the federal eminent domain power—whether by the Government or a private corporation….").

The Fifth Amendment limits the federal power of eminent domain by prescribing the manner in which it may be exercised—"just compensation" must be paid. By imposing the Florida Constitution's "full compensation" standard, the district court erroneously subjected the federal power of eminent domain to a different, state law limitation that improperly "diminished" the federal power and "prescribe[d] the manner in which it must be exercised." *Kohl*, 91 U.S. at 374; *cf. U.S. v. Tree-Removal Rights,* 249 F. Supp. 3d 1315, 1318-19 (N.D. Ga. 2017) ("[R]estrictions that the Georgia Constitution might place on such takings do not apply in this case, which involves the *federal* government's power of eminent domain. … Thus, [a] challenge based on the Georgia Constitution fails as a matter of law.") (emphasis in original).

C. *Tennessee Gas* does not support displacing the federal constitutional standard.

Appellees will cite to *Tennessee Gas* as a subsequent decision supporting the district court conclusions below. In *Tennessee Gas*, the Third Circuit "decide[d] to incorporate state substantive law as the federal standard of measuring just compensation in condemnation proceedings by private entities acting under the

authority of the [Natural Gas Act]."[5] 931 F.3d at 255.

Tennessee Gas does not support the district court's decision to apply the Florida Constitution's "full compensation" standard because the question presented in *Tennessee Gas* was not whether the condemnor must pay "just compensation" pursuant to the Fifth Amendment or a different compensation standard pursuant to a state constitution. *Tennessee Gas* only addressed what law "governs the measure of just compensation in condemnation proceedings brought by a private entity under the [Natural Gas Act]." *Id.* at 246.

The *Tennessee Gas* court concluded it was not bound by the Supreme Court's holding in *Miller* that state laws do not affect questions of substantive right—such as the measure of compensation—grounded in the U.S. Constitution, limiting *Miller* to cases where the United States is the condemnor. *See* 931 F.3d at 248. But nothing in *Miller* suggests its holding is grounded upon the identity of the

[5] Though Sabal Trail believes the Third Circuit ultimately reached the wrong conclusion in *Tennessee Gas*, the Third Circuit correctly distinguished federal common law from a "federal constitutional or statutory provision," *id.* at 245 (quoting *McGurl v. Trucking Emps.,* 124 F. 3d 471, 480 (3d Cir. 1997)), and stated "[b]ecause federal [constitutional or statutory] law does not supply a rule of decision on this precise issue, we must fill the void with a common law remedy," *id.* at 241, which presented the "question of whether state law or federal [common] law governs the substantive determination of just compensation in condemnation actions brought by private entities," *id.* at 242. Here, the Fifth Amendment supplies the rule of decision on the precise issue of what standard of compensation applies when the federal power of eminent domain is exercised. There is no "void" to be filled "with a common law remedy."

condemnor. And *PennEast* negates the federal government versus private party distinction. While *PennEast* addressed a pipeline company's power to condemn state-owned property, not what standard of compensation applies, the principle is clear—the federal condemnation power delegated to private entities through the Natural Gas Act is "complete in itself," and cannot be limited or abrogated by state law, including state standards of compensation. *See PennEast*, 141 S. Ct. at 2263 (quoting *Kohl*).

In support of its limited interpretation of *Miller*, the *Tennessee Gas* court erroneously concluded: "developing natural gas pipelines is not a function—much less an essential function—of the federal government." 931 F.3d at 249. This statement ignores the governmental nexus written into the Natural Gas Act: "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a). The statement also ignores the vital role natural gas plays in the supply of energy in the United States, representing the leading source—36%—of total primary energy production in the U.S. in 2020. *See* U.S. ENERGY INFORMATION ADMIN., Independent Statistics & Analysis, U.S. energy facts explained (June 2, 2021), https://www.eia.gov/energyexplained/us-energy-facts/data-and-statistics.php. As the Supreme Court has stated, the "fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas

at reasonable prices." *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978); *see also NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (noting the "principal purpose was to encourage the orderly development of plentiful supplies of … natural gas at reasonable prices.").

