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 REPLY BRIEF

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30. Spectra Energy Corp.

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

33. Appellees, Lee A. (Defendant/Appellee)

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

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

36. Appellees, Ryan B. (Defendant/Appellee)

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39. U.S. Southeastern Gas Infrastructure, LLC

40. USG Energy Gas Producer Holdings, LLC

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

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

The predicate question on appeal is what standard of compensation is owed when the federal power of eminent domain is exercised. The answer is the Fifth Amendment's "just compensation" standard—even when the eminent domain power is delegated by Congress pursuant to the Natural Gas Act. The next question, whether "just compensation" includes attorney's fees and costs, is answered by two U.S. Supreme Court decisions. It does not.

The U.S. Constitution's Fifth Amendment supplies the rule of decision on what standard applies, providing "just compensation" is owed when the federal power of eminent domain is exercised.[1] That is the supreme law of the land, not "federal common law" subject to a choice-of-law analysis.

There can be no real debate regarding whether "just compensation" includes attorney's fees and costs. This Court must follow Supreme Court decisions[2]

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[1] The Fourteenth Amendment imposes the same standard of compensation on any exercise of a *state's* power of eminent domain. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 238-41 (1897). But some state constitutions (like Florida's) also impose on *that state's* power a different standard of compensation. *See U.S. v. Crary*, 2 F. Supp. 870, 874 (W.D. Va. 1932).

[2] *Dohany v. Rogers*, 281 U.S. 362, 368 (1930); *U.S. v. Bodcaw Co.,* 440 U.S. 202, 203-204 (1979).

interpreting "just compensation" as excluding attorney's fees and costs. Those decisions are not merely "federal common law" but precedent that is binding on federal *and state courts* whenever "just compensation" is awarded pursuant to the Fifth Amendment.

A. Appellees ignore the material difference between the U.S. Constitution and "federal common law."

Sabal Trail's first argument in its opening brief is that the district court erred by engaging in an inapplicable choice-of-law analysis that resulted in the erroneous application of the Florida Constitution's "full compensation" standard. Appellees ignore that argument, instead assuming a choice-of-law analysis is required and contending that analysis requires adoption of state substantive law over "federal common law." Appellees use the phrase "federal common law" at least 40 times in their brief and implicitly acknowledge that courts employ choice-of-law analysis when choosing between "federal common law" and state substantive law. Appellees disregard that Sabal Trail does not rely on "federal common law" to supply the rule of decision on what standard of compensation is owed. Sabal Trail relies on the "supreme Law of the Land"[3]—the U.S. Constitution, which provides "just compensation" is the standard of compensation owed when the federal power of eminent domain is exercised.

[3] U.S. Const. art. VI, cl. 2.

As explained in Sabal Trail's opening brief, 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. *See, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (excepting matters "governed by the Federal Constitution" from cases where state law may apply). Here, the U.S. Constitution explicitly answers the predicate question, stating: "nor shall private property be taken for public use, without just compensation." In the face of the Fifth Amendment's straightforward statement, Appellees offer no response, instead manufacturing a choice of law where there is none. Appellees focus on decisions that did not regard differing constitutional standards of compensation but rather issues relating to the method of calculating "just compensation" for the property taken. None of the decisions cited support Appellees' mistaken assumption that courts may "choose" to apply state law, including a state constitution, over an *on-point* provision of the U.S. Constitution.

Appellees also ignore many of the authorities cited by Sabal Trail, including this Court's decision in *Transcontinental Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130 (11th Cir. 2018), which rejected the landowners' argument that "pre-taking compensation under the Georgia Constitution" was required in a Natural Gas Act taking. *Id.* at 1172. This Court recognized that a choice-of-law analysis is

inappropriate where a Federal Rule provides a "clear rule of decision." *Id.* at 1173. The Fifth Amendment's clear rule of decision merits at least as much weight as that of a federal rule of civil procedure. Appellees also ignore this Court's statement in another Natural Gas Act condemnation case, *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368 (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.'" *Id.* at 1372 (emphasis added).

