No. 18-11836-G

In the United States Court of Appeals for the Eleventh Circuit

SABAL TRAIL TRANSMISSION, LLC,

Plaintiff-Appellant,

vs.

3.921 ACRES OF LAND IN LAKE COUNTY, FLORIDA, SUNDERMAN GROVES, INC., *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF OWNERS' COUNSEL OF AMERICA, SOUTHEASTERN LEGAL FOUNDATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

Robert H. Thomas
Counsel of Record
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Kimberly S. Hermann
Southeastern Legal Foundation
560 West Crossville Road
Suite 104
Roswell, Georgia 30075
(770) 977-2131

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 to 26.1-3, undersigned counsel certifies that to his knowledge, the only interested parties omitted from the certificates of interested persons which have already been submitted are:

1. Owners' Counsel of America (amicus curiae); Owners' Counsel of America has no parent corporation and issues no stock.

2. Robert H. Thomas (counsel for amicus curiae).

3. Damon Key Leong Kupchak Hastert (law firm of counsel for amicus curiae). The law firm has no parent corporation, and all stock is held by the lawyer/Directors of the firm.

4. Southeastern Legal Foundation, Inc. (amicus curiae); Southeastern Legal Foundation has no parent corporation and issues no stock.

5. Kimberly S. Hermann (counsel for amicus curiae).

6. National Federation of Independent Business Small Business Legal Center (amicus curiae); National Federation of Independent Business Small Business Legal Center is affiliated with the National Federation of Independent Business, a 501(c)(6) business association,

which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Small Business Legal Center.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amici Curiae

Honolulu, Hawaii, November 6, 2018.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF OWNERS' COUNSEL OF AMERICA, SOUTHEASTERN LEGAL FOUNDATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

Owners' Counsel of America (OCA) Southeastern Legal Foundation, and National Federation of Independent Business Small Business Legal Center respectfully move, pursuant to Fed. R. App. P. 29(a)(3) and 11th Cir. R. 29-1, for leave to file the attached brief amici curiae urging affirmance in support of the Appellee Sunderman Groves, Inc.

1. Courts routinely permit non-parties to file amicus curiae briefs in support of the parties in appeals before this court and other courts. Motions for leave to file amicus curiae briefs are granted in recognition that they may helpful to the Court in understanding the importance of the issues involved, determining the rules of law applicable to the case, and to point out to the court material issues the parties' briefs do not address in detail.

2. OCA is an invitation-only national network of the most experienced eminent domain and property rights attorneys. Only one

member lawyer is admitted from each state. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. OCA members and their firms have been counsel for a party or amicus in many of the property cases the eminent domain and takings cases the courts nationwide have considered in the past forty years,[1] and OCA members

---

2. *See*, *e.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24 (1984). *See also Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), and *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los*

have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights.[2]

3. OCA's lawyer members represent property owners in eminent domain and takings cases in state and federal courts nationwide. Accordingly, they have a keen interest in two issues which this case

---

Angeles County, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

3. *See, e.g.*, Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on *Prelitigation Process* and *Flooding and Erosion*).

presents. First, whether state law provide the rules of decision in federal court eminent domain actions. Second, relatedly, whether a property owner's testimony of the value of his or her property is admissible to prove the property's fair market value, and the just compensation and damages to which he or she are entitled. The attached proposed amicus brief of OCA focuses on these two issues, pointing out nationwide authority from other courts.

4. Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For forty years, SLF has advocated for the protection of private property interests from unconstitutional takings. SLF frequently files amicus curiae briefs at both the state and federal level in support of property owners. *See Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S.725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Council*, 505 U.S. 1003 (1992); and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

5. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

6. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party's counsel authored the attached brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amici, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

7. This motion and brief are timely because they are being filed within the time grated by the Clerk of the Court for an extension for filing through November 6, 2018. *See* Fed. R. App. P. 29(a)(6). The brief complies with Federal Rule of Appellate Procedure 29(a)(5), because it is no more than half the maximum length of 13,000 words authorized for the Brief for Appellee.

8. All parties to this appeal have been notified of our intention to file this brief. Counsel for the Appellants was asked to consent to the filing but has not responded. Counsel for the Appellees consented.

