

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
U.S. Court of Appeals for the Fifth Circuit

JOINT ANSWERING BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT OF THE CASE

- Nature of the Case:* This appeal arises on certified questions, from the U.S. Court of Appeals for the Fifth Circuit, in a matter challenging the validity of the public’s easement rights and their enforcement under the Open Beaches Act, *see* TEX. NAT. RES. CODE §§ 61.001-.026.
- Trial Court:* The Honorable Kenneth M. Hoyt, U.S. District Court for the Southern District of Texas, Houston Division.
- Trial Court Disposition:* The trial court granted Defendants-Appellees’ motion to dismiss. *See* USCA5 760-776.¹
- Parties in the Court of Appeals:* Appellant: Carol Severance.
- Appellees: Commissioner Patterson; Attorney General Abbott; and Criminal District Attorney Sistrunk.
- Court of Appeals:* U.S. Court of Appeals for the Fifth Circuit.
- Court of Appeals Disposition:* The panel unanimously dismissed Plaintiff’s takings claim as unripe, *see Severance v. Patterson*, 566 F.3d 490, 504 (5th Cir. 2009), but split 2-1 on both the justiciability of Plaintiff’s “unreasonable seizure” claim and the need to certify questions regarding that claim to this Court, *see id.* at 495-504; *id.* at 504-15 (Wiener, J., dissenting) (finding that Plaintiff lacked standing to press the seizure claim and that the claim otherwise failed on the merits).

1. The record on appeal in the U.S. Court of Appeals for the Fifth Circuit is referenced as “USCA5 [page number].” Plaintiff’s opening brief in the Fifth Circuit is referenced as “Opening Br. [page number]” and her reply brief as “Reply Br. [page number].” Her brief filed in this Court is referenced as “Plaintiff’s Br. [page number].”

ISSUES PRESENTED

In a divided decision, a panel of the U.S. Court of Appeals for the Fifth Circuit issued a set of three certified questions to determine whether Texas courts would compensate Plaintiff had she brought a proper inverse-condemnation claim in state court. Those questions were the following: (1) whether Texas recognizes a “rolling easement”; (2) if there is such an easement, whether it is derived from the common law or the Open Beaches Act; and (3) whether a landowner is entitled to compensation for any “taking” of her property by the imposition of a “rolling easement.” *See Severance*, 566 F.3d at 504.

While it enumerated these three questions, the panel expressly “disclaim[ed] any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.” *Id.* at 504. The State respectfully submits that two additional questions, both implicating important questions of state law, are appropriate for the full and proper consideration of Plaintiff’s “unreasonable seizure” claim:

1. Standing: The panel unanimously held that Plaintiff would lack standing to seek compensation for any “seizure” that resulted from the imposition of an easement on her property *before* she purchased it—whether or not the “rolling easement” is a background common-law rule. Although the public’s easement attached to the property in question no later than 1999, the panel found that the “rolling easement” purportedly “shifted farther inland” after Plaintiff’s purchase in 2005. 566 F.3d at 496. The question presented, accordingly, is whether the “rolling easement” is a *single* easement—attaching to Plaintiff’s entire property at once, and giving the public the inchoate right to use any part of the property

so long as the easement’s conditions are met (*i.e.*, the land falls on the dry beach)—or instead an infinite number of *separate* easements that arise independently with every inch the easement advances on the property. *See id.* at 499 n.9 (flagging this issue as one “the Texas Supreme Court must address”).

2. Fourth Amendment “Takings” and Inverse Condemnation: The panel majority held that an “ordinary” taking (under the Fifth Amendment) could be recast as an “unreasonable seizure” (under the Fourth Amendment) if the State refuses to provide just compensation. The question presented is whether Texas’s inverse-condemnation remedy, which authorizes full and robust relief for *every* viable takings claim, renders it legally impossible for Plaintiff to identify an “unreasonable” seizure—because, under a proper understanding of state law, no plaintiff will ever be “unreasonably” denied compensation for a valid claim.

