Consolidated Case Nos. 21-11995, 21-11998

United States Court of Appeals

for the

Eleventh Circuit

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,

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

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR DEFENDANTS-APPELLEES LEE A. THOMAS AND RYAN B. THOMAS

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, Defendants/Appellees, Lee A. Thomas and Ryan Brady Thomas a/k/a Ryan B. Thomas, hereby certify that they have no parent corporation and no publicly held corporation owns 10% or more of Appellees' stock and submit the following Certificate of Interested Persons:

1. Akerman LLP (Counsel for PNC Bank, N.A.)
2. Armitage, Brian (corporate representative of Plaintiff/Appellant)
3. Bauerle, Esq., Kurtis T. (Counsel for Plaintiff/Appellant)
4. Belz, Matt (Counsel for Defendants/Appellees)
5. Belz, Timothy (Counsel for Defendants/Appellees)
6. Brigham Property Rights Law Firm, PLLC (Counsel for Defendants/Appellees)
7. Brigham, Esq., Andrew Prince (Counsel for Defendants/Appellees)
8. Bucalo, Esq., Christopher C. (Counsel for Defendants/Appellees)
9. Childs, E. Ginnette (Trial Counsel for PNC Bank, N.A.)
10. Copeland, Esq., E. Scott (Counsel for Defendants/Appellees)
11. Crispin, William K. (Counsel for Defendants/Appellees)
12. Davis, Esq., Stephen S. (Counsel for Plaintiff/Appellant)

13. Drummond Community Bank
14. Duke Energy Corporation (NYSE: DUK)
15. Duke Energy Florida, LLC
16. Duke Energy Sabal Trail, LLC
17. Enbridge Inc. (NYSE: ENB)
18. Florida Power & Light Company
19. Florida Southeast Connection, LLC
20. Harris Harris Bauerle Ziegler Lopez (Counsel for Plaintiff/Appellant)
21. Harris, Esq., Bruce M. (Counsel for Plaintiff/Appellant)
22. Hearne, II, Esq., Mark F. (Thor) (Counsel for Defendants/Appellees)
23. Huck, The Honorable Paul C. (U.S. District Judge)
24. Hutson, Esq., Trevor S. (Counsel for Defendants/Appellees)
25. Law Offices of William K. Crispin, Chtd. (Counsel for Defendants/Appellees)
26. Lopez, Esq., Edgar (Counsel for Plaintiff/Appellant)
27. Lopez, Esq., Kimberly A. (Trial Counsel for PNC Bank, N.A.)
28. NextEra Energy Capital Holdings, Inc.
29. NextEra Energy Pipeline Holdings, LLC
30. NextEra Energy Power Marketing, LLC
31. NextEra Energy Resources, LLC

32. NextEra Energy, Inc. (NYSE: NEE)

33. O'Connor, Esq., Ryan D. (Counsel for PNC Bank, N.A.)

34. PNC Bank, N.A.

35. Rogers, Pam f/k/a Herring, Pam (Corporate Representative for Plaintiff/Appellant)

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

37. Spectra Energy Corp

38. Spectra Energy Partners Sabal Trail Transmission, LLC

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

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

41. Thomas, Lee A., as Successor Sole Trustee of the Trust Agreement for Beverly J. Thomas Dated October 1, 2003 (Defendant/Appellee)

42. Thomas, Lee A., as Successor Sole Trustee of the Trust Agreement for Lee A. Thomas Dated October 1, 2003 (Defendant/Appellee)

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

44. Transcontinental Gas Pipe Line Company, LLC

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

46. U.S. Southeastern Gas Infrastructure, LLC

47. USG Energy Gas Producer Holdings, LLC

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

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

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

STATEMENT REGARDING ORAL ARGUMENT

Ryan B. Thomas and Lee A. Thomas Trust (Thomas Family), the appellees, believe oral argument will be helpful to this Court due to the importance of the issues in this appeal. Because this appeal presents the possibility of a break from an *en banc* decision of this Court's predecessor-court – the Fifth Circuit – and a split from two sister-circuits – the Third and Sixth circuits – the Thomas Family believes oral argument will assist this Court in resolving the important issues that arise in this case and the other district court cases now working their way through this Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

STATEMENT OF THE ISSUE

Was the District Court correct to apply Florida substantive law as the rule of decision to determine the compensation an owner is due when a private pipeline company takes private property for a natural gas pipeline?

STATEMENT OF THE CASE

A. The Sabal Trail pipeline project.

Sabal Trail Transmission, LLC (Sabal Trail), is a joint venture of Spectra Energy Partners, NextEra Energy, Inc., and Duke Energy – large private energy companies with a combined value in excess of $100 billion.[1] Sabal Trail wanted to construct a 517-mile-long pipeline from Alexander City, Alabama, to Reunion, Florida, to transport natural gas for Florida Power and Light and Duke Energy of Florida. See Compl., Doc. 1, pp. 4-5. The pipeline is capable of transporting more than one billion cubic-feet of natural gas per-day.[2]

Congress granted pipeline companies the authority to acquire easements through private property by eminent domain. See Natural Gas Act (NGA), 15 U.S.C. §717f(h) (Addendum A). This provision of the NGA allows pipeline companies to file a condemnation lawsuit in state court or federal district court.

[1] Spectra Energy alone, via a 2017 merger with Enbridge Inc., has an enterprise value of $126 billion. See Spectra Energy's website at: http://www.spectraenergy.com.

[2] See Sabal Trail's website at: www.sabaltrailtransmission.com.

B. The Thomas Family's property.

In 2003, Lee Thomas, through a trust he created, bought an 837-acre farm in Levy County, Florida. Lee Thomas' son, Ryan Thomas, grew watermelons and peanuts, tended cattle, and boarded horses on the Thomas Trust land. In 2006, Ryan Thomas purchased a 40-acre tract of land adjoining the property owned by the Thomas Trust his father established. Ryan Thomas also leased the 837-acre Thomas Trust property. Ryan and his two children lived on this land. (We refer to Ryan Thomas' property and the Thomas Trust property as the "Thomas Family" property.)

During the pendency of this appeal, Ryan Thomas initiated Chapter 12 bankruptcy proceedings in the Bankruptcy Court of the Northern District of Florida. The bankruptcy filing resulted in a stay of proceedings before this Court and the District Court. Ryan Thomas was able to secure financing sufficient to satisfy his primary creditor and dismissed the bankruptcy proceedings. See *In re Ryan Brady Thomas*, No. 21-10185-KKS (Bankr. N.D. Fla. Sept. 27, 2021), Doc.70.

C. Sabal Trail's condemnation of the Thomas Family Property.

Sabal Trail wanted to build a pipeline through the Thomas Family's property. Sabal Trail offered Ryan Thomas $6,800 and the Thomas Family Trust $59,700 for

their property. *L. Thomas Trust*,[3] Doc.280-6; *R. Thomas*,[4] Doc.243-6. The Thomas Family didn't want a natural gas pipeline running through their land. The Thomas Family didn't accept Sabal Trail's offer because Sabal Trail did not offer the Thomas Family any compensation for damage to the Thomas Family's remaining property.

So, Sabal Trail invoked §717f(h) of the National Gas Act (NGA) and Rule 71.1 of the Federal Rules of Civil Procedure and filed a condemnation lawsuit in the Northern District of Florida. Less than twelve weeks after filing its condemnation lawsuit against Ryan Thomas and Thomas Trust, Sabal Trail took possession of the Thomas Family's property.

Sabal Trail's lawsuits against Ryan Thomas and the Thomas Family Trust were combined and tried to a jury presided over by the Honorable Paul C. Huck. While the Honorable Mark E. Walker presided over the proceedings from initial filing until present, Judge Huck presided over the trial.

