No. 09-0387

In the Supreme Court of Texas

CAROL SEVERANCE,
Plaintiff-Appellant,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE;
GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; and
KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS,
Defendants-Appellees.

On Certified Questions from the
United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE TEXAS PUBLIC POLICY FOUNDATION

IN SUPPORT OF APPELLANT CAROL SEVERANCE ON REHEARING

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INTEREST OF AMICUS CURIAE

The Texas Public Policy Foundation is a non-profit, non-partisan research institute founded in 1989. Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research. The Foundation's mission is to promote and defend limited government, free markets, private property rights, individual liberty, and personal responsibility throughout Texas and the United States by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach. This certified question is of central concern to the Foundation because it implicates two principles—limited government and private property rights—which the Foundation is mission-bound to defend.

No fee was paid, nor will any fee be paid, to the Foundation for the preparation of this amicus brief. *See* TEX. R. APP. P. 11(c).

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit asked this court to respond to the following certified question:

> Does Texas recognize a 'rolling' public beachfront access easement, i.e., an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?

Severance v. Patterson, 566 F.3d 490, 503-04 (5th Cir. 2009), *certified questions accepted*, 52 Tex. Sup. Ct. J. 741 (May 15, 2009).[1]

On November 5, 2010, this Court answered the question by finding that Texas does not recognize such "rolling easements" along the Gulf coast without proof of prescription, dedication or custom:

> We have never held that the State has a right in privately owned beachfront property for public use that exists without proof of the normal means of creating an easement…[C]onsidering the absence of any historic custom or title limitations for public use on private West Beach property, principles of property law answer the first certified question.

Severance v. Patterson, 2010 Tex. LEXIS 854, *32-*33.

Amicus curiae agrees with the legal basis of the November 5th opinion, and will not burden this Court by repeating the merits arguments here. Instead, amicus curiae seeks to comment on the important public policy interests that will be undermined if this court now

[1] The Fifth Circuit presented two further certified questions, contingent upon a finding that Texas law recognizes a "rolling" public beachfront access easement along the Gulf. Amicus curiae agrees with this court's original determination that Texas does not recognize such "rolling easements," and thus we do not reach the second and third certified questions.

reverses its opinion and fashions an illegal "rolling easement" doctrine in this case. Put bluntly, the "rolling easement" will erode significant constitutional checks on government power because the Court will have established a doctrine whereby (1) the State may evade its burden of proof in public easement cases along the Gulf and to pass this burden onto private property owners, who will not have the resources in many cases to resist the force of state power; and (2) the Court will have limited the State's accountability to constituents by allowing the State to seize property without paying compensation, and thus freeing the State from its obligation to justify expending tax dollars on the acquisition of private property.

As this Court has realized once before, the law compels only one answer to the certified question: there is no "rolling easement" doctrine along the Gulf Coast absent proof of prescription, dedication, or custom. *See id.* Amicus curiae urges the Court to recognize that the law in this case is not arbitrary; it protects vital public policy interests limiting the size and scope of government, and these interests will be harmed if the court reverses its November 5th opinion. This Court should, therefore, reaffirm.

ARGUMENT

I. FASHIONING A "ROLLING EASEMENT" DOCTRINE ALONG THE GULF THAT DOES NOT REQUIRE PROOF THAT THE EASEMENT WAS ACQUIRED BY PRESCRIPTION, DEDICATION, OR CUSTIOM WILL, IN EFFECT, IMPROPERLY ELIMINATE THE STATE'S BURDEN OF PROOF

In easement cases, the party asserting the easement bears the burden of proof. *Bains v. Parker*, 182 S.W.2d 397, 399 (Tex. 1944) ("[t]he burden is on the party claiming an easement in another's land to prove all of the facts necessary to establish the easement"); *see also Van Dam v. Lewis*, 307 S.W.3d 336, 340 (Tex. App.—San Antonio 2009, no pet.) (burden of proof is on the party claiming an easement by dedication); *Vinson v. Brown*, 80 S.W.3d 221, 228 (Tex. App.—Austin 2002, no pet.) (burden of proof is on the party claiming an easement by implication); *Wiegand v. Riojas*, 547 S.W.2d 287, 289 (Tex. Civ. App.—Austin 1977, no writ) (burden of proof is on the party claiming an easement by prescription). If this Court establishes a new doctrine recognizing "rolling easements" along the Gulf Coast without first requiring proof of a public easement acquired by prescription, dedication, or custom, it will have made a dramatic departure from the law and effectively eliminated the State's burden of proof.