Rather than addressing the supremacy of the Fifth Amendment, Appellees argue the analysis "begins and ends," (Appellees' Brief ("A.B.") at 21 of 61[4]), with the choice-of-law framework employed in *Georgia Power v. Sanders*, 617 F.2d 1112 (5th Cir. 1980). In *Georgia Power,* the questions on appeal were (1) whether a project-based increase in value of the remaining property should be set-off against damages to that remaining property only or also against the value of the part taken and (2) whether an increase in the property's value resulting from general knowledge of the project should be excluded from valuation. *Id.* at 1115. These are questions about what factors are used in the calculation of "just compensation," or in *Georgia Power's* nomenclature, how to "measure" it. Since

[4] Citations to the pages of Appellees' Brief are to the PDF page number, not the page numbering within the document.

those questions were not expressly governed by the U.S. Constitution, federal statutes, or the Federal Rules, the *Georgia Power* court employed a choice-of-law analysis to determine whether to apply "federal common law" or adopt state law as the rule of decision addressing those questions. The *Georgia Power* court did not determine whether the Fifth Amendment's "just compensation" standard or Georgia's "just and adequate compensation" standard[5] was owed. *Georgia Power* does not mention Georgia's standard, let alone adopt it in place of the Fifth Amendment.

Here the predicate question is what standard of compensation is owed, not how to calculate or "measure" it. The U.S. Constitution provides the answer and, as a matter of supremacy, there can be no other "choice." The Fifth Amendment's standard must be applied to any exercise of the federal power, even if state law were adopted to answer questions regarding how to measure "just compensation."[6] *See Rover Pipeline v. 10.55 Acres,* No. 5:17-CV-239, 2018 WL 4386024, *3 (N.D. Ohio Sept. 14, 2018) (recognizing the Fifth Amendment's "just compensation" standard applies, while adopting Ohio law to measure the compensation due under

[5] Ga. Const. art. I, § 3.

[6] This Court need not decide whether to apply federal common law or adopt state law to measure "just compensation" because the only question presented here that regards how to measure "just compensation" must have the same answer regardless of that choice, as explained in the next subsection.

that standard).

B. Appellees ignore the material difference between Supreme Court decisions interpreting the U.S. Constitution and "federal common law."

There can be no doubt that attorney's fees and costs are not included in the calculation or measure of "just compensation." This Court must follow Supreme Court decisions interpreting the Fifth Amendment's "just compensation" standard as "not embrac[ing]" attorney's fees and costs. *See Dohany v. Rogers*, 281 U.S. 362, 368 (1930); *U.S. v. Bodcaw Co.,* 440 U.S. 202, 203-204 (1979). Courts may not "choose" between *Dohany* and *Bodcaw*, on one hand, and state law, on the other. Supreme Court decisions interpreting the U.S. Constitution are binding on both federal and state courts and are part of the substantive law of all states. *E.g., Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Oregon v. Hass*, 420 U.S. 714, 719-20 (1975); *Minnesota v. Nat'l Tea Co*., 309 U.S. 551, 557 (1940); *Pennekamp v. Fla.,* 328 U.S. 331, 335 (1946). In other words, *Dohany* and *Bodcaw* are not merely "federal common law" but, due to the weight and scope of their precedential value,[7] represent *both* federal and state law on the question of whether the Fifth Amendment's "just compensation" standard includes attorney's fees and costs. Appellees ignore this argument and these authorities altogether.

[7] The precedent of a Supreme Court decision interpreting the U.S. Constitution is so strong it may be "altered only by constitutional amendment or [a subsequent Supreme Court decision]." *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

If the only federal court decisions on the question of whether the Fifth Amendment's "just compensation" standard includes attorney's fees and costs were issued by district or circuit courts, then "federal common law" and state law might differ. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013) ("[F]ederal courts of appeals do not bind [a state court] when it decides a federal constitutional question."). Likewise, if the only federal court decision on the question was a Supreme Court decision reached "not as a matter of constitutional compulsion," i.e., not a "constitutional ruling," then it may not be binding on state courts. *See Murphy v. Florida*, 421 U.S. 794, 798 (1975). But neither is the case here.