Sabal Trail and the Thomas Family presented testimony of appraisers qualified as expert witnesses, who told the jury their respective opinions of what the property taken from the Thomas Family was worth. Lee Thomas, as Trustee for the Thomas Trust, owner of the 837-acre farm property, told the jury his opinion of what

[3] *Sabal Trail Transmission LLC v. 18.27 Acres of Land in Levy County, Florida, et al.*, No. 1:16CV93-MW-GRJ (N.D. Fla.).

[4] *Sabal Trail Transmission LLC v. 2.468 Acres of Land in Levy County, Florida, et al.*, No. 1:16CV95-MW-GRJ (N.D. Fla.).

the Thomas Trust property was worth. Ryan Thomas, as the lessee of the 837-acre farm property and the owner of the 40-acre property, told the jury his opinion of the value of both properties and damages to the remainder property.

Judge Walker instructed the jury (among other instructions):

> The Florida Constitution provides that the owners of property taken have a right to "full compensation." Full compensation includes the fair market value of the property taken plus whatever damages result to the owner's remaining lands as a result of the taking.
>
> The Owner is to be put in as good a position financially as he or she would have been if the property had not been taken….
>
> The constitutional requirement of full compensation means that the landowner must be paid completely for the whole loss resulting from the taking. In most cases, it will be necessary and sufficient to full compensation that the award constitute the fair market value of the property. Although fair market value is a reliable standard in determining the amount of full compensation to be paid to the owner, it is not the only standard. It is merely a tool to assist you in determining what is full compensation as guaranteed by the Florida Constitution. In determining full compensation, all facts and circumstances that bear a reasonable relationship to the owner's loss must be taken into account…An owner of property taken in condemnation proceeding may testify as to the full compensation for the owner's estate or interest in the property on the date of value.
>
> The testimony of the owner as to the value is to be weighed and considered by you the same as that of any other witness expressing an opinion as to full compensation on the date of value….

L. Thomas Trust, Doc.186, pp. 5-8; *R. Thomas*, Doc.144, pp. 5-8.

The jury returned a verdict awarding $861,264 in compensation for the Lee Thomas property. *L. Thomas Trust*, Doc.193. The District Court entered an order

directing Sabal Trail to pay Ryan Thomas $463,439.[5] *R. Thomas*, Doc.157.

Sabal Trail appealed the jury's decision and Judge Huck's order raising two issues. *First*, Sabal Trail argued the District Court should not have allowed the jury to hear the testimony of Lee Thomas and Ryan Thomas concerning damages to the remainder property. Sabal Trail lost this appeal. This Court held it was not an abuse of discretion for the district court to allow the jury to hear a property owner's opinion as to the value of the owner's property. See *Sabal Trail Transmission v. 18.27 Acres*, 824 Fed. Appx. 621, 625-26 (11th Cir. Aug. 3, 2020) ("Although Lee and Ryan provided little explanation for the specific values they testified to, we cannot say their testimony was purely speculative or that the district court abused its considerable discretion in admitting it."). In a similar case, *Sabal Trail Transmission, LLC v. 3.921 Acres*, 947 F.3d 1362, 1369-70 (11th Cir. 2020), this Court held "Because [the property owner]'s opinion was based on her personal experience and knowledge, we conclude that the district court did not abuse its discretion in allowing her to testify."

Second, Sabal Trail claimed the District Court should not have awarded compensation for attorney fees as the Florida Constitution and law provide. Sabal Trail argued federal common law displaced Florida's substantive law and

[5] See also *Sabal Trail Transmission, LLC v. Real Estate*, 2017 WL 2783995 (N.D. Fla. June 27, 2017).

constitution and, under the Fifth Amendment, attorney fees are not part of "just compensation," so therefore, the District Court should not have ordered Sabal Trail to pay the Thomas Family's attorney fees and expenses. But, because the District Court had not yet determined the specific amount of attorney fees and costs, this Court remanded this choice-of-law issue to the District Court. On remand, the District Court determined a reasonable attorney fee for work representing the Thomas Trust was $286,583.50 for work in the District Court, a reasonable attorney fee for work on the appeal was $99,982.50, and the costs of $62,222.34 were reasonable. See *Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy County*, 538 F. Supp.3d 1243, 1284 (N.D. Fla. 2021), *L. Thomas Trust*, Doc.298. The District Court determined the reasonable attorney fee for work representing Ryan Thomas was $188,562.25 for work in the District Court, a reasonable attorney fee for work on Ryan Thomas' appeal was $79,507.50, and the costs of $49,016.59 incurred by Ryan Thomas were reasonable. *R. Thomas* Doc.257. The District Court ordered Sabal Trail to pay the Thomas Family these amounts.

Judge Walker held,

> This Court previously held 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. Accordingly, Florida's full compensation measure applies here, which includes reasonable attorney's fees. See, Art X, §6A, Fla. Const. ("No private property shall be taken except for a public purpose and with *full* compensation therefor paid to each owner.…") (emphasis added); *Joseph B. Doerr Trust v. Cent. Fla. Expressway Auth.*, 177 So. 3d 1209,

> 1215 (Fla. 2015) (holding it is "fundamentally clear" that the definition of full compensation under Florida's Constitution includes reasonable attorney's fees (citations omitted).
>
> Several courts have reached the same conclusion – that state substantive law governs the measure of compensation – both before and after this Court conducted its analysis.[6]

L. Thomas Trust, Doc.298, pp. 1-2; *R. Thomas* Doc.257, pp. 1-2.

STANDARD OF REVIEW

The District Court had subject matter jurisdiction under 28 U.S.C. §1331 and 15 U.S.C. §717f(h). This Circuit has appellate jurisdiction under 28 U.S.C. §1292(b). The District Court's decision to apply Florida substantive law as the rule of decision is reviewed by this Court de novo. See *Tampa Bay Water v. HDR Engineering, Inc.*, 731 F.3d 1171, 1177 (11th Cir. 2013); *Alabama Power Co. v. 1354.02 Acres in Randolph County, Ala.*, 709 F.2d 666, 668 (11th Cir. 1983) (citing *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (*en banc*)).

SUMMARY OF THE ARGUMENT

Property rights have traditionally been one of the core areas in which state substantive law, rather than federal common law, creates the governing legal regime.

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[6] Citing *Tennessee Gas Pipeline Co., LLC v. Permanent Easement*, 931 F.3d 237 (3rd Cir. 2019); *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992); *Sabal Trail Transmissions LLC v. Real Estate*, 2018 WL 2305768 (M.D. Ga. May 21, 2018); *Equitrans LP v. Real Estate*, 2017 WL 1455023 (N.D.W.V. Apr. 21, 2017).

This history of state law predominance is a critical factor in the choice-of-law framework adopted in *Georgia Power* and reflected in prior and subsequent decisions of the United State Supreme Court. The choice-of-law analysis begins and ends with the binding *en banc* decision in *Georgia Power*. *Georgia Power* has deep constitutional roots in our constitutional system that establish Florida substantive law as the appropriate source for the federal rule of decision concerning the measure of compensation owed to a landowner when a private party, such as Sabal Trail, acting pursuant to a federal statutory delegation of eminent domain authority, takes private property.

The District Court faithfully applied the controlling *en banc* decision in *Georgia Power* and followed the decision of the Sixth Circuit in *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage*, 962 F.2d 1192 (6th Cir. 1992). The District Court's decision is likewise in harmony with the Third Circuit's subsequent decision in *Tennessee Gas Pipeline Co., LLC v. Permanent Easement*, 931 F.3d 237 (3rd Cir. 2019). These circuits applied and followed *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), directing that state law – not federal common law – provides the federal rule of decision.

State substantive law, not federal common law, defines an owner's interest in property. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring) ("In determining whether a taking has occurred, we are

mindful of the basic axiom that [p]roperty interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)) (internal quotations omitted). See also 36 *CJS Federal Courts* §189(5) (1960) ("as a general rule, legal interests and rights in property are created and determined by state law….[thus,] the courts of the United States have applied state law in cases involving…the powers of eminent domain and its exercise.…").