9. Given amici's substantial interest in this case and their belief that the attached proposed brief will aid the court in its analysis and

disposition of this appeal, amici curiae respectfully moves for leave to file the attached brief as amici curiae.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Kimberly S. Hermann
Southeastern Legal Foundation
560 West Crossville Road
Suite 104
Roswell, Georgia 30075
(770) 977-2131

Counsel for Amici Curiae

Honolulu, Hawaii, November 6, 2018.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(g), I certify that this motion complies with the length limitations set forth in Fed. R. App. P. 27(d)(2)(A) because it contains 1,388 words, as counted by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 27(a)(2)(B).

/s/ Robert H. Thomas
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on November 6, 2018, I served the foregoing motion upon all counsel of record through the CM/ECF system.

/s/ Robert H. Thomas
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
Counsel for Amici Curiae

No. 18-11836-G

In the United States Court of Appeals for the Eleventh Circuit

SABAL TRAIL TRANSMISSION, LLC,

Plaintiff-Appellant,

vs.

3.921 ACRES OF LAND IN LAKE COUNTY, FLORIDA, SUNDERMAN GROVES, INC., *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF AMICI CURIAE OF OWNERS' COUNSEL OF AMERICA, SOUTHEASTERN LEGAL FOUNDATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

Robert H. Thomas
Counsel of Record
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Kimberly S. Hermann
Southeastern Legal Foundation
560 West Crossville Road
Suite 104
Roswell, Georgia 30075
(770) 977-2131

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 to 26.1-3, undersigned counsel certifies that to his knowledge, the only interested parties omitted from the certificates of interested persons which have already been submitted are:

1. Owners' Counsel of America (amicus curiae); Owners' Counsel of America has no parent corporation and issues no stock.

2. Robert H. Thomas (counsel for amicus curiae).

3. Damon Key Leong Kupchak Hastert (law firm of counsel for amicus curiae). The law firm has no parent corporation, and all stock is held by the lawyer/Directors of the firm.

4. Southeastern Legal Foundation, Inc. (amicus curiae); Southeastern Legal Foundation has no parent corporation and issues no stock.

5. Kimberly S. Hermann (counsel for amicus curiae).

6. National Federation of Independent Business Small Business Legal Center (amicus curiae); National Federation of Independent Business Small Business Legal Center is affiliated with the National Federation of Independent Business, a 501(c)(6) business association,

which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Small Business Legal Center.

Respectfully submitted,

/s/ Robert H. Thomas
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amici Curiae

Honolulu, Hawaii, November 6, 2018.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Constitutions, Statutes, and Rules

TABLE OF AUTHORITIES—Continued

Page

Other Authorities

IDENTITY AND INTEREST OF AMICI

Owners' Counsel of America. Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys.[3] Only one member lawyer is admitted from each state. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. OCA members and their firms have been counsel for a party or amicus in many of the property cases the eminent domain and takings cases the courts nationwide have

[3] All parties to this appeal have been notified of our intention to file this brief. Counsel for the Appellants was asked to consent to the filing, but has not responded. Counsel for the Appellees consented. In accordance with Fed. R. App. P. 29(c)(5), amici state that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae and their counsel and members, contributed money that was intended to fund preparing or submitting this brief.

considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights. OCA's lawyer members represent property owners in eminent domain and takings cases in state and federal courts nationwide.

Southeastern Legal Foundation. Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For forty years, SLF has advocated for the protection of private property interests from unconstitutional takings. SLF frequently files amicus curiae briefs at both the state and federal level in support of property owners.

NFIB Small Business Legal Center. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is

the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Amici have a keen interest in, and unique viewpoint on, two issues which this appeal presents. First, whether state law governs the determination of just compensation in eminent domain actions brought in federal court by private for-profit condemnors under the Natural Gas Act. Second, whether a property owner's testimony of the value of his or her property is admissible to prove the property's fair market value and

the just compensation and damages to which she is entitled. We believe our viewpoint and this brief will be helpful to the court.