In 1947, Congress amended the Natural Gas Act to add the eminent domain delegation and ensure FERC-certified natural gas companies could condemn necessary easements through use of the federal power, rather than any state power, avoiding the application of problematic state constitutional and statutory provisions restricting the use of state power. S. Rep. No. 80-429, 1st Sess. (1947). Some state constitutions and laws prohibited foreign pipeline companies from using the state power of eminent domain, while others prohibited the exercise of that power for pipelines built to distribute natural gas in other states. *Id.* at 2. The *PennEast* Court cited this legislative history and stated that prior to the 1947 amendment "certificate holders often had only an illusory right to build." 141 S. Ct. at 2252. To ensure prohibitive state laws would not apply, Congress granted the federal power of eminent domain for interstate natural gas operations "with respect to which the States may not constitutionally legislate." S. Rep. No. 80-429 at 4. The *PennEast* Court recognized the purpose of this Congressional delegation of eminent domain power, stating: "§717f(h) was passed specifically to solve the problem of States impeding interstate pipeline development by withholding access to their own

eminent domain procedures." 141 S. Ct. at 2257.

Ensuring an adequate energy supply is an essential government function. The Supreme Court would not have concluded the States waived their Eleventh Amendment immunity, as it did in *PennEast,* for a non-essential government function.

As Judge Chagaras wrote in a dissenting opinion to *Tennessee Gas*, "resolution of the question here presented begins and ends with the *Miller* decision" and "the standard by which we measure just compensation due for an exercise of the Fifth Amendment eminent domain power is the same regardless of whether it is the Government or a Government-delegatee that exercises that power." 931 F.3d 237 at 255. This Court should adopt the well-reasoned conclusion of Judge Chagaras, explained as follows:

> [T]he right to just compensation "grounded upon the Constitution of the United States" is a federal substantive right, *Miller*, 317 U.S. at 380, 63 S.Ct. 276, that is triggered by an exercise of the federal eminent domain power, not necessarily the Government's exercise of that power. And although the Supreme Court in *Miller* did not explicitly expound that its holding applies to a private party's exercise of the federal power, it did not explicitly limit its reach to the Government's exercise, either. Its focus was on the condemnee's federal right to compensation. *Miller*, 317 U.S. at 379–80, 63 S.Ct. 276.
>
> To carve out a separate set of rules for private parties exercising federal eminent domain power for a federal public purpose under 15 U.S.C. § 717f(h) would create "an artificial wedge between federal condemnations brought by the United States and federal condemnations brought by private entities acting pursuant to

> congressionally delegated authority." Tenn. Gas Br. 10; *see also Ga. Power Co.* … (Rubin, J., dissenting) (observing that there is no "sound reason to distinguish between condemnation proceedings brought by the United States and those in which it authorizes its power to be used by its statutory licensee for a federal public purpose"). In either action, the federal eminent domain power is exercised and triggers the constitutional right to compensation.

931 F.3d 257-58. Judge Chagaras made these points regarding the question of what law should be used to measure just compensation. But they are even more critical to the question presented here regarding what constitutional standard governs this Natural Gas Act condemnation case. The standard of compensation depends on the origin of the power—the federal or state sovereign—not the holder of the power. And with the *PennEast* decision, Judge Chagaras has been proven right.

D. *Georgia Power* does not support displacing the federal constitutional standard.

As noted, there is no choice of law question in this case because the Fifth Amendment provides the clear rule of decision—the "just compensation" standard applies. And the Supreme Court decisions of *Dohany* and *Bodcaw* interpreting the Fifth Amendment as excluding attorney's fees and costs control, regardless of whether federal or Florida substantive law is applied to measure "just compensation." However, if this Court deems it necessary to consider the choice-of-law question addressed in *Georgia Power*, the Court should conclude the material differences between the Federal Power Act and Natural Gas Act compel federal common law be applied to measure "just compensation" in Natural Gas Act

cases.

According to the *Georgia Power* Court, state law should supply the federal rule "unless there is an expression of legislative intent to the contrary," which it found absent in Section 21 of the Federal Power Act. 617 F.2d at 1116, 1118. But Section 21, which involves hydroelectric projects on federal waters, often in a single state, is distinguishable from the Natural Gas Act, the plain purpose of which is to provide federal regulation of the interstate distribution of natural gas. *See* 15 U.S.C. § 717(a) ("Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.").[6] As this Court's predecessor stated:

> Implicit in the provisions of the [Natural Gas Act] are the facts, among others, that vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital need of the product; and that the only way this natural gas can be feasibly transported from one State to another is by means of a pipe line.