This argument—that a choice-of-law analysis is irrelevant here because Supreme Court decisions interpreting the U.S. Constitution must be followed even by state courts—was not made in the cases relied upon by Appellees. *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1198 (6th Cir. 1992), does not cite any Supreme Court decisions on the question presented in it. *Georgia Power* and *Tennessee Gas Pipeline Co. v. Permanent Easement for 7.053 Acres,* 931 F.3d 237 (3d Cir. 2019), indicate Supreme Court decisions conflicted with state law on the issues presented. But those Supreme Court decisions did not interpret the U.S. Constitution[8] and, thus, are not binding

[8] *Georgia Power* cites the Supreme Court decision of *Bauman v. Ross*, 167 U.S.

on state courts in the manner that *Dohany* and *Bodcaw* are.

Appellees claim that footnote four of *Georgia Power* "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." (A.B. at 30-31 of 61.) An award of attorney's fees and costs was not at issue in *Georgia Power*, and *Georgia Power* gives no indication that *Dohany* or *Bodcaw* were even considered. Footnote four is simply *dicta*.

Appellees' only reference to *Dohany* and *Bodcaw*, (A.B. at 41 n.18 of 61, n.18), fails to address Sabal Trail's argument. Appellees simply assert Congress has enacted certain statutes requiring the federal government to pay owners' attorney's fees and costs in some eminent domain cases. Those statutes do not weaken the binding precedent of *Dohany* and *Bodcaw*. In fact, those statutes

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548 (1897), as allowing project benefit offsets against the land taken. 617 F.2d at 115. But *Bauman* does not interpret the Fifth Amendment as requiring a certain manner of offsets. Rather, *Bauman* held it is "within the authority of Congress" to provide for benefit offsets against the land taken in specific legislation. 167 U.S. at 584. *Georgia Power* also cites the Supreme Court decision of *United States v. Miller*, 317 U.S. 369 (1943), as excluding any increase in the property's value caused by general knowledge of the project. 617 F.2d at 115. *Miller* contains a statement supporting that principle, 317 U.S. at 377, but it is not based on constitutional interpretation. Rather, the Court was "adopt[ing] working rules in order to do substantial justice in eminent domain proceedings." *Id.* at 375. Similarly, *Tennessee Gas* cites *Miller* as representing a federal rule in conflict with Pennsylvania law on the question of benefit offsets. 931 F.3d at 244-45. But again, *Miller* does not address benefit offsets as a matter of constitutional interpretation.

highlight that Congress understands "just compensation" does not encompass attorney's fees and costs (otherwise, those statutes would be unnecessary) and that Congress has occupied the field of attorney's fees and costs awards by enacting statutes that identify specific circumstances in which attorney's fees and costs may be awarded. And the statutes Appellees cite would not provide grounds for an award of attorney's fees and costs in this case even if the United States were the plaintiff.

Appellees argue at length that the Florida Constitution's "full compensation" standard encompasses attorney's fees and costs under Florida caselaw and is "more expansive than that of the Fifth Amendment." (A.B. at 41 of 61.) Similarly, Appellees argue that states may "*augment* rather than *diminish* the measure of compensation." (A.B. at 51 of 61.) But this augmentation is only permitted when the *states'* power of eminent domain is exercised. States are without power to limit the *federal* power of eminent domain by imposing a different standard of compensation than the U.S. Constitution imposes. And in matters controlled by the U.S. Constitution, state courts are bound to follow the Supreme Court's interpretation of the U.S. Constitution. As Justice Rehnquist explained:

> [S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution. ….
>
> State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution. In doing so, they

are *not* free from the final authority of this Court**.**

Arizona v. Evans, 514 U.S. 1, 8-9 (1995) (emphasis in original). If a Florida court had occasion to interpret the Fifth Amendment's "just compensation" standard, that state court would be bound to follow *Dohany* and *Bodcaw* and conclude "just compensation" does not include attorney's fees and costs. *See, e.g., State ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20, 23 (Fla. 1955) ("[W]e deem it to be our inescapable duty to abide by this decision of the United States Supreme Court interpreting the federal constitution.").

