CAUSE NO. 15802

ANGELA MAE BRANNAN, ET AL.,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFFS,	§	
	§	BRAZORIA COUNTY, TEXAS
V.	§	
	§	
THE STATE OF TEXAS, ET AL.,	§	239TH JUDICIAL DISTRICT
	§	
DEFENDANTS.	§	

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

INTRODUCTION AND BACKGROUND

In 1998 (and until the Texas Supreme Court's decision in *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012)), the State adhered to rules defining the width of the public beach by the landward extent of the natural vegetation line. Any private land seaward of the line was considered part of the public beach due to the (presumed) existence of a public easement on the area. This was not informal policy, but codified in State regulations. *See* 31 TAC § 15.2(60) (defining the "public beach" consistent with Texas Natural Resources Code, § 61.013(c) which states that "'public beach' shall mean any beach bordering on the Gulf of Mexico that extends *inland from the line of mean low tide to the natural line of vegetation*") (emphasis added); *id.* § 15.3(b) ("Boundary of the public beach. The public beach is defined in the Open Beaches Act, § 61.013(c) [which again sets the boundary at the line of vegetation] . . . . The line of vegetation is typically used to determine the landward extent of the public beach."); *id.* § 15.2(42) (defining "Line of vegetation" as "[t]he extreme

seaward boundary of natural vegetation which spreads continuously inland. *The line of vegetation is typically used to determine the landward extent of the public beach.*") (emphasis added).

Plaintiffs have alleged and the record shows that immediately prior to 1998's Tropical Storm Frances, Plaintiffs' beachfront properties were landward of the line of vegetation. Clerks Record in prior appeals (CR) at 1253 (GLO finding of fact that vegetation line was seaward of homes prior to the "meteorological event"); *id.* at 979 (Porter affidavit: "The vegetation line moved seaward on my property . . . after Frances"); CR at 1007 (Brannan affidavit: "Vegetation grew seaward of my house . . . from the time I built the house in 1969 until I sold it in 2000."); CR at 314 (Land Commissioner's post-Frances letter stating that Plaintiffs' homes "have *come* to be located seaward of the line of vegetation") (emphasis added).

When Frances hit on September 10-12, 1998, it caused minor property damage, CR at 0673, but severely and obviously dislocated the vegetation line. CR at 314; *id.* at 666; *id.* at 979; *id.* at 3494 (Porter Affidavit testifying that Frances "carried vast quantities of sand off the beach at Surfside several blocks inland"); *see generally*, James C. Gibeaut, et al., *Threshold Conditions for Episodic Beach Erosion Along the Southeast Texas Coast*, Gulf Coast Association of Geological Studies, vol. 52, at 323-35 (2002) (concluding that "Frances caused 15 to 25 m[eters] of [vegetation line] retreat"). The storm moved the vegetation line landward of Plaintiffs' homes, leaving them on dry sand lots. CR at 215 ¶ 26; *id.* at 314; *id.* at 979; *id.* at 1002-03. Indeed, the Land Office made a factual determination—expressed in the then-Land Commissioner's 1999 letter to the Texas Attorney General—that Plaintiffs' homes had come to be seaward of the vegetation line after Frances. *See* State Defendants' Plea to the Jurisdiction and Alternative Cross Motion for Partial

Summary Judgment on Plaintiffs' Takings Claims, Exhibit A at 1; *see also*, CR at 314; *id.* at 215 ¶ 29. The State affirmed this factual determination in prior proceedings and briefing in this Court and others. CR at 1094.

The GLO's factual determination that Plaintiffs' properties were seaward of the vegetation line after Frances is what led the Land Commissioner to state in the 1999 letter to the Attorney General that Plaintiffs' land was part of "the public beach." In 2004, the GLO confirmed this determining with additional findings of fact relating to the state of Plaintiffs' properties. CR at 1252-64. In issuing a temporary OBA moratorium order that year, the agency found that Plaintiffs' homes remained seaward of the vegetation line "that establishes the public beach easement at the location of the house," that the properties came to be in this location due to a "meteorologcal event" [*i.e.*, Frances], and that they were landward of the vegetation before the event. *Id.* In its original (2004) summary judgment motion on the rolling easement takings issue, the State told this Court that it was an "undisputed fact" that Plaintiffs' "beachhouses . . . are seaward of the current vegetation line," and that "public easements 'of use and lateral passage' have been imposed upon these properties." CR at 818.

