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Colorado Court of Appeals, Case No. 20CA1780
Opinion by Judge Ted C. Tow, III
(Judge Richman and Judge Grove concurring)

Freemont County District Court,
Case No. 18CV30069
The Honorable Lynette M. Wenner, Judge

Petitioners: State of Colorado,
Mark Everett Warsewa, and Linda Joseph
v.
Respondent: Roger Hill

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Case No. 2022 SC 119

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND REVERSAL

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this amicus brief complies with all requirements of C.A.R. 28, 29, 32, including all formatting requirements set forth therein.

Specifically, I certify that this amicus brief complies with the word limit set forth in C.A.R. 28(g) and 29(d). This brief contains 3,229 words in those portions subject to C.A.R. 28(g).

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation, a nonprofit, tax-exempt California corporation, is the nation's oldest public-interest legal foundation that seeks to vindicate the principles of limited government, economic liberty, and property rights. PLF's attorneys have extensive experience in the area of property rights and have been lead counsel at the Supreme Court of the United States in several major cases involving the rights of landowners. *See Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). This case involves an assertion by a member of the public that land long considered privately held is actually held by the State in public trust for the people of Colorado. PLF's attorneys have specific experience in matters involving the public trust doctrine and judicial takings. *See Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013); *Pavlock v. Holcomb*, 35 F.4th 581 (7th Cir. 2022), *cert. denied*, 143 S.Ct. 374 (2022) (mem.). PLF is interested in this case because it will determine who can assert public trust rights in Colorado, and thus whether individual Coloradans will have the

power to initiate a case that could end in an uncompensated taking of private property.

INTRODUCTION

This case involves a single plaintiff's attempt to alter long-settled Colorado law so that he may access and use what has been historically understood to be privately owned property. His entire case is based upon the theory that the riverbed where he seeks to trespass is actually owned by the State because the portion of the Arkansas River where it lies was navigable when Colorado achieved statehood. But the State has not joined his complaint—on the contrary, it sought review asking this Court to hold that no single individual has standing to assert the State's interest in the riverbed. The plaintiff, Roger Hill, nevertheless seeks to do just that. But the State is correct—Mr. Hill lacks standing to assert the State's property interests. After all, even assuming Mr. Hill's theory of state ownership were correct, the lack of recognition of state ownership does not cause him any particularized injury.

As Colorado courts recognize in the analogous context of charitable trusts, where the State has special enforcement responsibility, no individual beneficiary of the trust has standing to sue unless he is "entitled to benefits different from those to which members of the public are entitled generally." *Herbst v. Univ. of Colo. Found.*, 513 P.3d 388, 393 (Colo. App. 2022) (quoting *Anderson v. Suthers*, 338 P.3d 384,

388 (Colo. App. 2013)). Even were Mr. Hill correct that Colorado holds the contested portion of the riverbed in trust for the public, he is in no position to enforce the terms of the alleged public trust because he has the same rights to the riverbed as any other member of the public.

There is an additional reason that Mr. Hill lacks standing to enforce the alleged public trust: If successful, his lawsuit would permit one individual to obtain a judgment that would transfer private property to the State without just compensation being paid to the owners. Courts have no more power to do this than do legislatures. Simply put, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980). To allow any one individual to maintain a case seeking to strip long-established property rights from private individuals and transfer them to the State would destabilize property rights throughout Colorado. If anyone is to put such a radical theory before a court, it should be the State, after a full consideration of the potential that the court might overturn decades of settled law and effect an uncompensated taking.

In short, there is no reason to allow an individual plaintiff to circumvent the usual standing rules to pursue an action with the end goal of effecting a judicial

taking. To the extent the Court of Appeals held that the plaintiff has standing to pursue such a case, that decision should be reversed.

ARGUMENT

I. Whether As a Quiet Title or Declaratory Relief Action, an Individual Member of the General Public Lacks Standing to Assert the State's Property Rights

There are two distinct causes of action in this case, but ultimately they require the same treatment. Mr. Hill's first cause of action sounds in quiet title. But the Court of Appeals correctly found that Mr. Hill lacks standing to bring a quiet title action where he has no personal interest in the disputed property. *Hill v. Warsewa*, No. 20CA1780 (Colo. App. Jan. 27, 2022) (slip op. at 9) (hereinafter "Decision Below"). Mr. Hill's attempt to shoehorn the equal footing doctrine into the argument changes nothing. Even if he were correct about the operation of this doctrine—and he is not[1]—the argument would be a mere distraction since the core of his argument is

[1] Under the equal footing doctrine, each State has the power to "allocate and govern" equal footing lands—those below the ordinary high-water mark of navigable waterways—"according to state law." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). While each State holds this land in trust for the people, "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988). Thus, even assuming the disputed riverbed lies within Colorado's equal footing land (a proposition Colorado disputes, because this portion of the river was nonnavigable at statehood), Colorado could still recognize private ownership of the riverbed.

that *the State* holds title. He cannot sue to quiet title in a third party. *Meyer v. Haskett*, 251 P.3d 1287, 1292 (Colo. App. 2010) ("Courts routinely deny defendants the standing to assert a third party's right.") (quoting *People v. Palomo*, 31 P.3d 879, 885 (Colo. 2001)).