In a case like this, in which the government is the party asserting the easement, removing the burden would be a particularly extraordinary shift because a presumption will have been created in favor of the government, and against property owners. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 n. 8 (U.S. 1994) (placing the burden of proof on the government in a regulatory takings context). Many scholars from both the left and right have argued that American law should favor (and historically does favor) the opposite presumption—in favor of property owners. *See, e.g.*, Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* 77

(1998) ("[t]his prohibition [against uncompensated takings] seems primarily designed to protect individuals and minority groups"); Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* at 333 (2003) (free societies should favor "[a] presumption of liberty [that] puts the burden upon states to justify any interference with liberty as both necessary and proper").[2] In litigation, individuals are rarely on equal footing with governments because governments bring tremendous power and vast resources. Barnett, *supra* at 333. Placing the burden of proof upon governments is an important procedural check on this power. *Id.*

The Open Beaches Act clearly places the burden of proof for demonstrating a public easement on the government, and thus it is an example of precisely the sort of law that reflects a "presumption of liberty" in favor of property owners. TEX. NAT. RES. CODE ANN. § 61.011(a) (Vernon 2010); Barnett, *supra* at 333. Rather than simply announcing a seizure of private property, the Open Beaches Act describes public access rights for property on which the state has first acquired an easement. *Id.* ("…*if the public has acquired* a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress…") (emphasis added). The burden of proof is on the State. *Id.*

The claimed easement in this certified question is located on West Beach, where the State explicitly divested all title in 1840. *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 928 (Tex.

[2] Some scholars have argued that the U.S. Constitution treats the right to private property as a fundamental right. This would suggest not only that the burden of proof rests on the government, but also that the government's position must be subject to heightened scrutiny. *See, e.g.*, Ryan Brannan, *Regulatory Takings: The Next Step in Protecting Property Rights in Texas* at 2 (Texas Public Policy Foundation Policy Perspective: July 2010) ("The Framers deemed property as a fundamental right, the procurement of which was not to be taken lightly or arbitrarily. They understood how to use modifiers such as "excessive fines" or "unreasonable searches and seizures" to limit constitutional protections. The Framers used no such language in the Fifth Amendment—these were important principles.").

Civ. App.—Houston 1964, writ ref'd n.r.e.). The State, therefore, became obligated to re-acquire subsequent public easements through ordinary legal processes. *See id.* (concerning an easement acquired and proved by the State in 1964). The State is now obligated to prove that it acquired the easement at issue in this case via a legal mechanism provided for in the Open Beaches Act: prescription, dedication or custom. *See Br. of Amicus Curiae Prof. Matthew Festa* at 9-14. As this court has already noted, however, there is nothing in the record of this case showing that the State has proved the existence of the easement. *See Severance,* 2010 Tex. LEXIS 854 at *47 ("We do not have a sufficient record to determine whether an easement has been proven, and the question was not certified."). The State has simply asked the Court to disregard the State's burden to prove a new easement, and instead assume that a previously proved easement has "rolled" landward. If this theory were to be recognized by this Court, it would allow the State to escape the burden of proving virtually any newly acquired easements on West Beach.

This is not how easement law operates. *Bains*, 182 S.W.2d at 399. Easement claimants are generally not permitted to evade their burden of proof. *Id.* As noted above, keeping the burden of proof on the easement claimant is particularly important when the State is the party making the claim. *See* Amar, *The Bill of Rights* at 77; Barnett, *Restoring the Lost Constitution* at 333. Without this safeguard, few individuals will want to cultivate or develop beachfront property along the Gulf. Indeed, under the Stare's broad theory which places no limitation on how far inland an easement may "roll," even property that is quite far landward will be unattractive for development. Few potential buyers will feel they are in a position to defeat a possible government taking that is based on the "rolling easement" theory.

The plain language of the Open Beaches Act unambiguously requires that the State

prove, rather than merely announce, its lawful acquisition of an easement along the beachfront. *See* NAT. RES. CODE. § 61.011(a). Ignoring the law would dramatically alter the traditional burden of proof in cases concerning public easements along the Gulf, and it would significantly expand government. Unless this Court is prepared to take this unusually bold step to alter Texas public policy, it should reaffirm the core of its November 5th opinion. *See Severance*, 2010 Tex. LEXIS 854 at *47.

II. FASHIONING A "ROLLING EASEMENT" DOCTRINE ALONG THE GULF THAT DOES NOT REQUIRE PROOF THAT THE EASEMENT WAS ACQUIRED BY PRESCRIPTION, DEDICATION, OR CUSTOM WILL, IN EFFECT, ALLOW THE STATE TO EVADE THE DEMOCRATIC PROCESS WHEN TAKING PRIVATE PROPERTY BY NOT REQUIRING IT TO PAY COMPENSATION, AND THUS NOT REQUIRING IT TO JUSTIFY THE EXPENDITURE TO CONSTITUENTS

In Texas, if the government seeks to acquire property, it must pay adequate compensation to the property owner. TEXAS CONST. ART. 1 § 17(a) ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made…"); *Van Dam v. Lewis*, 307 S.W.3d 336, 340 (Tex. App.—San Antonio, 2009, no pet.). The Fifth Amendment of the U.S. Constitution also provides that "private property [shall not] be taken for public use without just compensation. *See* U.S. CONST. amend. V; *see also United States v. Cors*, 337 U.S. 325, 332 (1949) ("[t]he political ethics reflected in the Fifth Amendment reject confiscation [of property] as a measure of justice"). Even William Blackstone mentions the principle of just compensation in his *Commentaries*:

> In [the taking of private property] the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent

for the injury thereby sustained.