Sabal Trail admits that, under Florida's Constitution and case law, Sabal Trail must pay the "full measure of compensation" due a landowner and that full compensation includes payment of the owner's attorney fees and costs. "Under Florida substantive law 'full compensation' includes attorney's fees and costs." Sabal Trail brief, p. 18.

Sabal Trail does not challenge the District Court's determination of the reasonable attorney fees and costs the District Court awarded the Thomas Family. Sabal Trail only challenges the District Court's decision that Florida substantive law provides the rule of decision.

ARGUMENT

I. Florida law provides the rule of decision to determine the compensation a landowner is due when a landowner's property is condemned.

A. *Georgia Power* is controlling precedent that binds this panel.

Georgia Power, *Columbia Gas*, and *Tennessee Gas* applied and followed the Supreme Court's decision in *Kimbell Foods*. Judge Walker correctly followed this authority when he concluded Florida state substantive law provides the rule determining the compensation Florida landowners are due when landowners' property is taken by eminent domain.

Twenty-three federal circuit court judges have considered this issue and have reached the same conclusion as Judge Walker.[7] To wit: state substantive law – not federal common law – provides the rule determining the compensation a landowner must be paid when a private company exercises a federally-delegated power of eminent domain.

Georgia Power is controlling precedent that strictly binds this panel. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) (former

[7] The *Georgia Power en banc* decision was written by Judge Randall and joined by Chief Judge Coleman and Judges Brown, Roney, Gee, Hill, Vance, Kravitch, Garza, Henderson, Reavely, Politz, Hatchett, Randall, Tate, (Sam) Johnson, and (Thomas) Clark, with Judge Fay concurring. *Columbia Gas* was a unanimous decision written by Judge Jones and joined by Judges Milburn and Engel. The Third Circuit's decision in *Tennessee Gas* was written by Judge Greenaway and joined by Judge Ambro.

Fifth Circuit decisions handed down prior to September 30, 1981, are binding precedent within the Eleventh Circuit). In *Georgia Power* the *en banc* Fifth Circuit considered whether state substantive law or federal common law governs the determination of compensation an owner is due when the owner's property is condemned by a private company exercising eminent domain under a federal license. The *en banc* Fifth Circuit concluded, "the law of the state where the condemned property is located is to be adopted as the appropriate federal rule for determining the measure of compensation when a licensee of the Commission exercises the power of eminent domain." 617 F.2d. at 1113.

Principles of federalism inform the choice-of-law analysis in the federal courts. Federal courts do not recognize a "general common law," as state law is presumed to provide the rule by which an owner's compensation is determined. The federal government is one of limited and enumerated powers, and powers not delegated to the federal government are reserved to the states. See *United States v. Lopez*, 514 U.S. 549, 552 (1995). See also *Kamen v. Kemper Financial Services*, 500 U.S. 90, 98 (1991); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

Georgia Power explained,

> In analyzing the state's interests in having its laws of compensation apply when a licensee exercises the power of eminent domain under Section 21 of the [Federal Power Act (FPA)], we begin with the state's interest in avoiding displacement of its laws in the area of property

> rights, traditionally an area of local concern. Since property has been viewed as a bundle of valuable rights and since the question of what constitutes property is usually determined with reference to state law, we think it consistent that the value of those rights also be determined with reference to state law. Since states, as well as the federal government, have an interest in providing economical energy to their citizens, their laws of compensation, accommodating that interest with that of insuring that their condemnee-landowner citizens are compensated in accord with their (states') views of what is just, are entitled to weight.
>
> *Georgia Power*, 617 F.2d at 1123.

Georgia Power explained that state substantive law should not be displaced by federal common law unless Congress clearly and unequivocally stated that Congress intended to displace state law with a federal rule and there is a compelling reason why federal law should displace state law.

> Since the statute [the FPA] does not specify the appropriate rule of decision, the task of interstitial federal lawmaking falls upon the federal judiciary in this case to declare the governing law in an area comprising issues substantially related to an established program of government operation. Thus, the question which remains is whether the court should choose federal common law or state law as the applicable federal rule.
>
> The answer to this question is largely dependent upon whether one begins with the position that state law should be adopted unless it is shown that legislative intent or other sufficient reasons exist to displace state law with federal common law or with the position that federal common law should be utilized unless it is shown that legislative intent or other sufficient reasons exist to warrant adoption of state law. Basic considerations of federalism, as embodied in the Rules of Decision Act, prompt us to begin with the premise that state law should supply the federal rule unless there is an expression of legislative intent to the

> contrary, or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case.

Georgia Power, 617 F.2d at 1115-16.[8]

Georgia Power found nothing in the text or legislative history of the equivalent provision of the FPA that supported the notion Congress intended to "supply [a] federal rule in determining the measure of compensation in condemnation cases." 617 F.2d at 1118.

As the Third Circuit later held in *Tennessee Gas*,

> [T]he NGA [like the FPA] also does not provide a federal rule of decision as to the appropriate compensation owed to the condemnees under the statute…. [T]he NGA does provide that the practice and procedure in condemnation actions under the statute must conform as nearly as may be with the practice and procedure in similar actions or proceedings in the courts of the state where the property is situated. Some courts have concluded that this statutory directive mandates that state law govern the measure of just compensation.

931 F.3d at 249.[9]

The Third Circuit continued, "courts have read this clause as 'raising a strong presumption that state law does provided the proper measure for such determination.'" *Id.* (citing *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662, 665, n.3 (5th Cir. 1985), and quoting *Columbia Gas*, 962 F.2d at 1197).

[8] Internal quotations and citations omitted.

[9] Internal quotations and citations omitted.

If Congress had intended a federal common law rule of decision to displace state law, Congress would not have included §717f(h) in the NGA. *Georgia Power* explained,

> The foregoing review of Supreme Court decisions leads us to the conclusion that they do indeed evidence a growing desire to minimize displacement of state law, and that conclusion strongly supports our position that state law should be adopted as the federal rule of compensation unless it is shown that legislative intent or other sufficient reasons exist to displace state law with federal common law.
>
> 617 F.2d at 1118.[10]

When the United States is not the condemning authority, there is an even stronger presumption in favor of state substantive law.[11] *Georgia Power* held,

> Although federal rules have been applied to the determination of just compensation in federal condemnation cases *where the United States is the party* condemning and paying for the land, we do not deem those decisions controlling since our case arises in the context of a Section 21

[10] Internal quotation and citation omitted.

[11] Compare *Clearfield Trust Co. v. United States*, 318 U.S. 363, 67 (1943) (federal common law chosen as applicable rule of decision in action against the United States involving issuance of a federal check), and *United States v. Standard Oil Co.*, 332 U.S. 301, 310-11 (1947) (uniform national treatment via federal common law in action by United States against third-party tortfeasor to recover resulting from injury to U.S. serviceman), *with Bank of America National Trust & Savings Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956) (state law would supply federal rule of decision in litigation between private parties involving federal commercial paper), *Wallis*, 384 U.S. at 68 (state law to supply federal rule of decision in litigation between private parties relating to federal oil and gas lease issued pursuant to the Mineral Leasing Act of 1920), and *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 30 (1977) (state law held applicable to action against county by survivors of deceased airline passengers attempting to recover as third-party beneficiaries of contract between county and FAA).

> proceeding by a licensee where the nature of the federal interests involved differs markedly from the nature of the federal interests involved where the United States is the condemnor. Furthermore, while also not controlling, there is authority for the application of state law to questions concerning compensation, such as admissibility of evidence of consequential damages and the propriety of interest on a compensation award in condemnation actions brought in federal court under Section 21.