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JOINT ANSWERING BRIEF FOR DEFENDANTS-APPELLEES

TO THE HONORABLE SUPREME COURT OF TEXAS:

This Court should respond to the certified questions in a manner that eliminates any possible doubt over the validity of a common-law doctrine that has been uniformly acknowledged by every single Texas court to have addressed the question in the near-half century since the Open Beaches Act was enacted. All three branches of Texas government have reached the same conclusion after examining the same set of common-law rules controlling migratory boundaries: the rolling easement is part of the background principles of Texas property law. So long as the public establishes an easement over the dry beach, the easement is tied to its natural boundaries and rolls with changes in those boundaries—just as every other dynamic boundary, in every other context of the law, has been found to shift with its natural movement. Plaintiff’s invitation for the Court to upend this settled

framework—and abruptly depart from established law as understood by everyone until now—is unsupported by precedent, has no basis in law or logic, and should be rejected.

In posing three certified questions, the panel was careful to explicitly disclaim any desire to limit the Court’s focus to the enumerated questions. This sensibly recognizes the possibility that other questions of state law might shape the Fifth Circuit’s resolution of the federal issue. And, indeed, there are at least two essential questions of state law that are dispositive to the outcome of Plaintiff’s claim. They implicate serious legal issues with important practical consequences. And they also represent the most efficient and straightforward resolution of this matter—without any need to resolve the common-law question.

On the first point, the panel majority’s analysis is predicated on a clear misunderstanding of the nature of the “rolling easement.” Contrary to that analysis, there is but a *single* easement—and as a matter of longstanding Texas law, once it reaches a piece of property, it burdens the title to that property all at once. To be sure, the *conditions* under which the easement can be used are narrow in scope: the easement provides only the right to use the dry beach between the mean-high-tide line and the line of vegetation—and when those conditions are not satisfied (such as when the dry beach migrates off the property entirely), the public has no present right to use any part of the land. But the *title to the land is still encumbered by the dynamic easement*. It accordingly is not the case, as Plaintiff contends, that there is a “birth of a brand new easement every time the vegetation line shifts.”

Severance, 566 F.3d at 508 (Wiener, J.). Such a result would lead to the “absurdity of endless litigation over an infinite number of infinitesimal accretions to the dry beach.” *Ibid.*

This confirms that Plaintiff herself never had the rights she now claims were taken: because the easement in question indisputably encumbered her property before she bought it, what she bought was land already burdened by an easement. And she clearly knew that going in. The law has required a mandatory disclosure since 1985—approximately *twenty years* before her purchase—warning her of the effect of the rolling easement. And the properties in question were *twice* included on official announcements recognizing that the public’s easement had attached to the land. Plaintiff spills much ink criticizing a doctrine that she indisputably knew had already reduced the sticks in the bundle of rights she was acquiring. It is not a matter for Texas taxpayers to reimburse her for the bargain she knowingly struck.

On the second point, the panel’s “unreasonable seizure” theory is likewise predicated on a misunderstanding of Texas’s established inverse-condemnation procedure for awarding just compensation. Under settled Texas law, any claimant presenting a viable takings claim will be fully compensated in Texas courts. Under the panel’s framework, it inexorably follows that it is a legal impossibility for *any* person to state a valid claim for an “unreasonable” seizure. If there is a taking, the plaintiff will be compensated as a matter of state law. If there was no taking, the plaintiff will not be compensated—because nothing was taken. Either way, because state law, when properly construed, authorizes a full and robust remedy—and because pre-taking compensation is *not* constitutionally required—Plaintiff

will never have a viable seizure claim under the panel’s own framework. Because this logic disposes of Plaintiff’s claim, this clarification of state law presents a swift and straightforward way to answer the certified questions—and to do so without the need to wade into a constitutional controversy over the “rolling easement.”