ARGUMENT

This brief makes two main points. *First*, even if federal law controls, just compensation under the Fifth Amendment requires the owner recover the "full and perfect equivalent for the property taken." And because Florida recognizes that one of the fundamental rights that owners of Florida property possess is the ability to recover attorney's fees and costs, an award of compensation under the Fifth Amendment must compensate for that right. *Second*, property rights are personal rights, and the personal civil right of just compensation is secured by the general rule—recognized by the district court and most other courts nationwide—that an owner has a fundamental personal right to testify about the value of her property.

I. "A Property Right It Shall Be" - The Fifth Amendment Requires The Owner Be Compensated For Whatever Interests Florida Recognizes

In *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (en banc), a case squarely on point with this one, this court concluded that Georgia's law of compensation provided the rule of decision. That case,

and its choice-of-law analysis driven by core principles of Constitutional federalism, should control the outcome here. This brief's point, however, is that even if federal compensation law provides the rule of decision, the same federalism concerns that animated *Georgia Power* compel the same result. Specifically, because the right of a property owner to recover attorney fees and litigation costs in an eminent domain proceeding can reasonably be viewed as a property right created by and protected under Florida property law, even federal law governing "just compensation" would require that such fees and costs be included when calculating the ompensation the owners are owed.

Suing a property owner to force them to surrender their land is different in kind than any other lawsuit. The owner, after all, has done nothing wrong—broken no laws, breached no duty, repudiated no promise—but finds itself a "defendant" only because it owns property Sabal Trail (a private, for-profit corporation) wants. Consequently, there is no "liability" determination; the suit is, in essence, a special proceeding to determine the amount of just compensation which the Fifth Amendment requires for the taking of Sunderman's property rights which Sabal Trail admittedly owes. That determination depends on what

property interests Sunderman owned. Florida's law defining Sunderman's rights obviously plays the critical role in that determination, because as the Supreme Court has repeatedly reminded, what interests an owner possesses that must be compensated when property is taken are defined primarily by state-law rules and customs, even in federal condemnation actions in federal court. *See*, *e.g.*, *Damon v. Territory of Hawaii*, 194 U.S. 154, 157 (1904) (local law defines "property"); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) ("Kuapa Pond has always been considered to be private property under Hawaiian law; federal government must either condemn and pay, or back off regulations).

In its brief, Sabal Trail argues that just compensation under the Fifth Amendment does not include attorney fees.[4] This, however, sets up a straw argument, because the Fifth Amendment does not, as Sabal Trail argues, categorically bar a property owner in a federal court

[4] Amici leave it to the parties to address the details of whether an eminent domain action by a private licensee raises the same federal interests as does a taking by the federal government itself. Amici only make the point that even federal compensation law requires the full and perfect equivalent for *all* property interests which the condemnor takes, and the scope of these property interests are determined by state law.

condemnation action governed by federal law from recovering attorney's fees and costs, *if state law recognizes entitlement to fees and costs as a right inherent in the property taken.* Which Florida law plainly does.

Florida's constitution and its supreme court unequivocally recognize that inherent in the ownership of property is the right to be fully compensated, including fees and costs. In *Dade County v. Brigham,* 47 So. 2d 602 (Fla. 1950), the court held that Florida property owners are entitled to be on the same "equal footing" as they were before any expropriation. *Id.* at 604. If that were not clear enough, that court recently emphatically reaffirmed the principle that this is baked into the ownership of Florida property. In *Joseph B. Doerr Trust v. Cent. Fla. Expressway Auth.,* 177 So. 3d 1209 (Fla. 2015), the court held the Florida Constitution recognizes "the Florida Constitution includes the right to a reasonable attorney's fee for the property owner." *Id.* at 1215. Importantly, Florida's courts treat "just compensation" and "full compensation" as interchangeable terms, holding that under either phrasing, the required "compensation" includes reasonable attorneys' fees and litigation expenses incurred in establishing the value of the property taken. *Tosohatchee Game Preserve, Inc. v. Cent. & S. Flood*

Control Dist., 265 So.2d 681 (Fla. 1972) (despite evolution of Florida constitutional language from "just compensation" to "full compensation," change in phrasing did not change rationale for underlying rule under to which Florida courts had consistently held that property owners were entitled to recover attorney fees and litigation expenses); *Brigham*, 47 So.2d at 604-05 (quoting with approval trial court ruling holding that "full compensation" was required under the constitution, and noting that Florida Declaration of Rights requiring "just compensation" should be interpreted in eminent domain proceedings to include award of reasonable litigation expenses to property owner); *JEA v. Williams*, 978 So.2d 842, 845 (Fla. Dist. 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.").