Finally, Appellees argue their attorney's fees and costs represent a "'stick' in the bundle" that must be compensated and suggest "fair play" demands an award of attorney's fees and costs. (A.B. at 42, 44 of 61.) But the Supreme Court rejected both arguments in *Bodcaw*. The Supreme Court reviewed a divided panel decision of the Fifth Circuit holding a landowner is not "made whole for the Government's taking of its land if the large amount expended by it for appraisals … is not considered an element of just compensation." *U.S. v. 1,380.09 Acres*, 574 F.2d 238, 241 (1978). The Supreme Court reversed that holding because "just compensation 'is for the property, and not to the owner'" and, "[a]s a result, indirect costs to the property owner caused by the taking … are generally not part of the just compensation to which he is constitutionally entitled." *Bodcaw*, 440 U.S. at 203. In other words, attorney's fees and costs are *not* "property" or a

"stick" in the "bundle" of property rights requiring compensation as a constitutional matter. This guts Appellees' argument that the award of their attorney's fees and costs implicates "property rights" that are "traditionally the domain of the states rather than the federal government." (A.B. at 55-56 of 61; *see also* A.B. at 20, 25, 34, 54 of 61.) The Supreme Court further explained:

> Perhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action. ... Congress moved in that direction with [the Uniform Relocation Assistance and Real Property Acquisition Act]. … *But such compensation is a matter of legislative grace rather than constitutional command*. The respondent's appraisal expenses were not part of the "just compensation" required by the Fifth Amendment.

Bodcaw, 440 U.S. at 204 (emphasis added). This addresses Appellees' "fairness" argument and confirms that it is for Congress by statutory decree, rather than the courts by judicial lawmaking, to determine the circumstances in which attorney's fees and costs should be awarded when the federal power of eminent domain is exercised.

C. Appellees' arguments hinge on a private versus public condemnor distinction absent from the U.S. Constitution and eviscerated by PennEast *and other Supreme Court decisions.*

Appellees argue Florida's constitutional standard and Florida law measuring that standard should be adopted here because there is a "distinction between the United States condemning property and a private for-profit corporation condemning private property under a limited delegation of eminent domain

authority." (A.B. at 28 of 51.) But Sabal Trail's status as a private corporation does not affect the supremacy of the Fifth Amendment and its direct application to the predicate question on appeal. Nothing in the Fifth Amendment indicates its reach is limited to takings by the federal government. The Fifth Amendment simply states that private property shall not be taken "for public use, without just compensation." This Court should reject Appellees's invitation to read words into the Fifth Amendment imposing a different standard when the federal power of eminent domain is exercised by a private corporation rather than the federal government. Some state constitutions contain dual standards.[9] But the Fifth Amendment does not differentiate based on the entity exercising the power.

A FERC-certificated natural gas company "though a private one, is … a *public utility*" and the interstate transportation of natural gas "is, in fact and in law, as by the Natural Gas Act declared, a *public business*…." *Thatcher v. Tenn. Gas Trans'n Co.*, 180 F.2d 644, 647, 648 (5th Cir. 1950) (emphasis added). Appellees ignore not only *Thatcher* but similar statements in *Cherokee Nation v. Southern Kansas Railway*, 135 U.S. 641 (1890), and *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878), cited by Sabal Trail. Appellees may disagree

[9] For example, Arizona's Constitution provides no private property shall be taken without "just compensation" but further provides that "no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation" is paid. Ariz. Const. art. 2, s. 17.

with Congress's decision to rely on "public utility" corporations to achieve the public purpose of promoting the interstate transportation of natural gas. But courts must defer to Congress's prerogative to meet the public purpose as Congress sees fit, including delegation of its federal eminent domain power to FERC-certificated corporations.