STATEMENT OF FACTS

I. STATUTORY FRAMEWORK

A. The Texas Open Beaches Act

In 1959, the Texas Legislature enacted the Texas Open Beaches Act (“OBA”). *See* Act of July 16, 1959, 56th Leg., 2d C.S., ch. 19, 1959 TEX. GEN. LAWS 108-12. The OBA declared the “public policy of this state” to secure “the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico.” TEX. NAT. RES. CODE § 61.011(a). The Legislature also extended the Act’s protection to other beach areas in which the public had independently acquired property rights under the common law: the Act would safeguard the beach “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.” *Ibid.* The statute also reflected the common-law doctrine of the rolling easement by specifically referencing the easement’s natural boundaries—the area between “the line of mean low tide” and “the line of vegetation bordering on the Gulf of Mexico.” *Ibid.*

The OBA safeguards the public’s rights by prohibiting persons from “creat[ing], erect[ing], or construct[ing] any obstruction, barrier, or restraint” that interferes with the

public beach “if the public has acquired a right of use or easement to or over the area.” *Id.* § 61.013(a). Although the OBA’s remedies are powerful—including the authority to remove permanent structures under certain conditions, *id.* § 61.018(a)—the Legislature also authorized considerable discretion for public officials making enforcement decisions. As a primary example, the OBA permits the Texas Land Commissioner, under specified circumstances, to enter a two-year moratorium on the removal of houses from the public beach. *Id.* § 61.0185.

In light of the public’s rights along the coast—and the public’s success in proving common-law easements over the dry beach—the Legislature amended the OBA in 1985 to require certain, significant disclosures to potential purchasers of property bordering the ocean. *See* Act of May 24, 1985, 69th Leg., R.S., ch. 350, § 1 1985 TEX. GEN. LAWS 1419. At the time of Plaintiff’s purchase, these disclosures include the following warnings:

- “[i]f the property is in close proximity to a beach fronting the Gulf of Mexico, the purchaser is hereby advised that the public has acquired a right of use or easement to or over the area of any public beach by prescription, dedication, or presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom”;
- “[t]he extreme seaward boundary of natural vegetation that spreads continuously inland customarily marks the landward boundary of the public easement”;
- “State law prohibits any obstruction, barrier, restraint, or interference with the use of the public easement, including the placement of structures seaward of the landward boundary of the easement”; and
- “structures erected seaward of the vegetation line (or other applicable easement boundary) or *that become seaward of the vegetation line as a result of natural processes such as shoreline erosion* are subject to a lawsuit by the State of Texas to remove the structures.”

Id. § 61.025(a) (formatting altered; emphasis added); *see also ibid.* (also requiring the mandatory disclosure to include advice to “determine the rate of shoreline erosion in the vicinity of the real property” and to “seek the advice of an attorney or other qualified person” before executing any land contract).²

B. Proposed Amendment to the Texas Constitution

In a reflection of the importance of the Open Beaches Act, the Legislature in the last session overwhelmingly passed a joint resolution “proposing a constitutional amendment to protect the right of the public to access and use public beaches.” TEX. H.J.R. RES. 102, 81st Leg., R.S. (2009) (passing by a vote of 140-1-1 in the House and 29-2 in the Senate). The proposed amendment would parallel the OBA’s definition of the “public beach”—including its recognition of the natural common-law boundaries that border the rolling easement. *See ibid.* (defining the term to encompass “any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired a right of use or easement to or over the area . . . under Texas common law”). The proposal would further dedicate any such common-law easement as “a permanent easement in favor of the public” and authorize the Legislature to “enact laws to protect the right of the

2. Pursuant to Texas Department of Insurance Rule 28 Tex. Admin. Code § 9.1, Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, Section II, Form T-1, *Owner’s Policy of Title Insurance*, (available online at <http://www.tdi.state.tx.us/title/titlem2b.html#Form%20T-1>), title insurance policies written in Texas must conform to the agency’s prescribed form, which includes the following exclusion from coverage: “This policy does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees or expenses) that arise by reason of . . . [a]ny titles or rights asserted by anyone, including, but not limited to, persons, *the public*, corporations, governments or other entities, . . . *to the area extending from the line of mean low tide to the line of vegetation, or the rights of access to that area or easement along and across that area*” (emphases added).