One way to construe these cases is as holding that the compensation owed to an owner whose property is taken via eminent domain must include the costs incurred in establishing the value of the property. But amici suggest these Florida cases can also be interpreted as holding that the right to compensation for the transaction costs incurred in establishing the value of the property is *per se* a component of the owner's

property rights, designed to recognize and provide a financial benchmark for the loss of what is without question one of the most valuable "sticks" in the bundle of property rights traditionally defined by state law – namely, the right to sell one's property at a time and for a price of one's choosing. Viewed in this light, even applying a federal rule of compensation would still, in this case, result in the owners recovering their fees and costs.

Consequently, the right to recover fees and costs is not a "limitation . . . on Florida's state power of eminent domain," somehow constraining only the power of state actors, as Sabal Trail asserts. *See* Op. Br. at 32. Indeed, the right of Florida property owners to recover attorneys' fees and costs is not a "limitation" on the exercise of eminent domain power at all—by either the state or federal government (or, as here, a private for-profit pipeline)—in any sense of that word, because it does not proscribe what or whether Florida condemnors can expropriate. Instead, it is a substantive condition placed on the exercise of the power, making clear that if taken, an owner's property includes the right to be made completely whole. Nor is Florida's "full compensation" provision merely a rule applicable in the courts of Florida. Rather, it substantively creates

and defines the property rights of every Florida owner by recognizing that one of the "sticks" in their bundle of property is the right to be fully compensated, including fees and costs. This is not a mere expectancy, or one that is limited only to takings by state actors pursuant to Florida eminent domain authority, but a property right that, in the words of the U.S. Supreme Court, "has the law in back of it." *Kaiser Aetna*, 444 U.S. at 178.[5]

Yes, Florida property law may be "more expansive" than the "floor" the Fifth Amendment requires. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (federal law recognizes a baseline "normative dimension" of property); *Fowler v. Guerin*, 899 F.3d 1112, 1118 (9th Cir. 2018) (Fifth Amendment protects, at minimum, "core" property rights). But states are free to recognize that an owner's property includes more "sticks" than the minimum the Fifth Amendment and federal law require to be recognized and compensated. And when a state does so (as Florida has done here) and an owner is deprived of those property rights (as Sunderman is threatened with

[5] This would mandate the same result were it the federal government itself doing the taking, a question not presented here.

here), the Just Compensation Clause prohibits a court from simply ignoring that state's law. The Fifth Amendment requires payment "measured by the loss caused to [the owner] by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public." *Bauman v. Ross*, 167 U.S. 548, 574 (1897). Thus, Florida property owners cannot be deprived of their state law right to recover fees and costs simply because it isn't a state actor doing the expropriating, and the case isn't in state court.

When it is a private for-profit enterprise doing the taking—even under color of federal authority—any justification that might support a rule exempting the federal *government* from putting the owner "in as good a position pecuniarily as if his property had not been taken," *Olson v. United States*, 292 U.S. 246, 255 (1934), and paying for all of the Florida property rights taken, evaporates. Thus, in addition to the decision in *Georgia Power*, three other circuits—the Sixth, Tenth, and Second—have determined that state substantive law applies in determining just compensation in federal court actions under the NGA by private condemnors like Sabal Trail. *See Columbia Gas Trans. Co. v.*

An Exclusive Natural Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992) (federal standard for valuation in condemnation proceedings under the NGA incorporates the law of the state in which the property is located), *cert. denied*, 506 U.S. 1022 (1992); *Rockies Express Pipeline v. 4.895 Acres*, 734 F.3d 424, 429 (6th Cir. 2013); *Bison Pipeline, LLC v. 102.84 Acres*, 560 Fed. App'x. 690, 695-96 (10th Cir. 2013); *Winooski Hydroelectric Co. v. Five Acres*, 769 F.2d 79, 81-82 (2d Cir. 1985). In *Columbia*, the Sixth Circuit rejected the theme of Sabal Trail's arguments, where it asserts there is some compelling federal interest in applying the federal common law of compensation. The court concluded it was not necessary to have a nationally uniform rule of compensation for private parties exercising the power of eminent domain under the NGA. *Columbia*, 962 F.2d at 1199. Similarly, in *Bison Pipeline*, the Tenth Circuit concluded that nothing about the application of Wyoming compensation law frustrated the federal law objectives.