Thatcher, 180 F.2d at 647; *see also PennEast*, 141 S. Ct. at 2252 ("Natural gas has been a part of the Nation's energy supply since at least the 1820s…. Initially, difficulties in transporting natural gas limited its distribution…. In 1938, Congress passed the Natural Gas Act … to regulate the transportation and sale of natural gas

[6] The only similar provision in the Federal Power Act, 16 U.S.C. § 824(a), states federal regulation extends only to matters not subject to state regulation and does not even apply to the subchapter containing Section 21 (16 U.S.C. § 814).

in interstate commerce."). The Natural Gas Act applies only to transportation or sale of natural gas across state lines, *see* 15 U.S.C. § 717(b), and specifically exempts certain intrastate transactions "declared to be matters primarily of local concern and subject to regulation by the several States," 15 U.S.C. §717(c).

By contrast, the purpose of Section 21 of the Federal Power Act is not to regulate interstate power transmission but to address the competing interest of hydroelectric development and navigation of federal waters by licensing dams and power-generating facilities. *See Montana Power Co. v. Fed. Power Com'n*, 330 F.2d 781, 789 n.1 (9th Cir. 1964). As the *Georgia Power* court recognized, "a Section 21 licensee-condemnor is typically either the state itself, a state-owned entity, a municipality, or a private utility, organized and operating under the laws of the state and heavily regulated by a state utility commission" that "usually condemns property for a project and sells electricity produced therefrom only in the state where it operates." 617 F.2d at 1123. Under those circumstances—a Georgia utility regulated under Georgia law condemning property within Georgia to produce electricity for Georgians—the *Georgia Power* Court held state law "is to be adopted as the appropriate federal rule" to measure the "just compensation" owed "when a licensee … exercises the power of eminent domain pursuant to Section 21 of the Federal Power Act." *Id.* at 1113.

The *Georgia Power* Court relied on a provision in the Federal Power Act

that differentiates projects of such federal (interstate) significance as to be undertaken by the United States from those that are local (intrastate) and left to private licensees. *See* 16 U.S.C. § 800(b). It found this provision significant, writing:

> Before a license may be issued under the Federal Power Act, there must be a determination by the Commission that the project does not affect the "development of any water resources for public purposes (that) should be undertaken by the United States itself." 16 U.S.C. § 800(b). Thus, by definition, a licensed project does not implicate the interests of the United States to the degree that it is thought desirable that the project be undertaken by the United States itself.

617 F.2d at 1118. The court found "persuasive and relevant" a distinction observed in another case: "By issuance of a license [under the Federal Power Act] the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the public interest on a national scale; the [Section 21] licensee often on a local scale, on projects thought to be of insufficient dimensions to warrant the assertion of national power." *Id.* at 118-19 (citation omitted).

In the Natural Gas Act, Congress did not differentiate between natural gas projects to be undertaken by private companies and projects to be undertaken by the United States. Instead, Congress chose to rely exclusively on private companies to achieve its purpose—the construction and operation of interstate natural gas transportation projects. Thus, projects undertaken by licensees under Section 21 of

the Federal Power Act are, by definition, local whereas interstate pipeline projects under the Natural Gas Act are, by definition, federal.

In fact, the Natural Gas Act is far more comparable to another section of the Federal Power Act—Section 216 enacted in 2005, which grants eminent domain power to private utilities to acquire right-of-way for electric transmission in a "national interest electric transmission corridor" ("NIECs"). *See* 16 U.S.C. § 824p. By their nature, NIECs span great distances, often through multiple states. The Ninth Circuit has held NIECs constitute "major Federal action" and described Section 216 as creating "new federal rights, including the power of eminent domain, that are intended to, and do, curtail rights traditionally held by the states and local governments." *Cal. Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1101 (9th Cir. 2011).

Sabal Trail's FERC Certificate confirms the project is not a "matter primarily of local concern," and Sabal Trail is not acting "on a local scale" like the condemnor in *Georgia Power*. The differences between the Natural Gas Act and Section 21 of the Federal Power Act militate against extending *Georgia Power* to this case. These distinctions are even more important in light of the *Georgia Power* Court's recognition that the "choice of law question … [was] a close one." 617 F.2d at 1124.

E. *Columbia Gas* does not support displacing the federal constitutional standard.

The district court cited *Columbia Gas* as support for its extension of *Georgia Power* to Natural Gas Act condemnation cases. (ECF 225-9 at 13-14.) But, like *Georgia Power*, *Columbia Gas* does not support displacing the federal constitutional standard of compensation with a state constitutional standard. The *Columbia Gas* court referred to its initial question as whether the Natural Gas Act "can be read as … incorporating the substance of state law rules for purposes of determining just compensation," indicating the court recognized "just compensation" is the standard. 962 F. 2d at 1197.