617 F.2d at 1119-20.[12]

Sabal Trail is intentionally oblivious to the distinction between the United States condemning property and a private for-profit corporation condemning private property under a limited delegation of eminent domain authority. Sabal Trail supports its argument with citations to cases in which *the United States* and not a *private pipeline company* was the condemnor and citations to dicta from district court opinions. Sabal Trail brief, pp. 26-29.[13] Sabal Trail fails to comprehend that it (Sabal Trail) is not the United States of America. One need look no further than the case caption. If the caption is "*United States v. So Many Acres of Land*" or "*United States v. a Property Owner*," the analysis does not apply to cases captioned "*Sabal Trail v. 18.27 Acres of Land in Levy County, et al.*" In other words, a

[12] Emphasis added; citing *Feltz v. Central Nebraska Public Power & Irrigation Dist.*, 124 F.2d 578 (8th Cir. 1942).

[13] Sabal Trail cites twenty-one district court decisions, most of which are unpublished and from districts in other Circuits. Sabal Trail fails to explain why this panel of the Eleventh Circuit should accord these random unpublished district court opinions any weight or relevance in light of *Georgia Power*'s controlling precedent.

different choice-of-law analysis applies when the United States of America (as opposed to a private company) is exercising the power of eminent domain.

As explained by *Georgia Power*, and later by the Sixth Circuit in *Columbia Gas* and by the Third Circuit in *Tennessee Gas*, a private licensee who invokes the limited delegation of eminent domain authority conferred by the FPA or the NGA is not equivalent to the United States of America. A limited delegation of eminent domain authority to a licensee does not confer upon the private licensee the sovereignty of the United States, and a limited delegation of eminent domain to a licensee does not implicate the same federal interests that arise when the national government itself condemns property for a federal infrastructure project using federal labor and public funds. See *Georgia Power*, 617 F.2d at 1118-24 (FPA case); *Columbia Gas*, 962 F.2d at 1197-99.

This distinction between (a) private for-profit companies acting under a limited delegation of eminent domain power, and (b) the federal government acting directly and in its own name, is especially applicable to condemnations of private property taken pursuant to the NGA. One of the NGA's primary aims was "to protect consumers against exploitation at the hands of natural gas companies." *Sunray Mid-Con. Oil Co. v. Fed. Power Comm'n*, 364 U.S. 137, 147 (1960).

Federal actors are ultimately accountable to federal officials, sworn to uphold the Constitution, charged with promoting the public good, and held accountable by

the voters on Election Day. Private corporations such as Sabal Trail are not sworn to uphold the Constitution, exist primarily to generate private profit, and are accountable only to their shareholders, not to the public-at-large. Direct federal condemnations require expenditure of taxpayer dollars; private corporate condemnors are spending corporate money. Direct federal condemnations often require ongoing federal participation, via federal employees and contractors, in construction and maintenance efforts; private condemnations do not. And, in direct federal condemnations, the federal government retains a continued ownership interest in the property taken; no such federal ownership interest exists in the property taken via eminent domain by a private corporate licensee.

Georgia Power addressed attorney fees, noting that attorney fees would have been included in the compensation award under Georgia law. A subsequent Georgia Supreme Court decision (issued while the *Georgia Power* litigation proceedings were still ongoing) held that attorney fees "need not be included in the measure of just compensation under the Georgia Constitution." *Georgia Power*, 617 F.2d at 1112, n.4 (citing *DeKalb County v. Trustees, Decatur Lodge No. 1602*, 251 S.E.2d 243 (Ga. 1978)).

The *Georgia Power* court's discussion of evolving Georgia case law and the compensation requirements of the Georgia Constitution confirms that *Georgia Power* treated Georgia's substantive law on the measure of compensation as the

pertinent source of legal authority with respect to whether attorney fees would be included in any compensation award. And *Georgia Power* noted that any "questions concerning the exact parameters of *Georgia law*" on the issue of compensation would "have to be resolved on remand." 617 F.2d at 1112, n.4 (emphasis added). This language in footnote 4, coupled with the absence of any discussion relating to the supposed "federal common law attorney fee" cases cited by Sabal Trail, confirms that there is no basis for carving out an "attorney fee exception" to the binding federalism and choice-of-law framework adopted by the *en banc* Court in *Georgia Power*.

B. The Sixth Circuit followed *Georgia Power* in *Columbia Gas.*

Columbia Gas Transmission Corporation wanted to use several hundred acres of farmland in Wayne County, Ohio, for an underground natural gas storage facility in connection with the company's pipeline. The land included several hundred acres of land the McCullough family owned. The gas company offered the McCullough family $13,000 for their property. Appraisers determined that the property the gas company wanted was worth several hundred thousand dollars. Columbia Gas didn't want to pay the McCullough family what the appraisers determined the property was worth, and so the gas company filed a condemnation suit in federal district court invoking §717f(h) of the NGA to condemn the McCullough family's land. The district court appointed three commissioners, who appraised the property and

determined the property taken was worth $213,798. The district court entered judgment for the McCullough family in this amount. The pipeline company appealed and argued that the standard to determine compensation should be a uniform national common-law rule of compensation, not Ohio state substantive law. Not surprisingly, under the pipeline company's formulation of a "national common-law rule," the compensation the pipeline company would have to pay the McCullough family was far less than under the Ohio state-law rule governing the compensation an owner is due when the owner's land is condemned. The Sixth Circuit rejected the pipeline company's federal choice-of-law argument and held Ohio's state substantive law provided the rule of decision by which compensation is determined.

The Sixth Circuit wrote, "[t]his appeal requires us to address whether this circuit should develop a federal common-law rule as the standard of valuation, or rather, whether the [NGA] requires that we adopt the law of the state in which the property is situated as the appropriate federal standard." *Columbia Gas*, 962 F.2d at 1193-94. The Sixth Circuit concluded, "we hold that the federal standard should incorporate the law of the state in which the condemned property is located." *Id.* The Sixth Circuit explained, "we must first determine whether this issue should be resolved in accordance with state law, in this case the law of Ohio, or under federal common-law." *Id.* at 1195. The court then followed and applied the Supreme

Court's analysis in *Kimbell Foods*, also citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943). As did the *en banc* Fifth Circuit in *Georgia Power* and the Third Circuit subsequently in *Tennessee Gas*, the Sixth Circuit noted that in *Kimbell Foods*,

> the [Supreme] Court enunciated three considerations guiding its analysis: (1) the need for a nationally uniform body of law, (2) whether application of state law would frustrate specific objectives of the federal program at issue, and (3) the extent to which application of a federal rule would upset commercial relationships predicated on state law.[14]

The Sixth Circuit wrote, "we have no hesitation concluding, consistent with the threshold *Kimbell Foods* inquiry, that defining the contours of §717f(h) is an issue of federal law." *Columbia Gas*, 962 F.2d 1196. But "[l]ess obvious is whether, as a matter of federal law, this Court should fashion a federal common-law rule as the federal standard or instead adopt the law of the state in which the condemned property is situated." *Id.* at 1196-97. On this point the Sixth Circuit consulted the two Fifth Circuit decisions, *Tabor* and *Georgia Power*, for guidance. The Sixth Circuit relied especially upon *Georgia Power* noting, "[i]n language materially identical to §717f(h), the Federal Power Act [16 U.S.C. §814] mandates that federal

[14] The Supreme Court reaffirmed its *Kimbell Foods* three-factor analysis in *Kamen v. Kemper Financial Services*, 500 U.S. 90, 108 (1991) ("where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute").

courts apply the 'practice and procedure' of the state in which the condemnation occurs." *Id.* at 1197.[15] The Sixth Circuit further noted that "at least one other circuit has found *Georgia Power* persuasive and, accordingly, adopted its analysis." *Id.* at 1198 (citing *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1266-67 (2nd Cir. 1987), *cert. denied* 484 U.S. 954 (1987)).

Applying the *Kimbell Foods* three-factor analysis, and guided by *Georgia Power*, the Sixth Circuit concluded,

> A number of reasons support adopting state law as the federal standard for determining compensation under §717f(h). First, property rights have traditionally been, and to a large degree are still, defined in substantial part by state law. … Thus, regardless of the rule chosen in this case, it will invariably derive its essence and much of its practical import from how the parties have previously allocated these state-defined property rights.
>
> *Columbia Gas*, 962 F.2d at 1198.