Until late 2006, the State exclusively relied on the GLO's vegetation line/public beach rules in this matter. But it subsequently added a submerged lands claim; *i.e.*, that Plaintiffs' homes came to be on state-owned submerged lands in October, 2006, because of the effects of a "bull-tide" event. Thus, from 1998-2006, the State held that Plaintiffs' homes were on non-submerged lands (dry sand) that it adjudged to be seaward of the natural vegetation line, and legally defined as a "public beach" for that reason.

ARGUMENT

I

THE STATE IMPOSED A PUBLIC ACCESS EASEMENT THROUGH AND BY STATE RULES REQUIRING PUBLIC BEACH ACCESS ON ANY PROPERTIES—LIKE PLAINTIFFS'—DETERMINED TO BE SEAWARD OF THE VEGETATION LINE

The State attempts to turn this dispute into a *Porretto*-like case of no-actionable takings injury by asserting that Plaintiffs' takings claims rest on mere "opinions," legal positions, and unofficial actions. In essence, with respect to a taking by easement imposition, the State claims it never took any action to require public access or interfere with the private nature of Plaintiffs' land; it just talked about it. *See* State Defendants' Plea to the Jurisdiction and Alternative Cross Motion for Partial Summary Judgment on Plaintiffs' Takings Claims at 3, 4-11; State Defendants' Response to Plaintiffs' Motion for Summary Judgment Seeking Declaratory Relief on Takings Claims at 5-7. This is disingenuous and easily refuted.

The core flaw in the State's argument is its refusal to mention (much less analyze) its post-Frances administrative findings that Plaintiffs' properties were seaward of the vegetation line, a determination initially made in 1999, after Frances, and reaffirmed in 2004. These agency determinations are critical because they triggered binding State laws and regulations that converted Plaintiffs' property into a "public beach." *See* 31 TAC § 15.2(60); *id.* § 15.2(42); *id.* § 15.3(b) *see*

also, OBA §§ 61.011-61.013. Indeed, it was upon these laws that the State relied in considering Plaintiffs' land to be a public area. See CR at 822 (State's original (2004) summary judgment motion).

The application of laws defining Plaintiffs' properties as a public beach because of their administratively determined location in front of the vegetation line in turn triggered state rules requiring public access on Plaintiffs' "beach." The OBA states, for example, that

> [n]o person may display or cause to be displayed on or adjacent to any public beach any sign, marker, or warning, or make or cause to be made any written or oral communication which states that the public beach is private property or represent in any other manner that the public does not have the right of access to the public beach . . . .

Tex. Nat. Res. 61.014(b). A different section of the Act makes it

> an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively, lawfully and legally to enter or to leave any public beach or to use any public beach.

Id. § 61.013(a). Similarly, GLO administrative regulations prohibit, any construction on the "public beach" (again, the area seaward of the vegetation line) so as to protect public access to the area. 31 TAC 15.5(a).

In this context, it is apparent that the GLO Commissioner's 1999 letter to the Attorney General, which stated that Plaintiffs' homes were encroachments on the "public beach," was not some new, informal agency "opinion." The letter communicated statutorily and administratively mandated changes to Plaintiffs' properties arising from the State's determination that the properties were seaward of the vegetation line after Frances. The letter supplies proof of GLO determinations

that triggered public beach regulations and provisions requiring imposition of public access on Plaintiffs' land. But the taking by imposition of easement ultimately arose from application of state OBA laws.

II

STATE RULES AUTHORIZING ACCESS TO PLAINTIFFS' LAND AS A PUBLIC BEACH CAUSED A PHYSICAL TAKING

Once it is clear that the taking by easement of which Plaintiffs complain arises from legally imposed public beach and access requirements, rather than informal communications, it also becomes clear that Plaintiffs should prevail on their easement-based takings claim. Therefore, the State is neither entitled to its plea to the jurisdiction or summary judgment on the easement takings claim.

A. Public Easements Imposed by Law on Private Property Cause an Unconstitutional Physical Taking

Takings law might not always be a model of clarity, but if there is one incontestable principle, it is that the government must pay just compensation when it enacts or applies laws that authorize a public access easement on private property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, . . . we have no doubt there would have been a taking," because public access is a physical taking.); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (a regulatory order requiring public access over was a physical taking); *see also, Severance v. Patterson*, 566 F.3d 490,

496 n.5 (5th Cir. 2009) (noting that application of the rolling easement is best analyzed as a physical taking).[1]

When laws authorize public occupation of private property, neither the public interest advanced in support of the encumbrance, the size of invasion, or the property owners' expectations matter; the taking is unavoidable. *Id. Nollan*, 483 U.S. at 831-32 ("[W]here governmental action results in '[a] permanent physical occupation' of the property, by the government itself or by others, 'our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'" (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 n.9 (1982), *id.* at 434-35)); *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996).