The analysis employed by the Supreme Court in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), makes clear a FERC-certificated corporation 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. Appellees ask this Court to look only at the primary question and holding in *PennEast* regarding sovereign immunity, while paying no attention to the majority's reasoning behind that holding. But the Court's analysis regarding sovereign immunity applies equally here: "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." 141 S. Ct. at 2260, citing *Kohl v. U.S.*, 91 U.S. 367, 374 (1875). This statement presupposes that a FERC-certificated corporation possesses the *same* eminent domain authority as the federal sovereign, not some "limited delegation" as Appellees suggest, (A.B. at 28-29, 51

of 61). A state may no more diminish the *delegated* federal eminent domain authority than it may diminish the federal eminent domain authority when exercised by the United States. Imposing a duty to pay the Florida Constitution's broader, "full compensation" standard on a FERC-certificated corporation's exercise of the federal power of eminent domain likewise would "violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign." *PennEast,* 141 S. Ct. at 2260.

Appellees allege that Sabal Trail asks this Court to reject precedent and split with other Circuits. But *Georgia Power*, *Columbia Gas*, and *Tennessee Gas* addressed different questions on appeal than this case presents and, therefore, are distinguishable. This case presents two questions: what standard of compensation applies to an exercise of the federal power of eminent domain and whether that standard includes attorney's fees and costs. The Fifth Amendment and the Supremacy Clause of the U.S. Constitution answer the first question—"just compensation" applies to an exercise of the federal power of eminent domain. A court should not employ choice-of-law analysis to choose between an on-point provision of the U.S. Constitution and state law. *Dohany* and *Bodcaw* answer the second question—"just compensation" does not include attorney's fees and costs. *Dohany* and *Bodcaw* are not mere "federal common law" but binding on federal

and state courts alike. A choice-of-law analysis cannot justify a different answer to that question. Appellees do not dispute that "just compensation" would be owed, and attorney's fees and costs would not be included if the United States exercised its federal power of eminent domain directly. The Fifth Amendment and the Supreme Court cases interpreting it likewise provide the rules of decision when a "public utility" corporation exercises the same federal power of eminent domain delegated by Congress pursuant to the Natural Gas Act.[10]

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

Sabal Trail argued two additional points in its opening brief: (1) Congress has occupied the field of attorney's fees and costs awards in federal question cases, preempting state law; and (2) federal courts may not award costs exceeding those allowed by the federal cost statutes in either federal question or diversity cases. Appellees' response to the first point reflects a fundamental misunderstanding of

[10] Sabal Trail does not abandon its arguments in the opening brief that the *Georgia Power* and *Tennessee Gas* courts erred in distinguishing *U.S. v. Miller*, 317 U.S. 369 (1943). (Appellant's Brief at 36-38, 44-48 of 70.) Sabal Trail also does not abandon its arguments in the opening brief that, if the Court deems a choice-of-law analysis necessary, there are material differences between the Federal Power Act and Natural Gas Act that compel application of federal common law to measure "just compensation" in Natural Gas Act cases. (*Id.* at 35-56 of 70). However, Sabal Trail rests on the merit of those arguments already made and focuses this Reply Brief on its primary position that this Court need not determine if *Georgia Power* or other Circuit Court's decisions were erroneously decided because those decisions are distinguishable from the issues and arguments presented here.

Sabal Trail's argument and the difference between "field preemption" and "express preemption." Appellees do not respond to the second point.