When holding it should adopt state law rather than federal common law to measure the "just compensation" owed, the Sixth Circuit considered the issue *sua sponte*, *see id.* at n.4, and relied on inapplicable and abrogated *dicta*. *Columbia Gas* mistakenly noted: "In *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662 (5th Cir. 1985) ['*Tabor*'], the Fifth Circuit summarily held the statutory language of [the Natural Gas Act] required state law be adopted as the federal rule." 962 F.2d at 1197. But the *Tabor* court's comment on this issue was mere *dicta* stating Louisiana law controlled due to the "practice and procedure" language of the Natural Gas Act. 757 F. 2d at 665 n.3. And this Court has held the "practice and procedure" language regarded procedural matters only and was repealed by Rule 71.1. *Cullman,* 197 F.3d at 1373-74. *Columbia Gas* also overlooked that the

condemnor in *Tabor* exercised both state and federal powers of eminent domain, making it logical to apply Louisiana substantive law. 757 F.2d at 665. Here, Sabal Trail is only exercising the federal power of eminent domain.

The *Columbia Gas* court erred by extending *Georgia Power*'s holding to a Natural Gas Act case. As noted, the choice-of-law analysis employed in *Georgia Power* favors application of federal common law in Natural Gas Act cases. The *Columbia Gas* court's error may be attributed both to the lack of briefing on the issue and the facts of the case, which involved a condemnation action against a single landowner for a natural gas storage facility entirely within a single state, Ohio. 962 F.2d at 1194. Under those facts, the Sixth Circuit may not have considered the broad nature of its ruling or that most Natural Gas Act condemnation cases involve interstate pipelines.

A single state natural gas storage facility resembles a single state hydroelectric dam project but differs from a multi-state natural gas pipeline. In fact, when addressing a case involving "easements across seven states for the purpose of erecting and transmitting electric power," the Sixth Circuit determined the activity gives rise to a federal interest in having a uniform approach in related condemnation cases. *See Sherwood v. T.V.A.*, 590 F. App'x 451, 461 (6th Cir. 2014). The Second Circuit employed similar logic in *National Railroad Passenger Corp. v. Two Parcels*, 822 F.2d 1261 (2d Cir. 1987), holding federal law controlled

the compensation due when Amtrak exercised its federal power of eminent domain to construct multi-state rail lines. *Id.* at 1262. The court distinguished *Georgia Power* as involving licensees that often act on a local scale, while Amtrak serves national needs across state lines. *Id.* at 1267.

Sabal Trail's project serves a broad federal need across multiple states and is analogous to projects undertaken by the TVA or Amtrak, not the purely local projects in *Tabor*, *Georgia Power,* and *Columbia Gas*. Unlike the solitary condemnations and intrastate projects in those cases, Sabal Trail's project is of "sufficient dimensions to warrant the assertion of national power," *Georgia Power*, 617 F.2d at 1118, and application of uniform federal common law. This case is distinguishable from *Georgia Power* and presents facts and arguments supporting rejection of *Columbia Gas*.[7]

Finally, consistent with Sabal Trail's argument that *Dohany* and *Bodcaw* must be followed here regardless of any choice-of-law analysis, one court has narrowly read *Columbia Gas* as standing for the principle that state law only

[7] The Tenth Circuit also relied on *Columbia Gas* when applying state law to a Natural Gas Act case in *Bison Pipeline v. 102.84 Acres*, 560 Fed. Appx. 690, 695-96 (10th Cir. 2013), narrowly limiting its holding to the facts of that unique case and stating "[i]n a different case with different facts" it might hold otherwise. *Id.* at 696. Significantly, the condemnor had agreed Wyoming law governed the measure of just compensation at the district court level and only asserted federal law should apply on appeal, after application of Wyoming law resulted in an unfavorable verdict. *Id.* at 693-95.

"fill[s] the gaps" in federal law when no on-point Supreme Court decision exists. *Kern River*, 2006 WL 1472602, at *5. As that court explained: "[Where] the United States Supreme Court has already established a federal rule … there is no need to turn to state law." *Id.*

F. Congress neither subjected Natural Gas Act condemnations to state law nor provided for an award of attorney's fees and costs.