The Sixth Circuit continued, "[s]econd, we are confident that incorporating state law as the federal standard will not frustrate the specific objectives of the Natural Gas Act." *Id*. The Sixth Circuit explained that "even if it could be shown that state law might result, on average and over time, in consistently greater or lesser

[15] Certainly, federal procedural law applies to condemnation actions under the NGA. See *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1374-75 (11th Cir. 1999) (federal procedure governs condemnations bought under the NGA, and Rule 71A (now 71.1) supersedes Section 717f(h)). But, as already established under *Georgia Power* and *Columbia Gas*, state substantive law provides the appropriate federal rule of decision for determining compensation in NGA cases involving private condemnors.

awards, we seriously doubt that the amount would rise to the level to frustrate the specific objectives of the Natural Gas Act." *Id*.

Georgia *Power* held that nothing in the legislative history of the FPA suggested an intent to displace state law governing the measure of compensation in private-condemnor eminent domain actions filed in federal court. See *Georgia Power*, 617 F.2d at 1118. The Sixth Circuit in *Columbia Gas* addressed the exact question presented here in an Ohio eminent domain case arising under Section 717f(h) of the NGA, and emphasized that the legislative history of Section 717f(h) supported the Sixth Circuit's decision to follow *Georgia Power's* choice-of-law analysis and apply state law in determining the amount of compensation due an owner, stating,

> we note that legislative history of §717f(h) suggests that it was intended to mirror the parallel provision of the FPA. See H.R.Rep. No. 695, 80th Cong., 1st Sess., reprinted in 1947 U.S.C.C.A.N. 1477, 1477. The court in *Georgia Power* concluded that the FPA's legislative history warranted the application of state law. 617 F.2d at 1118.
>
> In sum, we conclude that, although condemnation under the NGA is a matter of federal law, §717f(h) incorporates the law of the state in which the condemned property is located in determining the amount of compensation due.

962 F.2d at 1199.

For all these reasons the Sixth Circuit held that the law of the state where the condemned property is situated provides the federal rule of decision to determine the compensation the owner is due. The Sixth Circuit also distinguished those opinions

(upon which Sabal Trail relies) as not relevant because in those cases the United States, not a private party, was the condemnor. *Columbia Gas*, 962 F.2d at 1198 (discussing *National R.R. Passenger Corp.* and, at note 7, *United States v. 33.5 Acres of Land*, 789 F.2d 1396 (9th Cir. 1986)).

C. The Third Circuit followed *Georgia Power* and *Columbia Gas* in *Tennessee Gas*.

Tennessee Gas is in every essential respect identical to this case. King Arthur Estate owned a tract of land in Pike County, Pennsylvania. Tennessee Gas Pipeline Company wanted an easement to construct and operate a natural gas pipeline through King Arthur's land. The pipeline company filed a condemnation lawsuit in federal district court and argued federal common law governed the determination of compensation. But, "by contrast [to federal common law], Pennsylvania has enacted its own remedial scheme that is applicable to condemnation proceedings that take place within the state." *Tennessee Gas*, 931 F.3d at 244.

The Third Circuit explained, "fair market value appears to be a more inclusive concept under Pennsylvania law. In contrast to the federal rule regarding partial takings, the recoverable market value under Pennsylvania law appears to include any benefits to value of the remaining property as a result of the taking." *Tennessee Gas*, 931 F.3d at 244 (citing 26 Pa. Cons. Stat. §§702(a), 706(a)). Importantly, the Third Circuit noted, "Pennsylvania law also permits recovery of professional fees such as appraisal, attorney, and engineering fees." *Id.* at 245 (citing Pa. Cons. Stat. §710).

The Third Circuit concluded that "on the whole, then, Pennsylvania law allows private property owners within the state to obtain more money from condemnors than they could under federal law." *Id.*

The pipeline company, seeking to pay King Arthur as little as possible, argued a federal common-law rule governed and the more generous Pennsylvania law defining an owner's compensation, which included attorney fees and expert costs, was displaced by Section 717f(h) of the NGA. The district court sided with the pipeline company and held that "although King Arthur could recover consequential damages for professional fees and development costs under Pennsylvania law, it could not do so under federal law." 931 F.3d at 242. King Arthur's "consequential damages at issue totaled just under $1 million." *Id.* The Third Circuit reversed, holding that state law, not federal common law, provided the rule by which to determine the owner's compensation. *Id.* at 255.

Relying explicitly upon *Georgia Power* and *Columbia Gas*, the Third Circuit found "the NGA is silent regarding the applicability of state law in condemnation proceedings under the statute. *Tennessee Gas*, 931 F.3d at 243. Indeed, the NGA is generally silent on the remedies available in the condemnation proceedings it allows. For example, it does not even expressly require that just compensation be provided." *Id.* The Third Circuit went on to hold,

> [T]he NGA also does not provide a federal rule of decision as to the appropriate compensation owed to condemnees under the statute. As

> mentioned previously, the NGA does provide that the "practice and procedure" in condemnation actions under the statute must "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). Some courts have concluded that this statutory directive mandates that state law govern the measure of just compensation. See, *e.g.*, *Tabor*, 757 F.2d at 665 n.3. Other courts have read this clause as "raising a strong presumption that state law does provide the proper measure for such determination." *Columbia Gas*, 962 F.2d at 1197. For two reasons, however, this clause is inapplicable here, rendering the NGA silent on the issue of compensation.

Id. at 249.

Relying upon *Georgia Power* and *Columbia Ga*s, the Third Circuit concluded that, under the Supreme Court's decision in *Kimbell Foods*, "state law should be incorporated as the federal standard" and that "*(i) Fashioning a Nationally Uniform Rule is Unnecessary, … (ii) Incorporating State Law Does Not Frustrate the NGA's Objectives*, … [and] *(iii) Application of a Uniform Federal Rule Would Upset Commercial Relationships.*" *Id.* at 251-54 (emphasis and capitalization in original).

In *Tennessee Gas* the pipeline company claimed a federal common-law standard, derived from *United States v. Miller*, 317 U.S. 369 (1943), should govern the measure of compensation a private pipeline company must pay landowners and that, under this federal common-law rule, the pipeline company needn't pay the owner's legal fees and costs. Sabal Trail makes this same argument here. See *Tennessee Gas*, 931 F.3d at 244.

The Third Circuit emphatically rejected the pipeline company's argument, stating, "nothing in *Miller* or its progeny expands its reach to condemnations by private entities. Indeed, *Miller* itself only concerned a condemnation by the federal government." 931 F.3d at 248. The Third Circuit went on to hold, "*That There Exists a Body of Related [Federal] Common Law Does Not Matter*." *Id.* at 250 (emphasis and capitalization in original).

The Third Circuit concluded,

> [B]ecause neither *Miller* nor any other binding authority provides a federal rule of decision as to what constitutes just compensation precisely where a private entity condemns private property under the statute, we turn to *Kimbell Foods*. That case and its progeny reflect a presumption in favor of state law, one not rebutted here. Even without that presumption, however, the *Kimbell Foods* factors collectively weigh in favor of state law because, for the reasons explained previously, (1) fashioning a nationally uniform rule is unnecessary, (2) incorporating state law does not frustrate the NGA's objectives, and (3) application of a uniform federal rule would upset commercial relationships. In light of this analysis, we decide 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 NGA.