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

Based on *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), *F. D. Rich Co. v. U.S.*, 417 U.S. 116 (1974), *Dionne v. Floormasters Enterp.,* 667 F.3d 1199 (11th Cir. 2012), *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency*, 561 F.2d 1327 1333 (9th Cir. 1977), *Home Savings Bank, F.S.B., v. Gillam*, 952 F.2d 1152, 1162 (9th Cir. 1991), and *Design Pallets, Inc., v. Gray Robinson, P.A.,* 583 F. Supp. 2d 1282, 1287 (M.D. Fla. 2008), Sabal Trail argued in its opening brief that Congress has "occupied the field" of attorney's fees and costs awards in federal question cases. By enacting a vast statutory scheme that addresses the award of attorney's fees and costs in certain federal question cases, Congress has preempted state law as a basis for such awards in other federal question cases. Sabal Trail even provided an example of a federal statute that permits attorney's fees and costs awards in federal condemnation cases brought by "any person who has the authority to acquire property by eminent domain under Federal law," but only in specific circumstances that do not apply here. *See* 42 U.S.C. §§ 4601, 4654; *see also Atl. Coast Pipeline v. 3.92 Acres*, No. 5:18-CV-258-BO, 2021 WL 102186

(E.D.N.C. Jan. 12, 2021) (finding this statute applicable to FERC-certificated natural gas company that canceled project and dismissed condemnation action).

Courts may not ignore Congress's decision to allow awards of attorney's fees and costs only in certain circumstances by looking to state law to justify such awards in others. *See Alyeska*, 421 U.S. at 260 (stating Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights."); *Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008) ("Where Congress has provided a comprehensive statutory scheme of remedies … the interpretive canon of *expressio unius est exclusio alterius* applies. … ('The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.').").

In response, Appellees first argue that "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." (A.B. at 51 of 61.) Appellees' argument might address a claim of express preemption, which "occurs when Congress manifests its intent to displace a state

law using the text of a federal statute." *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008). But Sabal Trail does not claim the Natural Gas Act manifests Congressional intent to displace state laws regarding attorney's fees and costs. Rather, Sabal Trail argues an entire scheme of federal statutes granting attorney's fees and costs awards in multiple federal question cases has resulted in "field preemption" in all federal question cases. "Field preemption occurs when a congressional legislative scheme is 'so pervasive as to make the reasonable inference that Congress left no room for the states to supplement it.'" *Id.* As *Design Pallets* held: "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." 583 F. Supp. 2d at 1286.

Appellees also incorrectly summarize Sabal Trail's argument, describing it as "that natural gas pipelines are national because they cross state boundaries, and therefore, the [NGA] implies Congress intended to 'occupy the field,' …." (A.B. at 51 of 61.) Again, Sabal Trail does not rely on the Natural Gas Act to support its field preemption argument. And Sabal Trail's statements regarding natural gas pipelines being "national" and crossing state lines were made in its arguments distinguishing *Georgia Power* and *Columbia Gas*, not its preemption argument.

Appellees next argue the "discretion granted to 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…." (A.B. at 52 of 61.) Appellees again confuse Sabal Trail's arguments.

Sabal Trail has not argued that field preemption relates to "federal uniformity." Moreover, Appellees conflate the jurisdictional provision of the Natural Gas Act with the question of what substantive law applies. Appellees incorrectly assume that if condemnors choose state courts through which to exercise the federal power of eminent domain granted by the Natural Gas Act, those state courts would be incapable of applying the Fifth Amendment, Supreme Court decisions interpreting that provision, and any relevant federal statutes. Just as the federal courts regularly apply state law to federal diversity cases, state courts can and should apply the Fifth Amendment, Supreme Court decisions interpreting the Fifth Amendment, and relevant federal statutes when the federal power of eminent domain is exercised in state courts.