Moreover, it is critical to properly identify the "federal interest" in uniformity here. It is not, as Sabal Trail suggests, an interest in a nationwide "no attorney's fees" rule. No, the Fifth Amendment itself defines the federal interest: uniformity that a property owner receive the

"full and perfect equivalent" for whatever state-recognized interests the condemnor has taken. *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893). That one state's property law differs from others should not be surprising. Florida's property law stands mostly alone on this. But just because a property right recognized by state law is unique or unusual, doesn't immunize it from the Fifth's Amendment's compensation requirement when taken by any condemnor, including the federal government. As the Supreme Court held, if a state has recognized it as a property right, "a property right it shall be" –

> A right of this sort [in that case, a right of fishery] is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. *The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be*, and there is nothing for the courts to do except to recognize it as a right.

Damon, 194 U.S. at 158 (emphasis added).

The federal interest is not in *defining* the property taken (an assumption on which Sabal Trail's arguments are premised), but in ensuring the owner receives the equivalent in cash of the value of

whatever state law defines as a property interest. *See Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795) (Fifth Amendment requires cash payment for taken property); *United States v. Miller*, 317 U.S. 369, 373 (1943) (same).[6]

This court should reaffirm *Georgia Power* and join the Second, Sixth, and Tenth Circuits in concluding that just because a taking is accomplished under the auspices of a federal statute, does not mean that state law property rules of valuation and the loss to the owner should not govern what is a compensable property interest.

[6] Settled expectations recognized by state law lie at the core of the protection of the civil right of property, and the Supreme Court has recognized that the means to protect this foundation is a system which fosters "certainty and predictability" in land titles. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979). State courts also recognize this principle. For example, the Michigan Supreme Court held that "stability, predictability, and continuity" are the foundations of property law because they induce reliance, and that "[j]udicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital." *2000 Baum Family Trust v. Babel*, 793 N.W.2d 633, 655 (Mich. 2010) (internal citations omitted).

II. The Fifth Amendment Protects A Property Owner's Right To Testify About The Value Of Their Property

A. As The Holder Of A Personal Constitutional Right, A Property Owner's Testimony May Be The Best Evidence Of Its Value

The Fifth Amendment "deals with persons, not tracts of land." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). The property rights of the owner must be respected, because the Supreme Court affirmed an "essential principle"—that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist"). The Constitution embraces the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society." John Locke, *Second Treatise on Civil Government*, XI § 138. The Just Compensation Clause embodies that principle, and property owners understand the few protections available

to them if they find themselves on the receiving end of an exercise of eminent domain, the "most awesome grant of power." *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 155 (Cal. Ct. App. 1985). Consequently, what rights they do possess must be vigilantly safeguarded. This appeal presents the court with an opportunity to confirm that property owners have a unique understanding of the property they own, and cannot be categorically barred from testifying about its value simply because they may not qualify as "experts." *Cf. United States v. 329.73 Acres of Land*, 666 F.3d 281, 284 (5th Cir. 1981) ("Such testimony is admitted because of the presumption of special knowledge that arises out of ownership of the land.") (citing *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966)).

Moreover, and most critically, the Supreme Court has also observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted). The district court expressly recognized this. Thus, the Fifth Amendment requires that a property owner's testimony regarding the value of his or