Texas cases are no different. *See Waggoner's Estate v. Gleghorn*, 378 S.W.2d 47, 50 (Tex. 1964) (holding a state law "unconstitutional and void to the extent that it purports to authorize the taking of private property for a private purpose"); *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004) ("[W]here [a] regulation 'compel[s] the property owner to suffer a physical "invasion" of his property' . . . [t]he direct, physical effect on property, though short of government possession, makes the regulation categorically a taking.") (footnote omitted; emphasis added); *GTE Southwest Inc. v. Public Utility Comm'n of Texas*, 10 S.W.3d 7, 11 (Tex.

[1] *See Nollan*, 483 U.S. at 832 (physical occupation taking occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises").

App.–Austin 1999) (Commission order caused a physical taking by requiring that GTE surrender its right to exclude others.).

B. The State Cannot Escape the Fact That *Severance* Stripped Away Its Only Potential Way out of Liability for Authorizing Public Access Between 1998-2006

In this case, the State determined Plaintiffs' properties were seaward of the vegetation line in late 1998, and alleged the properties became submerged in late 2006. Even if this submerged lands claim proves to be true, the court is faced with an eight-year (non-submerged) period in which Plaintiffs' land was subject to regulations and laws authorizing a public beach and public access on their land. Temporary invasions are, of course, as unconstitutional as permanent ones. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318-19 (1987).

The State only has one way out of constitutional liability for its authorization of public access on Plaintiffs' private land: it must show that it was simply recognizing a pre-existing and lawfully created easement. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-31 (1992). This is what the State attempted to do previously by arguing that state common law required a "rolling" public easement to the vegetation line. Its argument was always that Plaintiffs cannot claim a taking from the post-Frances determination that their land is a public beach because pre-existing Texas common law recognizes a public easement on the dry sand. CR at 2172 (State's original motion for summary judgment: "As a matter of law, as the vegetation line moves landward and seaward, the public's easement rights move with it.").

But *Severance* took away this defense. State common law does not and never did require public access on private land simply because a storm stripped that beach land of its vegetation, and made it sandy. *See Severance*, 370 S.W.3d at 724. As the *Severance* court emphasized, without this common law support, such a public access rule raises major constitutional "takings" problems. *Id.* at 725.

And that is exactly what confronts the Court here: a significant takings problem. The State enacted and administered laws and regulations that made Plaintiffs' land—land under and immediately around their private homes—into a public beach based only on the GLO's determination that the land had come to be seaward of the vegetation line after a storm. The State thus opened up Plaintiffs' land for public access, and opened the way for the State and Village to target their homes, without any valid state law justification. *Id.* at 724-25. This clearly states a valid takings claim on which the State is not entitled to summary judgment.

It makes no difference that the State says it has now "abandoned" its invalid rolling easement laws and policies (at least with respect to Plaintiffs). After regulating Plaintiffs based on this theory for 15 years, the gesture offers no comfort to Plaintiffs. More importantly, the abandonment fails to give the State a pass when it comes to the Constitution. The government always has the right to cease actions that take private property, but it is still constitutionally required to pay compensation for the effective period of its actions, here, eight years of land appropriation. *First English*, 482 U.S. at 321 ("[W]here the government's activities have already worked a taking . . . no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

The State is desperate to minimize its actions against Plaintiffs' land after it lost in *Severance*. But it cannot deny its own rules and regulations that legally defined Plaintiffs' land as a public beach due to its post-Frances location in front of the vegetation line. The pre-*Severance* Texas OBA cases (on which the State once relied) *never* held that the State's redefinition of private land as a "public beach" under its OBA rules was an injury-less, non-justiciable dispute—as the State argues here. They held that the State was not liable for private property injuries based on the assumed validity of the rolling easement. But *Severance* abrogated this part of those cases, 370 S.W.3d at 730, leaving the State newly exposed to Constitutional liability for converting private dry sand properties, like those here, into a public beach park simply because the properties lost beach grass in a storm.

CONCLUSION

The Court should deny the State's Plea to the Jurisdiction, Motion for Summary Judgment and Grant Plaintiffs' Motions on its Rolling Easement Takings Claim.

DATED: January 26, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2015, at 9:30 a.m. I electronically filed the foregoing: BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION with the Clerk of the Court through TexFile.com, which has electronically served such filing to counsel at the following e-mail addresses:

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