Appellees claim this is "not a 'federal question' [case]" because "state law rather than federal law creates and defines property interests." (A.B. at 53, 54 of 61.) Again, this argument confuses jurisdiction with substantive law. When Sabal Trail cites decisions that regard "federal question cases" and argues Congress has

occupied the field of attorney's fees and costs awards "in federal question cases," it means cases in which the federal courts exercise federal question jurisdiction, rather than diversity jurisdiction. "So long as federal law authorizes a cause of action, a case arises under federal law for purposes of 28 U.S.C. § 1331." *Greiner v. De Capri*, 403 F. Supp. 3d 1207, 1218 (N.D. Fla. 2019). Entitled "Federal question," 28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This action was brought pursuant to the Natural Gas Act—a law of the United States—making it a "federal question case." Appellees neither address nor refute this fact.

Lastly, Appellees address just two of the decisions cited by Sabal Trail in its argument on preemption, ignoring *Buckhannon*, *F. D. Rich*, *Dionne*, *Richmond Elks*, and *Design Pallets*.[11] Appellees suggest *Alyeska* is not controlling because it "was not even a choice-of-law case." (A.B. at 55 of 61.) *Alyeska* and Appellees'

[11] In another section of their brief, Appellees argue Sabal Trail cited decisions "in which litigants tried to invoke state *procedural provisions,* rather than *substantive state law,* as the basis for recovering attorney fees in federal litigation." (A.B. at 45 of 61.) Sabal Trail believes this argument may be aimed at some of these decisions, although Appellees fail to identify the referenced decisions. In any event, none of these decisions hold a state law allowing attorney's fees and costs was inapplicable *because it was procedural*. Rather, all hold federal courts may not award attorney's fees and costs in federal question cases *because Congress did not direct the award of attorney's fees*. Moreover, the Florida statute at issue in *Design Pallets* is substantive, 583 F. Supp. 2d at 1285, but the court still found it preempted because Congress has occupied the field of attorney's fees awards in federal question cases.

statement about it support Sabal Trail's point. The Supreme Court made clear in *Aleyska* that, on the question of entitlement to attorney's fees, district courts should not engage in lawmaking (through a choice-of-law analysis or otherwise) to award attorney's fees and costs not expressly allowed by Congress, 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.

421 U.S. at 260-62. In other words, Congress has "occupied the field" of attorney's fees awards in federal question cases, preempting state law.

Appellees argue that *Home Savings* should be disregarded because "the attorney fee award reviewed by the Ninth Circuit was based on … Alaskan civil procedure" and the Ninth Circuit "held that a federal district court in a federal-question case could not arbitrarily abandon federal procedural rules.…" (A.B. at 55 of 61. Appellees misrepresent *Home Savings*, which does not even use the words "procedure" or "procedural" in addressing the attorney's fees award. Rather, the *Home Savings* court reversed the award because, since *Alyeska*, "the rule in federal courts has been that, absent an express statutory command, attorney's fees will not be awarded in civil cases" and none of the "three exceptions to this general prohibition" were present in *Home Savings*. 952 F. 2d at 1162.

Appellees also argue *Home Savings* is inapplicable because the Ninth Circuit "distinguished its ruling from the type of federalism-driven choice-of-law inquiry reflected in *Georgia Power*[.]" (A.B. at 56 of 61.) But the *Home Savings* court neither mentions *Georgia Power* nor rests on a choice-of-law analysis. The only mention of a choice-of-law analysis in *Home Savings* is in a footnote and supports Sabal Trail's position: "We also note that Alaska has no special interest in the collection of attorney's fees in federal question cases litigated in federal court." *Id.* at n.3. The court further wrote: "Alaska has no unique interest in regulating the behavior of parties in federal court or in promoting the enforcement of federal statutes with a nationwide impact." 952 F.2d at n.3. Like *Home Savings*, this is a case addressing "the collection of attorney's fees in [a] federal question case[ ] litigated in federal court" and Florida has no "unique interest" in regulating these parties' behavior in federal court or promoting the enforcement of the Natural Gas Act—a federal statute "with a nationwide impact." *Id.*

Bodcaw undercuts Appellees' suggestion that *Alyeska* and *Home Savings* are distinguishable because states have an interest in avoiding displacement of their laws in the area of "property rights" and Florida has a unique interest in ensuring landowners are awarded their attorney's fees and costs. As explained *supra*, the Supreme Court held in *Bodcaw* that attorney's fees and costs are not property requiring compensation as a constitutional matter. Rather, attorney's fees and costs

are "indirect costs to the property owner caused by the taking" to be awarded only as "a matter of legislative grace," should Congress so decide. 440 U.S. at 203, 204.