public to access and use a public beach and to protect the public beach easement from interference and encroachments.” *Ibid.*

In explaining the justification for the constitutional amendment, the resolution’s supporters stressed the established nature of the common-law rule regarding rolling easements, and the landowners’ widespread knowledge of the risks of locating near the beach:

Property owners who build or purchase homes on Texas beaches already know that they risk having their property shift into the public easement. Earnest money contracts, deeds, and title policies all contain provisions alerting owners of the risk of natural events moving the line of vegetation and causing their property to be located on a public beach. Building a home on the beach always has been a risky proposition as natural occurrences cause the mean low tide and vegetation lines to constantly move back and forth.

House Research Org., Bill Analysis, H.J.R. Res. 102, 81st Leg., R.S. (2009), at 2. The resolution requires that the proposed amendment be “submitted to the voters at an election to be held November 3, 2009.” TEX. H.J.R. RES. 102, 81st Leg., R.S. (2009).

II. THE UNDERLYING DISPUTE AND PROCEDURAL HISTORY

A. The Beach Easement and Plaintiff’s Property

Plaintiff, a California resident, purchased the two beachfront properties at issue on April 5, 2005. USCA5 605, 608. (She also purchased a third on March 1, 2005, but has since elected to withdraw claims related to that property from the lawsuit. Opening Br. 10 n.4. That property was specifically bound by an earlier judgment declaring it fully encumbered by the rolling public easement. *See* USCA5 832 n.19.) Each parcel included a single-family home that Plaintiff used as rental property. USCA5 608-09.

In 1999, years before Plaintiff acquired these properties, the Commissioner “drew up a list (1999 List) of approximately 107 Texas homes” that were “seaward of the vegetation line” and hence “on the public beach easement.” USCA5 613. Plaintiff’s two properties “were on the list.” *Ibid.* In June 2004, the Commissioner again published an official notice that “identified by address all the homes” that were on the public easement and subject to a “suspend[ed] removal action.” USCA5 614. This list once again included Plaintiff’s future properties, with the rental units spared by a temporary “moratorium” on house removal. *Ibid.* Before completing her purchase, Plaintiff also received a sales contract that disclosed the risks of the public’s declared easement on her properties: “the extreme seaward boundary of the natural vegetation line that spread continuously inland customarily marks the landward boundary of the public [beach] easement,” and “structures . . . that *become seaward of the vegetation line as a result of natural processes* are subject to a lawsuit by the State of Texas to remove the structures.” USCA5 611 (emphasis added). Plaintiff nonetheless purchased the parcels despite these written disclosures and the repeated notice of the easement.³

Although “the vegetation line began migrating back toward the sea” during the moratorium period, “erosion associated with Hurricane Rita moved the vegetation line to a position wholly or partially landward of all her homes” after her purchase. USCA5 614. On June 7, 2006, the temporary moratorium expired, and Plaintiff was informed that her property was still on the public easement. She was offered approximately \$40,000 in financial

3. The official notices regarding Plaintiff’s (future) property—and the fact that they were encumbered by the public’s easement—were filed in the real property records of Galveston County before Plaintiff’s purchase. *See App. A; App. B.*

assistance to relocate or remove her house from the easement. She declined, and instead on July 27, 2006 filed suit in federal court. USCA5 89.