931 F.3d at 255.

Sabal Trail argues that, instead of applying the Third Circuit's analysis in *Tennessee Gas*, this panel should split with the Third Circuit and adopt the dissenting opinion of Judge Chagaras. Sabal Trail brief, p. 3 ("This Court should adopt the well-reasoned conclusion of [dissenting] Judge Chagaras."). But dissenting Judge Chagaras's opinion (whether "well-reasoned" or not) is not the Third Circuit's

holding. For this panel to depart from the controlling *en banc* decision of *Georgia Power*, ignore the majority decision in *Tennessee Gas*, rule contrary to the unanimous decision of the Sixth Circuit in *Columbia Gas*, and adopt Judge Chagaras's dissent would be to "engage[ ] in an indefensible brand of judicial activism."[16] "No one puts Baby in the corner," said Patrick Swayze in the 1987 film *Dirty Dancing*. But that is what Sabal Trail asks this panel to do with *Georgia Power*.

II. Florida substantive law requires Sabal Trail to pay the Thomas Family's legal fees and litigation expenses.

Florida's constitution requires a condemning authority to pay the owner's legal fees and litigation expenses. The "full measure" of compensation the owner is due under the Florida Constitution includes the owner's attorney fees and expenses. See Fla. Const., Art. X, §6(a). In *Dade County v. Brigham*, 47 So.2d 602, 604-05 (Fla. 1950), the Supreme Court of Florida held, "an owner forced into court by one to whom he owes no obligation cannot be said to have received 'just compensation' for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair market value of the property, the expenses of which could conceivably exceed such value." See also *Jacksonville Expressway Authority v. DuPree Co.*, 108 So.2d 289, 290-92 (Fla. 1959).

[16] *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

In *Doerr v. Central Fla. Expressway Authority*, 177 So.3d 1209, 1215 (Fla. 2015), the Supreme Court of Florida held,

> In clear and direct terms, Article X, section 6(a), of the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." It is also fundamentally clear that full compensation under the Florida Constitution includes the right to a reasonable attorney's fee for the property owner.[17]

The Florida Supreme Court in *Doerr* continued, "'The right of private property owners to full compensation in eminent domain proceedings under the Florida Constitution is more expansive than that of the Fifth Amendment to the United States Constitution, which provides that private property shall not be taken for a public use "without just compensation.'" 177 So.3d at n.5.[18]

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[17] Citing *Tosohatchee Game Pres., Inc. v. Cent. & S. Fla. Flood Control Dist.*, 265 So.2d 681, 684-85 (Fla. 1972), and *JEA v. Williams*, 978 So.2d 842, 845 (Fla. Ct. App. 2008) ("A landowner's constitutional right to full compensation for property taken by the government includes the right to a reasonable fee for the landowner's counsel.").

[18] Citing *United States v. Bodcaw, Co.*, 440 U.S. 202, 203 (1979), and *Dohany v.* Rogers, 281 U.S. 362, 368 (1930). While Sabal Trail notes this point – that the Supreme Court's Fifth Amendment decisions have not included attorney fees as part of the "just compensation" the Fifth Amendment requires – Congress has adopted a number of statutes, such as the Tucker Act, 28 U.S.C. §1491, the Little Tucker Act 28 U.S.C. §1346, and the Uniform Relocation and Real Property Acquisition Policies Act, 42 U.S.C. §4601, *et seq.*, that require the federal government to pay the owner's attorney fees and litigation expenses when the federal government takes private property. Thus, Sabal Trail is wrong to suggest there is some federal policy of not paying an owner's attorney fees and expenses when the United States condemns private property.

Georgia Power described "property" as "a bundle of valuable rights," the content of which "is usually determined with reference to state law." 617 F.2d at 1123. The Florida Constitution, as explained by *Brigham* and *Doerr*, recognizes that making the owner whole with a "full measure" includes the owner's attorney fees and expenses. The Supreme Court of Florida in *Brigham* adopted the rationale articulated by the New York Court of Appeals in *In re Water Supply in City of New York*, 125 A.D. 219, 221, 109 N.Y.S. 652, 654 (N.Y. Ct. App. 1908), *aff'd* 192 N.Y. 569, 85 N.E. 1117 (N.Y. 1908). The New York court held that "no one would seriously question that there was ample authority for the payment of the costs, counsel fees, expenses and disbursements, including reasonable compensation for witnesses." 109 N.Y.S. at 654.

One of the core rights enjoyed by an owner of real property is that in the ordinary course of affairs, any sale of the property will be at a price mutually agreeable to the owner and the buyer. Eminent domain takes away this "stick" in the bundle, and the value of that stick is readily ascertained by looking at the costs incurred by the owner in arriving at a price for the property in the absence of a mutual voluntary agreement between buyer and seller. This understanding confirms that, under Florida law, the attorney fees and costs payable to an owner are a substantive component of the compensation paid for the property interests taken via eminent domain, not merely a separate procedural payment tacked on to a compensation

award.

In *Brigham*, the Supreme Court of Florida held that, "Freedom to own and hold property is a valued and guarded right under our government." 47 So.2d at 604. The Florida Constitution protects the ownership of private property as a fundamental right. Declaring a landowner has a right to his or her private property means nothing if the government, or a government licensee, can take the owner's property without making the owner whole. To protect this right from being taken against the owner's will by an exercise of eminent domain, "Full compensation is guaranteed by the [Florida] Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guaranty is that the owner shall be made whole so far as possible and practicable." *Id*.

A decade after *Brigham* the Supreme Court of Florida explained,

> [i]t must be borne in mind that in a condemnation proceeding the property of the landowner is subject to taking by the condemnor without the owner's consent. The condemnee is a party through no fault or volition of his own. Our Declaration of Rights, Section 12, Constitution of the State of Florida, F.S.A., makes it incumbent upon the condemnor to award "just" compensation for the taking.

Shell v. State Road Dep't, 135 So.2d 857, 861 (Fla. 1961).

The Florida Supreme Court continued,

> Unlike litigation between private parties' condemnation by any governmental authority should not be a matter of "dog eat dog" or "win at any cost." Such attitude and procedure would be decidedly unfair to the property owner. He would be at a disadvantage in every instance

> for the reason that the government has unlimited resources created by its inexhaustible power of taxation.
>
> *Id*.

The Supreme Court of Florida has reaffirmed this point. "We have previously emphasized the importance of fair play in eminent domain proceedings because of the inherent disadvantage to the property owner." *Doerr*, 177 So.3d at 1216. Both *Doerr* and *Brigham* looked to the New York decision in *In re Water Supply in City of New York*, 125 A.D. at 222, as explaining the rational underlying the policy Florida and New York embraced.

> [The condemning authority] desires a man's property. The individual knows that he must agree upon the price or submit to the award of commissioners, and with this advantage on the part of the city of New York it compels the owners of real estate to take its figures or to litigate the value of the property shall not be taken for public purposes except upon the payment of "just compensation;" and a man who is forced into court, where he owes no obligation to the party moving against him, cannot be said to have received "just compensation" for his property if he is put to an expense appreciably important to establish the value of his property he does not want to sell. The property is taken from him through the exertion of the high powers of the state, and the spirit of the Constitution clearly required that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals, as well as by the spirit of the Constitution; and it will not presumed that the Legislature has intended to deprive the owner of property of the full protection which belongs to him as a matter of right.
>
> 125 A.D. at 222.

It is thus a fundamental *substantive* principle of Florida law, protected in Florida's Constitution, that an owner whose property is condemned is entitled to the "full measure" of compensation that includes the owner's attorney fees and other expenses of the condemnation lawsuit.

As noted above, Sabal Trail concedes Florida's Constitution and substantive law requires condemning authorities to pay the owner's attorney fees and expenses as part of the full measure of compensation. And yet, Sabal Trail tries to avoid Florida's substantive law by arguing the NGA displaced Florida's constitution and substantive law with a federal common-law prohibition against paying the owner whose property has been condemned being paid the attorney fees and expenses incurred by reason of the condemnation lawsuit. Sabal Trail then posits that Florida's substantive standard of the "full measure" of compensation an owner is due does not apply to Sabal Trail because Sabal Trail must be treated as if Sabal Trail is the United States of America. And therefore, Sabal Trail argues, federal common law displaced Florida's constitutional and substantive law.