William Blackstone, "Of the Absolute Rights of Individuals," *Commentaries on the Laws of England* 1 (Oxford Clarendon Press, 1765).[3] "The right to exclude, so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (U.S. 1979). This requirement to pay just compensation is not just a matter of fairness, it is an important check on government power, and it encourages vibrant democracy. *See Pennell v. City of San Jose*, 485 U.S. 1, 22-23 (1988) (Scalia, J., concurring). This check will be significantly diminished if this Court reverses its prior opinion and establishes a "rolling easements" doctrine along the Gulf.

The compensation that is paid by the government to private property owners is necessarily taxpayer money, and because taxpayers are concerned that tax dollars be spent efficiently and on worthwhile endeavors, the government is generally obligated to go before taxpayers and justify its taking. *Id.* The compensation requirement, therefore, is a check on government power because it forces the government to justify a taking through the democratic process. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting that an important purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

In *Pennell*, a 1988 case concerning rent control, Justice Scalia explained the issue thus:

[3] Blackstone's *Commentaries* have had a significant influence on the development of law in the United States, but this chapter in particular "loomed large in antebellum America" and has greatly influenced the direction of American law. Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* 77 (1998). Furthermore, because the commentaries reflect English common law, they are a useful guide for understanding law in Texas. *See Courand v. Vollmer*, 31 Tex. 397 (1868) ("The common law of England (so far as it is not inconsistent with the constitution or the acts of congress now in force) shall…be the rule of decision in this republic…")

> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes. [The government] might, for example, have accomplished something like the result here by simply raising the real estate tax [but]…voters might well see other, more pressing, social priorities.

Pennell, 485 U.S. at 22-23. The New York Court of Appeals made a similar point about how takings without compensation allow governments to escape accountability:

> The ultimate evil of…a frustration of property rights under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment…[T]he ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however initially distributed. In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the "cost-free" benefit.

Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 596-97 (1976)[4]; *see also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1181-82 (1967) *and* Richard A. Posner, *Economic Analysis of Law* 58 (4th ed. 1992) (both arguing that the just compensation rule provides an incentive for government to take property for public use only when that is the best use of the property). The compensation clause thus plays a role in maintaining healthy democratic processes, and courts should be reluctant to establish doctrines which diminish the

[4] Both the *Pennell* case and the *Fred F. French* case are discussed at greater length in Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 84-86 (2006).

compensation requirement.

In this case, the State seeks to impose a public easement on beachfront land never before subject to public use, and in doing so, it urges this Court to establish a doctrine that will generally insulate it from paying compensation to property owners along the Gulf. It is worth considering the threat that this would pose to the public's interest in government accountability. *See Armstrong*, 364 U.S. at 49. The State presumably has many reasons for seeking the public beach easement seaward of the new vegetation line—to preserve beaches for public enjoyment, to allow beach re-nourishment, to preserve tradition—but democracy is healthier when the State is forced to present these reasons directly to the public. *See id.* "That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription [against takings without just compensation]—perhaps accidental, perhaps not. Its essence, however, is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." *Pennell*, 485 U.S. at 23; *see also International Paper Co. v. United States*, 282 U.S. 399, 406-07 (1931) (finding that the government was required to pay just compensation even in the extreme circumstance of a taking necessary during war time).

CONCLUSION

Texas law recognizes no "rolling easement" doctrine along the Gulf Coast absent proof of prescription, dedication, or custom. This Court understood this in its November 5th opinion, and amicus curiae urges the Court to reaffirm its prior opinion because the law compels it.

Amicus curiae also urges the Court to understand that law is intimately connected to policy, and if the Court reverses its previous opinion, it will not only have misunderstood the law, it will create deeply troubling policy outcomes. More than just creating "rolling easements,"

this Court will have established a doctrine which (1) permits the State to evade its burden of proof in public easement cases along the Gulf and pass that burden onto a private property owner, who in many cases, will not have resources to resist the force of state power, and (2) limits the State's accountability to constituents by allowing the State to seize property without paying adequate compensation, and thus allows the State to escape its obligation to demonstrate the necessity of the taking to the public.

Amicus curiae urges this Court to reaffirm its original answer to the Fifth Cirucit's certified question.

CERTIFICATE OF SERVICE

This is to certify that, pursuant to rule 6.3 of the Texas Rules of Appellate Procedure, a true and correct copy of the foregoing Brief Amicus Curiae has been forwarded on May 20, 2011 to the following counsel of record:

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