Appellees mistakenly view this preemption argument as presenting a choice-of-law between federal common law that holds attorney's fees may not be awarded without an express provision by Congress and state law that allows attorney's fees awards when the state power of eminent domain is exercised. But the preemption "choice" is between *federal statutes* and state law. Preemption exists when *a federal statute or statutory scheme* (not "federal common law") displaces state law on the same topic. "The doctrine of preemption … provides 'a rule of decision' that 'instructs courts what to do when state and federal law clash.'" *Close v. Sotheby's, Inc.*, 909 F.3d 1204, 1209 (9th Cir. 2018) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015)). The vast statutory scheme identified in *Alyeska* authorizes awards of attorney's fees and costs in a wide variety of federal question cases, "occupies the field," and preempts reliance on state law to award attorney's fees and costs in other federal question cases.

Appellees provide no support for their underlying assumption that, despite field preemption, state law in that field may be applied through a choice-of-law analysis. This simply cannot be. If Congress has chosen to occupy an entire field, a court may not fill perceived voids in that field through common lawmaking.

Rather, as the Supreme Court directed in *Alyeska*, courts must defer to Congress's decision to occupy that field.

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

Relying on *Henkel v. Chicago,* 284 U.S. 444 (1932), *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437 (1987), *Kansas v. Colorado*, 556 U.S. 98, 103 (2009), *Taniguchi v. Kan Pac. Saipan, Ltd*., 566 U.S. 560, 565 (2012), *Kivi v. Nationwide Mutual Insurance Co.,* 695 F.2d 1285 (11th Cir. 1983), and other decisions of this Court, Sabal Trail argued in its opening brief that federal courts may not award costs exceeding those allowed in federal cost statutes. This rule applies in both federal question and diversity cases. Those decisions rejected state law as a basis to award greater costs because Congress has enacted statutes specifying the type and amount of costs allowable in federal court. Appellees ignored this argument altogether, failing to cite or even allude to these legal authorities. Perhaps, again, Appellees assume that, despite this preemption by the federal cost statutes, state law allowing cost awards nonetheless may be applied through a choice-of-law analysis. But this Court has recognized that Congress has spoken on the question of awardable costs in the federal costs statutes. A federal court may not award costs exceeding those allowed in the federal cost statutes on the basis of state law in federal question or diversity cases. *See Kivi*, 695 F. 2d at 1289.

CONCLUSION

Appellees ask the Court to engage in an inapplicable choice-of-law analysis and adopt state law over a controlling provision of the U.S. Constitution and on-point Supreme Court precedent. This Court should decline the invitation, hold the Fifth Amendment's "just compensation" standard applies, and reverse the holding on entitlement to attorney's fees and costs. Appellees also ask the Court to ignore the plethora of federal statutes specifying in which federal question cases the courts may award attorney's fees and costs, the federal cost statutes that establish what costs may be awarded by federal courts, and Supreme Court precedent holding such awards should be made solely pursuant to Congressional directive. Again, the Court should decline and reverse.

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 6,087 words, excluding the parts exempted by Fed. R. App. P. 32(f). Microsoft Word software was used to count the words in the Brief.

/s/ Bruce M. Harris
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CERTIFICATE OF SERVICE

I certify that a true and correct copy hereof was filed March 10, 2022, via CM/ECF, which will distribute copies to all counsel of record.

/s/ Bruce M. Harris
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