Sabal Trail's argument begs the question of whether state substantive law or federal common law provides the rule by which compensation is determined. Sabal Trail tries to support its argument by citing cases in which litigants tried to invoke state *procedural provisions*, rather than *substantive state law*, as the basis for recovering attorney fees in federal litigation. This demonstrates Sabal Trail's

fundamental misunderstanding of the choice-of-law issue at issue in this appeal.

This is a federal lawsuit in federal court. No one disputes that federal *procedural law* applies in condemnation actions under the NGA. See *Southern Natural Gas*, 197 F.3d at 1374-75 (federal procedure governs condemnations bought under the NGA, and Rule 71A (now 71.1) supersedes Section 717f(h)). But, as explained in *Georgia Power*, *Columbia Gas*, and *Tennessee Gas*, state *substantive law* provides the rule of decision by which the court must determine the compensation a landowner is due.

Sabal Trail claims it is cloaked with the United States sovereign immunity because Sabal Trail is a federal licensee granted a limited power of eminent domain. First, and most obviously, Sabal Trail isn't the United States of America. Where there is no direct taxpayer responsibility for the cost of building and operating the natural gas pipeline, and no direct federal role in deploying labor to construct the pipeline pursuant to a federal budget and timetable, the limited federal interests that remain are adequately served by the existence of the statutory licensing process and by agency oversight over the activities of private companies acting in pursuit of private profit, which is exactly what Sabal Trail is doing here.

III. Congress did not "occupy the field" and displace Florida law.

A. *PennEast Pipeline* provides Sabal Trail no succor.

PennEast Pipeline Company "sought to exercise the federal eminent domain power under §717f(h) to obtain rights-of-way along the pipeline route approved by FERC, and to establish just compensation for affected owners." *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2253 (2021). "PennEast sought to condemn two parcels in which New Jersey asserts a possessory interest, and 40 parcels in which the State claims nonpossessory interests, such as conservation easements." *Id.* New Jersey didn't want PennEast's pipeline running through state-owned land. New Jersey challenged the proposition that the federal government could grant a private party authority to sue a sovereign state and condemn state-owned land. "[T]he Third Circuit ruled in New Jersey's favor based on the State's statutory argument that the NGA did not delegate to certificate holders the right to file condemnation actions against nonconsenting States." *Id.* at 2254. New Jersey and the dissenting justices argued that "private parties cannot condemn state-owned property under §717f(h) because there is no applicable exception to sovereign immunity." *Id.* at 2258.

In a five-to-four decision the majority held, "[b]y its terms, §717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States." *PennEast*, 141 S.Ct. at 2263. In a

notably ideological mix, Justices, Gorsuch, Thomas, Barrett, and Kagan dissented. The issue that divided the Court in *PennEast* was the question of state sovereignty and the ability of Congress to authorize a private delegatee to sue a state in federal court to condemn state-owned property. Justice Barrett and the dissenting justices noted that a private pipeline company's authority to bring private condemnation lawsuits was a license from the federal government under the federal government's Commerce Clause power, not an assignment of the United States' sovereignty. *Id.* at 2267.

Importantly, at no time did the Court (the majority or the dissent) consider the question presented here – to wit: whether federal common-law or state substantive law governs the determination of the compensation an owner must be paid when private property is taken for a natural gas pipeline.

Sabal Trail clings to *PennEast* like a limpet. But, Sabal Trail misrepresents the Supreme Court's holding in *PennEast*. Sabal Trail says, "The Supreme Court's recent *PennEast* [*sic*.] 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." Sabal Trail brief, pp. 20-21.

The Supreme Court's majority decision in *PennEast* held no such thing. The majority in *PennEast* did not hold a pipeline company "should be treated no differently than if the United States itself were exercising the power [of eminent domain]." Sabal Trail's statement is plainly false. At no point did the majority in *PennEast* hold a private for-profit pipeline company or a federal licensee "stands in the shoes of" the United States of America. The broadest reading of the majority decision in *PennEast* is, as Chief Justice Roberts wrote, that Congress may license the federal government's eminent domain authority "to condemn all necessary rights-of-way, whether owned by private parties or the States." 141 S.Ct. at 2263. Period. Full stop. Neither the majority nor the dissent in *PennEast* discussed or even considered whether state substantive law or federal common law governs the determination of that compensation an owner must be paid when property is condemned for a natural gas pipeline.

PennEast provides no support for Sabal Trail's contention that a federal common-law rule of compensation displaces the rule established in Florida's Constitution and under Florida substantive case law as in *Brigham* and *Doerr*.

B. The federal common law definition of "just compensation" is a floor not a ceiling.

Sabal Trail contends the federal common law definition of "just compensation" under the Fifth Amendment establishes a ceiling above which state substantive law may not provide greater compensation. Sabal Trail similarly argues

that federal common law establishes a prohibition upon attorney fees being part of compensation absent an explicit federal authorization even when substantive state law provides otherwise. Sabal Trail is wrong on both counts.

Florida has long incorporated into the concept of "just compensation" "the expenses [incurred by the owner in] establishing the fair value of the property[.]" *Brigham*, 47 So.2d at 604-05. No one disputes the Florida Supreme Court's holding in *Brigham* (which predated the Florida Constitution's reference to "full compensation") is an authoritative statement of Florida law on this issue.

Sabal Trail admits this is the measure of compensation under Florida law. But Sabal Trail makes the perplexing assertion that, even though *Brigham*'s and *Doerr*'s holdings were expressly predicated on the Florida Supreme Court's understanding of "just compensation," *Brigham* doesn't count because it was interpreting "just compensation" under the Florida Constitution rather than the Fifth Amendment. Sabal Trail brief, p. 32, n.10. In essence, Sabal Trail argues that when a court is applying state law to determine the measure of eminent domain compensation pursuant to *Georgia Power*, the respective state supreme court's interpretation of the state constitution is cabined and limited by federal common law interpreting "just compensation" according to the Fifth Amendment.

This is an attempt by Sabal Trail to get in the back door what they cannot get in the front door. Having unsuccessfully argued that federal common law does not

displace state substantive law determining compensation, Sabal Trail now tries to argue that state substantive law defining compensation must be the same as federal common law defining compensation. What Sabal Trail fails to appreciate is that the incorporation of the Takings Clause against the states does not mean the states may not *augment* rather than *diminish* the measure of compensation owed a landowner whose property was taken by eminent domain.

C. Congress did not "occupy the field" of attorney fee awards in condemnation cases.

Sabal Trail claims, "Congress has 'occupied the field' regarding the award of fees and costs in all federal question cases, preempting state law." Sabal Trail brief, pp. 10-11. Sabal Trail fails to identify any specific provision of the NGA supporting Sabal Trail's contention that Congress intended to federalize the rules of decision governing an award of attorney fees. "We presume that Congress does not hide 'fundamental details of a regulatory scheme in vague or ancillary provisions.'" *Biden v. Missouri*, 142 S.Ct. 647, 656 (2022) (Thomas, J., dissenting, joined by Alito, Gorsuch, and Barrett, JJ.) (citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

Sabal Trail argues that natural gas pipelines are national because the pipelines cross state boundaries, and therefore, the limited delegation of eminent domain authority the NGA granted private pipeline companies implies Congress intended to "occupy the field," displace state substantive law, and impose a federal common-

law rule governing the compensation landowners are due in all NGA eminent domain lawsuits.

The problem with Sabal Trail's narrative is that the text of the NGA refutes Sabal Trail's argument. Like its counterpart in the FPA, the NGA authorizes private condemnors (like Sabal Trail) to take private property by bringing condemnation lawsuits "in the district court of the United States for the district in which such land or other property may be located, *or in the State courts*." 15 U.S.C. §717f(h) (emphasis added).