B. Plaintiff's Complaint and the District Court's Ruling

Plaintiff's complaint alleged violations of the Fifth Amendment's takings clause and the Fourth Amendment's prohibition of unreasonable seizures, as applicable to the States through the Fourteenth Amendment. USCA5 605. Both claims were premised on the same core allegation: according to Plaintiff, the State had unconstitutionally "impose[d] a public beach access easement on Plaintiff's properties, based on the landward movement of vegetation, without provision of just compensation"—in other words, because the State had supposedly taken her property right without providing pre-taking compensation, it had violated her constitutional rights. USCA5 618. She sought declaratory and injunctive relief to block the "uncompensated 'rolling' public beach access easement" from her property.⁴

The district court dismissed her complaint in its entirety. USCA5 776. The court rejected the State's arguments that sovereign immunity barred her claims, USCA5 765-66, and found her claims "at least arguably" ripe, USCA5 767. But the court held that her claims were meritless. It found that "[w]hen [Plaintiff] purchased her rental properties in March and April of 2005, she had reason to know that the location of the vegetation line could pose a problem." USCA5 762. The court recognized the "rolling beach easement" as part of "a

4. Contrary to the implication from Plaintiff's recent submission, house removal is not a live issue in this case: as the panel acknowledged, Plaintiff "does not contest the dismissal of her house removal claims." *Severance*, 566 F.3d at 494; Opening Br. 15 (Plaintiff "no longer challenges the threatened removal of her homes, and the portion of the lower court ruling pertaining to such claims is not appealed.") (citation omitted).

doctrine of Texas’s common law of property,” USCA5 772, and hence concluded that the easement “already existed over the dry beach when [Plaintiff] purchased the properties,” USCA5 773. The court thus held that Plaintiff “has not suffered a taking because her right to exclude the public never extended seaward of the dynamic, natural boundary of the beach.” USCA5 774-75. Plaintiff appealed.

C. The Fifth Circuit’s Split Disposition and the Certified Questions

A divided panel of the Fifth Circuit affirmed in part and certified questions to this Court on the remaining claims. *Severance*, 566 F.3d at 504.

1. The panel majority held that Plaintiff’s Fifth Amendment takings claim should be dismissed as unripe: it held that Plaintiff had access to an inverse-condemnation remedy in state court, and she had failed to use it. *Id.* at 500. But the panel did find that Plaintiff had standing to press her Fourth Amendment “seizure” claim. The panel majority first noted the background rule that only a plaintiff who held property at the time of a physical taking has standing to press a claim: “any award goes to the owner at the time of the taking, and [] the right to compensation is not passed to a subsequent purchaser.” *Id.* at 495-96 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001)). But the panel found that Plaintiff possibly met this standard. “[E]ven if the easement had attached to some portion of Severance’s properties before the purchase, the vegetation line shifted farther inland after the purchase.” *Id.* at 496. It consequently followed, the panel believed, that Plaintiff had standing to seek relief for the square footage of her land not previously encumbered: “Because the State seeks to impose an easement on a different (and larger) segment of her

properties than was covered at the time of her purchase, [Plaintiff] has suffered an injury distinct from that of the previous owner.” *Ibid.*

The panel next held that Plaintiff had stated a potential claim under the Fourth Amendment—and its prohibition of “unreasonable searches and seizures”—for an ordinary “taking.” *Id.* at 501-02 (quoting the Fourth Amendment’s guarantee of the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”). According to the panel, it would be “unreasonable” for the State to refuse compensation for a purported taking—and hence an uncompensated “taking” could be transformed into an “unreasonable seizure.” *Id.* at 502-03. The panel majority therefore certified questions to this Court to determine whether Texas would in fact compensate Plaintiff had she brought a proper takings claim in state court. *Id.* at 503-04.

2. In dissent, Judge Wiener agreed that Plaintiff’s takings claim was non-justiciable—but he also believed she lacked standing to seek relief for any seizure. 566 F.3d at 505 (Wiener, J., dissenting). He recognized the panel majority’s decision as “conflat[ing] the elements of a Fourth Amendment seizure claim and those of a Fifth Amendment takings claim,” leading to the “unnecessarily approbat[ion of] a new avenue of attack against the State’s power of eminent domain.” *Ibid.* Judge Wiener also explained that the panel had “misinterpret[ed] both the Texas statute at issue and Texas case law.” *Ibid.* Because “there is but one easement, albeit one whose boundaries could shift and have shifted,” he noted, “if there ever was a taking, there was but one—and it occurred long before Severance acquired title to the properties.” *Ibid.* He accordingly concluded that her claims had no merit:

Severance’s action should be dismissed, once and for all, for her lack of standing to assert either a Fifth Amendment takings claim for reasonable compensation (because Severance has had nothing *taken* by the State) or a Fourth Amendment unreasonable seizure claim (because that which was putatively seized did not belong to Severance at the time; and even if it had, there was nothing unreasonable about the purported seizure).