her property—absent other considerations not present in this case—is presumptively admissible to show value. The district court adhered to that well-accepted principle, permitting the owner to testify. The court's conclusion is in accord with nearly every court that has considered the issue. *See*, *e.g.*, *Porras v. Craig*, 675 S.W.2d 503 (Tex. 1984) (property owner may testify regarding value of his land, even if incompetent to testify about another's property); *Mississippi State Highway Comn'n v. Franklin County Timber Co., Inc.*, 488 So.2d 782 (Miss. 1986) (co-owner and former owner could testify about value); *Langfeld v. State Dept. of Roads*, 328 N.W.2d 452 (Neb. 1982) (owner familiar with property is competent to testify as to value); *Johnson's Apco Oil Co., Inc. v. City of Lincoln*, 282 N.W.2d 592 (Neb. 1979) (owner who is shown to be familiar with property may testify without further foundation); *Acheson v. Shafter*, 490 P.2d 832 (Ariz. 1971) (owner may testify whether or not he qualifies as an expert). The Supreme Court has even concluded that owners of surrounding properties may testify regarding value even when they are unfamiliar with any comparable sales. *Montana Ry. Co. v. Warren*, 137 U.S. 348, 354 (1890).

B. The Majority Of Courts Admit An Owner's Testimony

The following section of our brief provides authority from courts nationwide to show that property owners are competent to testify about the value of their property. This broad nationwide consensus confirms that the district court was well within the mainstream rule, and that this court should affirm.

California: *Padre Dam Mun. Water Dist. v. Burkhardt*, 45 Cal. Rptr. 2d 506 (Cal. App. 1995) (owners may testify as to value, but they are subject to the same procedural rules as expert retained appraisers). *See also Spring Valley Water-Works v. Drinkhouse*, 92 Cal. 528, 28 P. 681 (1891).

Colorado: *Bd. of Directors of Baker Metro. Water & Sanitation Dist. v. Calvaresi*, 397 P.2d 877, 879-80 (Colo. 1964) (en banc) (finding no merit in the condemnor's contention that the landowner "should not have been allowed to testify to the difference between the residue of the land before the construction of the pipeline" and holding that "[a]n owner may testify as to his own estimate of value of his own land"); *Denver Urban Renewal Auth. v. Berglund-Cherne Co.*, 568 P.2d 478, 483 (Colo. 1977) (en banc) (holding that an officer of a corporation and majority or

controlling stockholder qualifies as a property owner who can testify about the value of the property and relying on *Calvaresi* for its holding that the landowner's opinion regarding the depreciation of the buildings was "admissible solely to establish a basis for his opinion and is inadmissible as substantive evidence"); *Denver Urban Renewal Auth. v. Hayutin*, 583 P.2d 296, 299–300 (Colo. App. 1978) ("The general rule is that an owner may state his opinion of the reasonable market value of his own property without having to be qualified as an expert witness.").

Idaho: The general rule is that the owner of property is a competent witness to its value, as he is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales. *Riley v. Larson*, 91 Idaho 831, 432 P.2d 775 (1967); *Rankin v. Caldwell*, 15 Idaho 625, 99 P. 108 (1908); *Weaver v. Vill. of Bancroft*, 439 P.2d 697 (Idaho (1968) (Appellant alleged that his property was devalued in the amount of $5,500 by reason of the Village's actions in removing the culvert and enlarging the ditch. He testified that as owner of the property its fair market value prior to removal of the culvert and enlargement of the ditch was $14,500. This figure was based upon the amount of money he had expended in improvements upon the premises excluding his own labor.

He further testified that after access to his property had been substantially impaired its market value was $9,000, *i.e.*, the highest price he could command upon resale.).

Illinois: *Dep't of Transportation v. Harper*, 381 N.E.2d 843, 846 (Ill. App. 1978).

Maryland: *Brannon v. State Roads Comm'n of the State Highway Administration*, 506 A.2d 634 (Md. 1986) (Court of Appeals—Maryland's highest court—interpreted the owner's opinion not to be based on the improper predicate); *State Roads Comm. v. Kuenne*, 213 A.2d 567 (Md. 1964) (owner testimony was not admissible because it was based on an improper predicate, i.e. an offer of sale as opposed to a consummated sale).

Minnesota: *State by Mattson v. Schoberg*, 155 N.W.2d 750, 754 (Minn. 1968) ("Under our practice, an owner of property is permitted to express his opinion as to its value without further qualifications. [The owner] is subject to the same rules of cross-examination to test his knowledge and the soundness of his opinion as is an expert witness"). An owner, however, does not necessarily have the unfettered right to say anything; *City of Minneapolis v. Yale*, 269 N.W.2d 754, 757 (Minn. 1978)

(where only a portion of the property is taken, damages are measured by the "before and after" approach to value and the owner is entitled to compensation for the diminution in the value of the remainder of the property after the taking).