When Congress intends to subject the federal power of eminent domain to state law, it does so explicitly. *See* 33 U.S.C. § 532; 43 U.S.C. § 36b; 25 U.S.C. § 357; 16 U.S.C. § 524. Likewise, when Congress intends to subject the federal power of eminent domain to a state constitution, it does so explicitly. *See* Act of May 22, 1926, 44 Stat. 617, as amended by Act of April 18, 1928, 45 Stat. 431 (granting power to condemn "in accordance with the constitutional provisions of the State of Minnesota"). Congress did neither here.

Although the Natural Gas Act provides the "practice and procedure" in condemnation cases shall "conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated[,]" 15 U.S.C. § 717f(h), this Court held that language "required conformity in procedural matters only. And insofar as it required such procedural conformity it was clearly repealed by Rule 71A, Federal Rules of Civil Procedure.'" *Cullman*, 197 F.3d at 1373-74 (quoting *93.970 Acres*, 360 U.S. at 333 n.7).

Regarding awards of attorney's fees and costs, Congress is presumed to have known of the Supreme Court's *Dohany* decision issued in 1930, holding attorney's fees and costs are not included within just compensation, when Congress amended the Natural Gas Act to delegate the federal power of eminent domain in 1947. *See Chesapeake & Potomac Tel. Co. v. Manning*, 186 U.S. 238, 245 (1902) ("[C]ourts always presume that the legislature acts advisedly and with full knowledge of the situation."); S. Rep. No. 80-429, 1st Sess. (1947) (amending Natural Gas Act). Likewise, Congress is presumed to have known of the Supreme Court's *Bodcaw* decision issued in 1979, reaffirming the same holding, when Congress amended the same provision of the Natural Gas Act in 1988. *See* Uniform Regulatory Jurisdiction Act of 1988, Pub. L. No. 100-474, 102 Stat. 2302. Yet, Congress chose not to provide for an award of attorney's fees and costs in either of the amendments.

District courts have held attorney's fees and costs may not be awarded in Natural Gas Act condemnation cases because Congress did not provide for their award. In *Northern Natural Gas Co. v. Approximately 9117 Acres,* 114 F. Supp. 3d 1144 (D. Kan. 2015), the court stated:

> [T]here is no provision for an award of attorneys' fees in the [Natural Gas Act]—the act upon which this action is based—nor have defendants identified any other federal law that would permit an award of attorneys' fees in this case. *See Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations,* 2010 WL 5104991, *3 (D. Mont. 2010) (American law

> does not provide for the award of attorney fees absent a contractual or statutory provision to the contrary, and there is no basis for attorneys' fees in the [Natural Gas Act] or Fed. R. Civ. P. 71.1); *Guardian Pipeline, LLC v. 295.45 Acres of Land,* 2008 WL 1751358, *6 (E.D. Wis. 2008) (Rule 71.1 has no fee-shifting provision that allows the owner to recover attorneys' fees from the condemnor).
>
> Defendants' reliance on state law is unavailing in a proceeding governed by federal law and procedures. Perhaps the state statutes they cite authorize attorneys' fees in similar actions under state law, but they have no application in this action under the [Natural Gas Act]. *See Irick v. Columbia Gas Transmission Corp.,* 2008 WL 191324, *3 (W.D. Va. 2008) (state law providing for attorneys' fees was inapplicable to action under the [Natural Gas Act]).

114 F. Supp. 3d at 1171, *aff'd*, 862 F.3d 1221, 1236 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 747 (2018). Likewise, in *Millennium Pipeline Co. v. Acres of Land, Inc.*, No. 07-cv-6511L, 2015 WL 6126949 (W.D.N.Y. 2015), the court advised the landowner: "[B]e aware that courts routinely hold that 'there is no provision for an award of attorneys' fees in the Natural Gas Act….' The United States Supreme Court has expressly stated that '[a]ttorneys' fees and expenses are not embraced within just compensation….'" *Id.* at *3 (citations omitted).

Congress did not subject the federal power of eminent domain exercised pursuant to the Natural Gas Act to state law or provide for an award of attorney's fees and costs in such cases. The district court erred by applying Florida substantive law and the Florida Constitution's "full compensation" standard to award attorney's fees and costs.

II. THE DISTRICT COURT ERRED BY AWARDING ATTORNEY'S FEES AND COSTS PURSUANT TO STATE LAW.

The district court also erred by failing to follow binding caselaw that establish Congress has occupied the field of attorney's fees and costs awards in federal question cases, preempting state law, and federal courts may not award costs based on state law in either federal question or diversity cases. In the absence of clear congressional directive to the contrary, attorney's fees and costs may be awarded in this federal question case only pursuant to a federal statute or rule.