As *Georgia Power* recognized, the discretion granted private licensees to choose between federal and state court when exercising their delegated right of eminent domain undermines any claim that "federal uniformity" justifies displacing state substantive law concerning the measure of compensation owed landowners. See *Georgia Power*, 617 F.2d at 1122.

Sabal Trail's "national uniformity" argument seeking to federalize the rule of decision for compensation in all NGA condemnation lawsuits makes no sense. If Congress intended some uniform federal common law to govern all aspects of the NGA eminent domain proceedings, it would *not* have given licensees unfettered discretion (on a parcel-by-parcel basis) to elect to pursue condemnation lawsuits in *state* or federal court.

Sabal Trail's argument for a uniform federal common-law rule prohibiting attorney fees in NGA condemnation lawsuits collapses on its own terms. If Sabal Trail is genuinely interested in a uniform federal common-law rule for attorney fees, Sabal Trail would ask this panel to follow (and not break from) the precedent established by the Fifth, Third, and Sixth Circuits in *Georgia Power*, *Tennessee Gas*, and *Columbia Gas* and not argue this panel should split with these circuits and adopt a different federal rule. Sabal Trail asks this panel to break with controlling Fifth Circuit precedent, and the Third Circuit and Sixth Circuit, and adopt a rule of decision that prohibits the district court from requiring the pipeline company to pay a landowner's attorney fees; while, under *Georgia Power*, *Tennessee Gas*, and *Columbia Gas*, the district courts in Texas, Louisiana, Mississippi, Michigan, Ohio, Kentucky, Tennessee, Pennsylvania, New Jersey, and Delaware would determine compensation including attorney fees under state substantive law.

D. *Alyeska* and *Home Savings Bank* do not cabin *Georgia Power*.

Sabal Trail claims "Congress has 'occupied the field' of attorney fees and cost awards in federal question cases preempting state law." Sabal Trail brief, p. 46. This statement is not true.

The measure of compensation due the Thomas Family for that property Sabal Trail took from the Thomas Family is not a "federal question" as Sabal Trail claims. *Georgia Power* recognized and acknowledged that "there is an established body of

federal law on the issue of just compensation," but it held that the existence of this body of federal law neither furthered nor detracted from the presumption that state law provides the rule to determine compensation when a private corporate licensee condemns property under the NGA. 617 F.2d at 1123, n.17.

This holding is premised upon principles of constitutional federalism, which have particular relevance in choice-of-law questions relating to property rights. As noted, state law rather than federal law creates and defines property interests. Georgia Power, 617 F.2d at 1123. See also *Butner v. United States*, 440 U.S. 48, 55 (1979) (applying state law as rule of decision and noting that "Property interests are created and defined by state law."); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210 (1946) (selecting state law as rule of decision and emphasizing that "the Congressional purpose [of the Reconstruction Finance Corporation Act] can best be accomplished by application of settled state rules as to what constitutes 'real property'.... Concepts of real property are deeply rooted in state traditions, customs, habits, and laws.").

The Ninth Circuit's decision in *Home Savings Bank, F.S.B. v. Gillam*, 952 F.2d 1152 (9th Cir. 1991), and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), provide Sabal Trail no support. *Home Savings* was in part an application of the Supreme Court's earlier decision in *Alyeska*.

First, although both cases addressed the availability of attorney fees in federal litigation, neither case considered whether a federal rule displaced state substantive law in an eminent domain case. *Alyeska* was not even a choice-of-law case and involved a straightforward holding that federal judges do not possess a free-floating discretionary power to award attorney fees to prevailing litigants based on abstract non-statutory considerations such as "equity" or "the public interest." See *Alyeska*, 421 U.S. at 269-71. In *Home Savings*, the attorney fee award reviewed by the Ninth Circuit was based entirely on a generic rule of Alaskan civil procedure under which Alaska "follows the English tradition of routinely awarding at least partial attorneys' fees to the prevailing party in civil actions." 952 F.2d at 1162 (citing *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 586-87 (Alaska 1973)). Unsurprisingly, the Ninth Circuit held that a federal district court in a federal-question case could not arbitrarily abandon federal procedural rules and instead embrace the generic fee-shifting approach reflected in Alaska Civil Rule 82. See *id.* at 1162-63.

Second, neither *Alyeska* nor *Home Savings* implicated what *Georgia Power* described as "the state's interest in avoiding displacement of its laws in the area of property rights, traditionally an area of local concern." *Georgia Power*, 617 F.2d at 1123. The word "federalism" appears nowhere in the *Alyeska* opinion, and the case had nothing to do with choice-of-law considerations relating to selecting an appropriate federal rule of decision in an area that was traditionally the domain of

the states rather than the federal government. As to *Home Savings*, the court there specifically distinguished its ruling from the type of federalism-driven choice-of-law inquiry reflected in *Georgia Power*, noting that Alaska had "no special interest" in regulating the payment of attorney fees in connection with an attempt by the federally-chartered Resolution Trust Corporation to recoup excessive compensation paid to the departing executives of an insolvent federally-insured bank. See *Home Savings*, 952 F.2d at 1154, 1163, n.3.

The Ninth Circuit also acknowledged that under the Supreme Court's decision in *Kimbell Foods*, the "extent to which [a] failure to incorporate state law in [a] federal question case would disrupt state interests is a factor in [the] choice of law." *Home Savings*, 952 F.2d at 1163, n.3. Meaningful "state interests" were not present in *Home Savings*, but they are unquestionably present in cases such as *Georgia Power*, *Columbia Gas*, and *Tennessee Gas*, which is why those courts cited *Kimbell Foods* as presuming state law to provide the rule decision. See *Columbia Gas*, 962 F.2d at 1197-98; *Georgia Power*, 617 F.2d at 1117-18.

CONCLUSION

Sabal Trail not only asks this panel to rule contrary to this Circuit's controlling precedent (an *en banc* precedent no less), but Sabal Trail also asks this panel to split with the Third Circuit and Sixth Circuit. In other words, *stare decisis* be damned. Sabal Trail asks this panel to engage in a plenary re-examination of the holding this

Circuit's predecessor (the old Fifth Circuit) adopted when it sat *en banc* and issued its decision in *Georgia Power*. The Supreme Court wrote, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by lower federal courts no matter how misguided the judges of those lower federal courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

Sabal Trail invites this panel to commit a cardinal sin by ruling contrary to *stare decisis* and the "hierarchy of the federal court system created by the Constitution and Congress." *Hutto*, 454 U.S. at 375. "Traditionally speaking, three-judge panels are absolutely bound by the prior decisions of the *en banc* court. They are also strictly bound by the decisions of prior panels under the 'law-of-the-circuit' rule." Bryan Garner, *et al.*, *The Law of Judicial Precedent* (2016), p. 37.[19] *Georgia Power* is controlling precedent, and Sabal Trail is wrong to invite this panel to depart from this precedent.

This Court is often called upon to decide close questions of law. Sabal Trail's appeal, however, does not present this Court with a close question. This panel need only follow and apply the controlling *en banc* decision in *Georgia Power* and follow the holdings of the Sixth and Third Circuits in *Columbia Gas* and *Tennessee Gas.* Twenty-three circuit court judges have considered whether state substantive law or

[19] The contributors to *The Law of Precedent* include then-circuit judges Neil Gorsuch and Brett Kavanaugh and circuit judges William Pryor, Diane Wood, and Jeffrey Sutton.

federal common law governs the determination of that compensation a landowner is due when a private corporation condemns land under a federal delegation of eminent domain authority. These twenty-three circuit judges have all agreed with district court Judge Walker, who held "state substantive law governs the compensation." This panel should affirm Judge Walker's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as the brief contains 11,120 words, excluding those parts exempted by 11th Cir. Local R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2022, four copies of the brief were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

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On this same date, a copy of the brief was served on all counsel of record via CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

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Addendum A

Natural Gas Act, 15 U.S.C. 717f(h)

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States 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: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.