Mr. Hill then pivots to the second cause of action, where he seeks a declaration that the property owners have no right to exclude him from their property. The Court of Appeals held that the distinction between a declaratory action and a quiet title action made all the difference. Decision Below at 10–11. In the declaratory posture, the court said, the plaintiff was "alleging an interest that is his own—the right to wade and fish in the river at the location in question." *Id.* at 10. But Hill's claimed right to use the riverbed derives entirely from his theory that Colorado holds title to the riverbed in trust for the public. *See id.* ("Hill argues that, because the river was navigable at statehood, the riverbed is public land owned by the State of Colorado. Thus, he, as a member of the public, is not trespassing by wading on the riverbed."). This theory fails to identify any purported right of Mr. Hill's to use the riverbed above and beyond that of any other member of the public. That lack of particularity is fatal to Mr. Hill's standing to seek declaratory relief.

While Colorado courts have selectively carved out broader standing doctrines than have the federal courts interpreting Article III of the United States Constitution,

the State "has not adopted general public interest standing." *Anderson*, 338 P.3d at 388. The most pertinent example is in the enforcement of the terms of charitable trusts. In *Herbst*, a group of individuals—including a trustee of the University of Colorado Foundation and a University of Colorado student—sued the Board of Directors of the Foundation for mismanaging its funds. 513 P.3d at 390–91. The Court of Appeals found that none of the individuals had standing to bring such a claim because "no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust and will receive charitable or other benefits from the operation of the trust." *Id.* at 392 (quoting *Anderson*, 338 P.3d at 388). Rather, only the State, in the person of the attorney general, "has standing to protect the public interest in a trust" at common law and under the relevant statute. *Id.*

The exception to this rule demonstrates the importance of particularity. Colorado courts do allow some individuals to sue to enforce the terms of trusts, but only those "entitled to benefits *different* from those to which members of the public are entitled generally." *Id.* at 393 (emphasis added). This echoes the longstanding federal rule that a plaintiff lacks standing to seek "relief that no more directly and tangibly benefits him than it does the public at large." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74

(1992)). The manner in which Colorado courts have treated charitable trusts demonstrates that state law respects this limitation on standing.

There is no reason a suit seeking redefinition of the terms of the public trust should receive different treatment. Like charitable trusts, the public trust places the State in a position of guardian of the public's rights. As the U.S. Supreme Court explained long ago, public trust title is "different in character from that which the state holds in lands intended for sale" because "[i]t is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The State thus has a special obligation to maintain the public trust. Members of the public, on the other hand, must "show 'that they have suffered some special and substantial injury, distinct and apart from the general injury to the public.'" *Parker v. Town of Milton*, 726 A.2d 477, 481 (Vt. 1998) (quoting *Hazen v. Perkins*, 105 A. 249, 251 (Vt. 1918)).

Indeed, *Herbst* acknowledged this very point in distinguishing *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), which held that individuals could challenge an agreement entered into by the State Board of Land Commissioners for the benefit of Colorado's public schools. *See Herbst*, 513 P.3d at

394. *Herbst* reasoned that standing existed in that case because the trust at issue held "land in trust not for the benefit of taxpayers at large, but for Colorado's public schools." *Id.* It follows that when an entity "holds land in trust . . . for the benefit of taxpayers at large," *id.*, like the State does in the context of the public trust doctrine, no individual has standing to sue unless he has suffered some injury over and above denial of rights alleged to be held by every member of the public. *See also Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring) ("Common-law courts . . . have required a further showing of injury for violations of 'public rights'—rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.'" (quoting 4 W. Blackstone, Commentaries at *5). "Such rights include 'free navigation of waterways, passage on public highways, and general compliance with regulatory law.'" (quoting Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 693 (2004))).

Mr. Hill can make no such showing. The right he claims—to wade and fish in the Arkansas River on the private property of the defendants—is not personal to him, but in theory held in common with every other member of the public.[2] Perhaps he

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[2] Mr. Hill's provocation of the landowners' reaction against his trespass cannot provide a legal basis for standing. Plaintiffs typically have no basis for recovery when their own acts instigate a response that causes injury. *See, e.g.*, *Gould by Clark*

cares more than others about wading and fishing at that particular spot, but his personal, subjective likes and dislikes provide no legal basis to complain. Whether or not this stretch of river is his favorite fishing hole, if Mr. Hill's legal claims are correct, he holds the same right to enter the private riverbed in common with every other Coloradan—even those who never cast a line. Lacking any individualized injury, Mr. Hill can no more assert such a right through a declaratory action than he can through a suit seeking to quiet title in favor of the State.