A. Congress has "occupied the field" of attorney's fees and costs awards in federal question cases, preempting state law.

In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), the Supreme Court made clear district courts should not adopt state law to award attorney's fees in federal question cases, writing:

> What Congress has done … is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances…. Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.

Id. at 260-62. Similarly, in *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court held: "Under th[e] 'American Rule,' we follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.'" *Id.* at 602

(citation omitted).

Likewise, this Court has held: "[U]nder the 'American Rule' parties in litigation are expected to bear their own attorney's fees and costs. … Congress may abrogate this rule … by explicitly providing otherwise." *Dionne v. Floormasters Enterp.,* 667 F.3d 1199, 1205 (11th Cir. 2012) (citing *Buckhannon*); *see also Home Savings Bank, F.S.B., v. Gillam*, 952 F.2d 1152, 1162 (9th Cir. 1991) ("Because established federal common law disfavors the award of attorney's fees in federal question cases absent an express congressional directive, we hold that the district court erred in applying Alaska's law on attorney's fees. Incorporation of state law occurs in federal question cases only in the absence of federal common or statutory law. Use of state law in such instances avoids the creation of new federal common law. However, when federal common law already exists, as it does here, the Supreme Court has refused to apply state law.") (citing *California v. U.S.*, 457 U.S. 273, 284 (1982)); *Davison v. Puerto Rico Firefighter Corps.*, 479 F. Supp. 2d 243, 246 (D.P.R. 2007) ("We will not apply state attorney's fees law to order one party to pay the attorney's fees of another in a federal question case when federal common law clearly dictates that the parties bear their own costs.").

In *Design Pallets, Inc., v. Gray Robinson, P.A.,* 583 F. Supp. 2d 1282, 1287 (M.D. Fla. 2008), the court recognized Congress has "occupied the field" of attorney's fees and costs awards in federal question cases, preempting state law.

Having prevailed on a federal question claim, a law firm sought an attorney's fees award pursuant to section 768.79 of the Florida Statutes. *Id.* at 1285. The court noted section 768.79 is substantive law but rejected the fees request, writing:

> [A] federal judge whose jurisdiction is founded solely on a federal question would not apply § 768.79 to the resolution of federal claims inasmuch as § 768.79 is preempted by federal law. In the seminal case of *Alyeska* …, the U.S. Supreme Court exhaustively reviewed the history, application, and exceptions to the "American Rule,"…. Since 1796—as either a matter of judicial custom or, after 1853, as a matter of federal statute—the Supreme Court concluded that it had consistently adhered to the American Rule and would not, absent a federal statute, allow awards of attorneys' fees….
>
> … Based on more than 150 years of statutory history and parallel Supreme Court precedents, Congress has rather clearly "occupied the field" concerning the provision of attorneys' fee awards for federal claims. … While the federal Costs Statute does not expressly preempt State law, pursuant to *Alyeska Pipeline,* this 155-year-old statute clearly demonstrates Congress' intent to occupy the field. Thus, the Supremacy Clause and the Costs Statute preempt § 768.79 where a district court's jurisdiction is founded solely on a federal question.

Id. at 1285-87.

The Supreme Court has made clear that when Congress creates a federal cause of action but does not expressly authorize an award of attorney's fees and costs, a court may not rely on state law to justify the award. In *F. D. Rich Co. v. U.S.*, 417 U.S. 116 (1974), the Supreme Court reversed a Ninth Circuit decision holding attorney's fees may be awarded in a suit brought under the Miller Act, which—like the Natural Gas Act—does not allow attorneys' fees awards. *Id.* at

126-31. The Ninth Circuit reasoned that California substantive law allows attorney's fees to prevailing parties in similar state court suits. *Id.* at 126-27. But the Supreme Court reversed, holding:

> The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law. Neither respondent nor the court below offers any evidence of congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees.

Id. at 127.

Three years after being reversed in *F. D. Rich*, the Ninth Circuit addressed a claim for attorney's fees and costs in a Fifth Amendment inverse condemnation case, *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1328, 1333 (9th Cir. 1977). With the benefit of the Supreme Court's *F. D. Rich* decision, the Ninth Circuit affirmed the district court's holding that state law was inapplicable to the question of liability for attorney's fees and costs because there was "no showing of congressional intent to incorporate state law into suits filed under the Fifth Amendment." *Id.* at 1333-34.