Mississippi: *Brown v. Mississippi Transportation Comm'n*, 749 So.2d 948, 960 (Miss. 1999); *Miss. State Highway Comm'n v. Strong*, 129 So.2d 349, 352 (Miss. 1961).

Missouri: *Wood River Pipeline Co. v. Sommer*, 757 S.W.2d 265, 268 (Mo. App. 1988) (property owner was competent "to testify as to diminution value by virtue of her familiarity with the land. The testimony as to the risk of pipeline leakage and contamination is a factor that would be considered by a willing buyer and seller when engaging in a land sale transaction. The fear caused by the risk had basis in reason and thus was properly considered by the jury. (Property owner) testified as to two nearby incidents of pipeline leakage of which she had personal knowledge. Because her testimony was based on actual experience the risk was properly considered as it related to future damage and damage to the remainder.").

Nebraska: *American Central City, Inc. v. Joint Antelope Valley Authority*, 281 Neb. 742, 807 N.W.2d 170 (2011) (landowner who is shown to be familiar with the value of his or her land shall be qualified to testify regarding its value for the use to which it is then being put, without additional foundation; the owner is not qualified by virtue of ownership alone to testify as to its value for other purposes and must be informed as to the state of the market like any other witness as to value).

Nevada: *City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984) (general rule is that an owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value; "The question of the landowner's competency to form an opinion of the land's value may be exposed on cross examination and affects the weight to be given to the testimony, not its admissibility."); *State Dept. Of Hwys., v. Campbell*, 80 Nev. 23, 30-31, 388 P.2d 733, 736-737 (1964).

New Jersey: *Riley v. Camden and Trenton Ry. Co.*, 70 N.J.L. 289 (E. & A. 1904); *Walsh v. Bd. of Educ. of Newark*, 73 N.J.L. 643 (E. &. A. 1906); *Ross v. Comm'rs of the Palisades Interstate Park*, 90 N.J.L. 461, 464-66 (Sup. Ct. 1917). *See also* N.J. Evid. Rule 56(1).

Pennsylvania: *Redevelopment Authority of City of Harrisburg v. Young Women's Christian Association*, 403 A.2d 1343 (Pa. Cmwlth. Ct. 1979) (condemnee may testify to value without supporting facts and data). *See also* 26 Pa. C.S.A. 1104.

Utah: *Utah State Rd. Comm'n v. Johnson*, 550 P.2d 216, 217-18 (Utah 1976) ("'An owner of property may testify as to its value . . . upon the assumption that he is particularly familiar with it and, because of his ownership, knows of the uses for which it is particularly adaptable.") (quoting *State v. Larsen*, 338 P.2d 135 (Wash. 1959)).

Washington: *State v. Wilson*, 493 P.2d 1252 (Wash. App. 1972); *Wicklund v. Allraum*, 211 P. 760 (Wash. 1922); *Cunningham v. Town of Tieton*, 374 P.2d 375 (Wash. 1962).

Wisconsin: *Genge v. City of Baraboo*, 241 N.W.2d 183 (Wis. 1974) (citing *Lambrecht v. State Highway Comm.*, 148 N.W.2d 732 (Wis. 1967); 5 Nichols, Law of Eminent Domain 3d ed., pp. 18.106-18.18, sec. 18.4(2)).

CONCLUSION

Amici respectfully request this court affirm the district court.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Kimberly S. Hermann
Southeastern Legal Foundation
560 West Crossville Road
Suite 104
Roswell, Georgia 30075
(770) 977-2131

Counsel for Amici Curiae

Honolulu, Hawaii, November 6, 2018.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and 29(d), amici curiae state that this brief complies with the type and volume limitations because it contains 4,798 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and this document has been prepared in a proportionally-spaced typeface in font Century Schoolbook, point sized 14.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae
Owners' Counsel of America

Honolulu, Hawaii, November 6, 2018.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and that

participants in the case who are registered CM/ECF users will be served by the system.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae
Owners' Counsel of America

Honolulu, Hawaii, November 6, 2018.