II. Permitting Any One Individual to Initiate a Potential Taking Would Destabilize Property Rights Throughout Colorado

Although it is clear that the plaintiff lacks standing under existing doctrine, there are collateral reasons to guard against extending the standing rules in this case. If Mr. Hill has standing, then *any* individual has the power to haul private property owners into a proceeding that threatens to redesignate their land as public property without compensation. The danger of a judicial taking occurring even in the face of State opposition—something that could happen in this case should the decision

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v. Spreitzer, 145 Ill.App.3d 938, 940 (1986) (plaintiff's initiation of "horseplay" with defendant was the sole proximate cause of resulting injuries); *W.S. Dickey Mfg. Co. v. Moore*, 347 S.W.2d 493, 583 (Tenn. 1961) (an employee who initiates a fight between himself and a fellow employee "to gratify his feeling of anger or hatred" may not recover workers' compensation for injuries sustained during the altercation).

below be affirmed—provides a strong caution to maintain existing limitations on standing in matters of the public trust.

A judicial taking is not a remote possibility. The Supreme Court has recognized that any branch of government can take property. In *Webb's Fabulous Pharmacies*, the Court declared that "[n]either the Florida legislature by statute, nor the Florida courts by judicial decree" could permit a county to take the interest from an interpleader account "simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." 449 U.S at 164. And even before that, the Court and individual justices often suggested that state courts cannot simply take away property rights that have existed under state law. *See, e.g.*, *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570–71 (1905) (plurality opinion) (suggesting that a state high court that reversed a lower court decision requiring compensation to property owners adjacent to construction of elevated railroad itself committed an uncompensated taking); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930) (the Supreme Court had jurisdiction to consider "[w]hether the state court has denied to rights asserted under local law the protection which the Constitution guarantees"); *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring) ("a State cannot be permitted to defeat the constitutional

prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all").

This makes sense—after all, the Supreme Court has consistently emphasized the importance of stability and reliance interests in property rights. *See, e.g.*, *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 110 (2014) (rejecting the government's attempt to recharacterize a property interest that the Court had previously recognized, "especially given 'the special need for certainty and predictability where land titles are concerned'" (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979))); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."). Stability cannot exist where long-established property rights may be taken by judicial decree.

The Court's most recent pronouncement on judicial takings occurred in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), where four justices opined that the Takings Clause "bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." *Id.* at 715 (plurality opinion). And while the remaining four justices who participated[3] were more hesitant, Justice Kennedy suggested that

[3] Justice Stevens did not participate.

"[i]f a judicial decision . . . eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law." *Id.* at 735 (opinion concurring in part and concurring in the judgment). Ultimately, *Stop the Beach* fits with the long line of Supreme Court cases cautioning that courts should tread lightly where their decisions might abruptly eliminate or diminish longstanding property rights. State courts, too, have long been warning of the danger of altering property rights through judicial decree. *See Bott v. Comm'n of Nat. Res.*, 415 Mich. 45, 76–80, 82–84 (1982) (rejecting the State's argument to expand recreational access to certain inland waterways because such a decree would amount to "eliminating a property right without compensation"); *Oregon v. Corvallis Sand & Gravel Co.*, 283 Or. 147, 165 (1978) (citing *Hughes*, 389 U.S. at 296–98); *Dolphin Lane Assocs., Ltd. v. Town of Southampton*, 339 N.Y.S.2d 966, 975 (Sup. Ct. 1971) (a redefinition of property rights would "certainly violate the rights of plaintiff").

And for the purposes of this case, this Court has already acknowledged the limits on judicial reordering of property interests. In rejecting a criminal defendant's argument that his trespass conviction should be overturned because the public has the right to use nonnavigable streams for recreation, this Court observed that "[i]f the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end."

People v. Emmert, 597 P.2d 1025, 1029 (Colo. 1978). That is true. The political branches, not the courts, bear both the power of eminent domain and the "responsibility to ensure that the taking makes financial sense from the State's point of view." *Stop the Beach*, 560 U.S. at 735. To permit any individual the power to instigate a taking by judicial decree, even in the face of the attorney general's opposition, would strip this power and responsibility from the elected State actors. Any decision to expand public rights in the shoreline and bear the corresponding liability should be made by political actors, not state judges.

In short, Mr. Hill's claim does not merit an extension of existing standing doctrine to permit him to assert the supposed rights of the general public to fish in a privately-owned riverbed. Even if he were correct that the portion of the Arkansas River he seeks to use was navigable at the time of statehood, the State, not Mr. Hill, has the responsibility of enforcing any public rights that might exist in the riverbed. Mr. Hill lacks standing to seek a judicial decree that—over the objection of the State—might result in a taking of private property without just compensation.

CONCLUSION

For the reasons stated herein and in the State's briefing, the judgment below allowing a private individual to seek declaratory relief against the private property owners should be reversed.

Respectfully submitted on the second day of February, 2023.

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In accordance with C.R.C.P. 121 §1-26(7), and C.A.R. 30(f), a printed copy of this document with original signature(s) is maintained by Pacific Legal Foundation and will be made available for inspection by other parties or the Court upon request.