Congress has passed hundreds of statutes granting attorney's fees and costs in federal matters. *See, e.g.,* Awards of Attorneys' Fees by Federal Courts and Federal Agencies, Congressional Research Service (Oct. 22, 2009), https://www.everycrsreport.com/ reports/94-970.html (providing 60-page list of federal attorney's fees statutes). For example, the Uniform Relocation Assistance and Real

Property Acquisition Act ("URA") authorizes attorney's fees and costs awards in federal condemnation cases under specific circumstances that do not apply here. *See* 42 U.S.C. §§ 4601, 4654. That vast statutory scheme of allowing attorney's fees and costs awards in certain federal question cases serves to preempt state law as a basis for attorney's fees and costs awards in other federal question cases.

B. Federal courts may not award costs based on state law in either federal question or diversity cases.

The Supreme Court has held federal courts may not award costs exceeding those allowed in federal cost statutes. *See Henkel v. Chicago,* 284 U.S. 444, 445 (1932) (reversing award of expert fees under state law because Congress had passed statute regarding witness fees and rejecting argument that state law should be regarded as rule of decision); *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 445 (1987) (rejecting "[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede those sections"); *Kansas v. Colorado*, 556 U.S. 98, 103 (2009) (rejecting request for expert fees beyond those allowed in § 1821, stating: "we conclude that the best approach is to have a uniform rule that applies in all federal cases"); *Taniguchi v. Kan Pac. Saipan, Ltd*., 566 U.S. 560, 565 (2012) (noting federal court practice of awarding costs pursuant to state law ended when Congress enacted legislation specifying costs allowable in federal court).

Even in diversity cases, only federal cost statutes may serve as the basis for an award of costs. In the diversity case of *Kivi v. Nationwide Mutual Insurance Co.,* 695 F.2d 1285 (11th Cir. 1983), this Court cited *Henkel* in rejecting a state law-based claim for expert fees exceeding those allowed under § 1821 and stated: "We need not labor long concerning this issue because it is well settled that expert witness fees cannot be assessed in excess of witness fees provided in § 1821." *Id.* at 1289. This Court frequently has cited *Kivi* when limiting cost awards in diversity actions to those allowed under federal law. *See, e.g., Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1526 (11th Cir. 1985); *Ageloff v. Delta Airlines*, 860 F.2d 379, 390 (11th Cir. 1988); *Cronin v. Washington Nat. Ins. Co*., 980 F.2d 663, 672 (11th Cir. 1993); *Primo v. State Farm Mut. Auto. Ins. Co.*, 661 Fed. Appx. 661, 666 (11th Cir. 2016).

As explained in *Kivi*, the Fifth Circuit's decision in *Henning v. Lake Charles Harbor and Tunnel District*, 387 F.2d 264 (5th Cir. 1968), does not compel a different result here. In *Henning*, the state of Louisiana brought a condemnation action originally in state court to exercise its state power of eminent domain to acquire land necessary for construction of an industrial canal and plant. *See id*. at 265 & n.2. The case was removed to federal court based on diversity. *Id.* at 295. Citing *Erie*, the district court applied Louisiana state law to tax expert fees as costs. *See id*. at 265, 267. *Henning* is inapplicable here because this is not a diversity

case, but a federal question case in which Sabal Trail exercised the federal power of eminent domain. *See Kivi*, 695 F.2d at 1289 (distinguishing *Henning* on the basis that it was a Louisiana condemnation case in which a Louisiana statute was applied).[8]

The district court erroneously concluded Sabal Trail's argument against the imposition of costs exceeding the federal cost statutes "implicitly hinges" on application of Federal Rule of Civil Procedure 54(d), which awards costs to "prevailing parties" in federal cases. (ECF 298 at 53.) According to the district court, federal cost statutes 28 U.S.C. §§ 1920 and 1821 do not govern this case because Federal Rule of Civil Procedure 71.1(l) renders Rule 54(d) inapplicable to federal condemnation actions. (ECF 298 at 53.) Rule 71.1(l) exempts condemnation actions from Rule 54(d). But the purpose of Rule 71.1(l) was to ensure the condemnor—normally the prevailing party—does not recover costs

[8] Just ten years after *Henning*, the Fifth Circuit noted conflict between *Henning* and its decision of *Kirby Lumber Corp. v. State of La.*, 293 F.2d 82, 83 (5th Cir. 1961). *See U.S. v. 1,380.09 Acres*, 574 F.2d 238, 241 n.7 (5th Cir. 1978) ("Insofar as *Henning* applies state law to a state condemnation, it is directly at odds with the terse comment in *Kirby Lumber* that expert witness fees cannot be recovered in federal courts, as *Kirby Lumber* was also a Louisiana state condemnation case."), *rev'd on other grounds sub nom. U.S. v. Bodcaw Co*., 440 U.S. 202 (1979). In *Kirby Lumber*, also a condemnation case bought by a state originally in state court but removed to federal court due to diversity jurisdiction, the Fifth Circuit denied expert witness fees because "[s]uch fees are never allowed in condemnation cases in Federal Courts," citing *Henkel*. 293 F. 2d at 87.

from the landowner. Fed. R. Civ. P. 71.1(l) advisory committee's note to 1951 amendment. Rule 71.1(l) does not repeal by implication §§ 1920 and 1821.

This is made clear in *Crawford Fitting*—the very case the district court cites in concluding §§ 1920 and 1821 do not govern where Rule 54(d) does not apply. The issue in *Crawford Fitting* was whether Rule 54(d) grants district courts discretion to exceed the witness fee cap set forth in § 1821(b). *See* 482 U.S. at 439. The Court noted the interplay between the cost statutes and Rule 54(d), explaining "§ 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs." *Id.* at 441. But the Court rejected the contention that Rule 54(d) provides "a separate source of power to tax as costs expenses not enumerated in § 1920" because such an interpretation would render the specific cost statutes superfluous. *Id*. The Court cautioned it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees." *Id.* at 445. The Court continued, "[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede those sections ignores our longstanding practice of construing statutes *in pari materia*," before holding: "absent explicit statutory or contractual authorization for the taxation of the

expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* Rather than constituting a "broad pronouncement[] concerning the limitation on taxing witness fees as costs," as characterized by the district court, (ECF 298 at 55), *Crawford Fitting* directly and unambiguously prohibits the assessment of witness fees and costs exceeding what is permitted under the federal cost statutes.

Had Congress intended for Rule 71.1(l) to exempt federal condemnation actions from the cost limitations set forth in §§ 1821 and 1920, it would have explicitly said so. *See Crawford Fitting*, 482 U.S. at 445; *see also Hyatt v. Hirshfeld*, No. 2020-2321, 2021 WL 3641024, at *5 (Fed. Cir. Aug. 18, 2021) ("The American Rule sets a high bar that vague definitions cannot overcome, particularly considering the many instances in which Congress has explicitly shifted expert fees."). There is no explicit statutory authorization to exceed the federal cost statutes in federal condemnation actions.

The district court also cited *Off Lease Only v. Lakeland Motors,* 846 Fed. Appx. 772 (11th Cir. 2021), in stating, "the Eleventh Circuit has recently explained that *Kivi* and cases like it do not require automatic application of sections 1920 and 1821 in *every* federal case." (ECF 298 at 54) (emphasis in original). But *Off Lease* involved costs assessed as a curative condition of a voluntary dismissal under Rule 41(a)(2). 846 Fed. Appx. at 775. There is no indication this Court would apply *Off*

Lease outside the narrow context of voluntary dismissals. *See Off Lease*, 846 Fed. Appx. at 775-76 (*citing Arias v. Cameron*, 776 F.3d 1262, 1268 (11th Cir. 2015), and *McCants v. Ford Motor Co.,* 781 F.2d 855, 856 (11th Cir.1986), in recounting the purpose of Rule 41(a)(2) and the need for curative conditions).

Because Congress has enacted numerous federal statutes permitting the award of attorney's fees in various federal causes of action and enacted specific cost statutes governing all federal cases, the district court erred by awarding attorney's fees and costs based on state law in this federal question case. Although both *Georgia Power* and *Tennessee Gas* contain *dicta* regarding attorney's fees and costs awards, neither hold attorney's fees and costs were properly awarded. Given the Supreme Court's commitment to the American Rule, the district court erred. *See Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 371, 372 (2019) ("This Court's ' "basic point of reference" when considering the award of attorney's fees is the bedrock principle known as the " 'American Rule' ": Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.' ") (citations omitted).

CONCLUSION

This Court should hold the Fifth Amendment's "just compensation" standard applies, reverse the district court's holding on entitlement to attorney's fees, and limit costs to those allowed under federal statutes.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to 11th Cir. R. 28-1, that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,974 words, excluding the parts exempted by Fed. R. App. P. 32(f). Microsoft Word software was used to count the words in the Brief.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy hereof was filed September 1, 2021, via CM/ECF, which will distribute copies to all counsel of record.

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