566 F.3d at 504-05 (Wiener, J., dissenting).

SUMMARY OF THE ARGUMENT

This case is about Plaintiff asking the taxpayers to compensate her for a property right she never had—and that was clear she never had for decades before her purchase. The Court should answer the certified questions in the following way.

1. The rolling easement is a settled part of the State’s common law: the public beach easement, once established, follows its natural migratory boundaries. Indeed, *every* branch of Texas government—legislative, executive, and judicial—has analyzed these issues exactly the same way and reached the same conclusion, relying on a doctrine with historical underpinnings in multiple jurisdictions dating back centuries. Plaintiff is therefore not asking the Court to honor her own settled expectations, but instead to disrupt the settled expectations of everyone else around her. The same common-law rules governing all other types of natural boundaries should govern this natural boundary—and Plaintiff has failed to provide any principled distinction that would support any other conclusion.

Indeed, in response to this uniform and established law, Plaintiff focuses on cases involving property interests defined by *fixed*, not natural, boundaries, and other cases involving property interests created and defined by *statute*, not the common law. In the end, Plaintiff has not identified any basis, in law or logic, for rejecting the settled common-law

rules for this context that apply everywhere else. Plaintiff cannot prove that the rolling easement does not exist by citing cases that fail to discuss it while effectively ignoring those that do.

2. In any event, whether or not the rolling easement has a common-law foundation, it has a clear and distinct relationship with Plaintiff's properties—having burdened those parcels years before Plaintiff's purchase. Because the rolling easement is a *single* easement that adheres to the entire property at once—and not an unworkable series of a virtually infinite number of separate, inch-by-inch easements—Plaintiff herself has not suffered any conceivable taking under the panel's framework.

What Plaintiff purchased in 2005 was land already burdened by the public's single beach easement. The *prior* landowners might have had a valid takings claim—had there been a taking—but Plaintiff never possessed the necessary sticks in her bundle of rights. As a matter of state law, she never had the property interest she now alleges was taken.

3. Finally, for the first time in over 200 years of jurisprudence, a federal court of appeals has held that the Fourth Amendment's prohibition of "unreasonable searches and seizures" applies to an ordinary "takings" claim. Under the panel's logic, Plaintiff has stated a possible "seizure" claim because it would be "unreasonable" not to compensate her for a viable takings claim. But this theory is predicated on a demonstrable misunderstanding of state law and, specifically, Texas's inverse-condemnation remedy.

That misunderstanding is this: the panel majority's theory incorrectly assumes that Texas law would authorize an *uncompensated* taking. But Texas law provides an

inverse-condemnation remedy that has effectively safeguarded constitutional rights for decades. This full and robust remedy guarantees compensation for any actual “taking”—establishing, under the panel’s framework, that any “taking” here cannot possibly double as an “unreasonable” seizure, no matter how the other certified questions are answered. If the panel’s confusion about state law is permitted to stand, Texas’s inverse-condemnation procedure likely will not. The Court should reaffirm the ongoing vitality of the inverse-condemnation remedy.

ARGUMENT

I. THE ROLLING EASEMENT IS A LONGSTANDING COMMON-LAW DOCTRINE WITH A SUBSTANTIAL HISTORICAL FOUNDATION—AND ACCORDINGLY IS A SETTLED FIXTURE IN THE BACKGROUND PRINCIPLES OF TEXAS PROPERTY LAW.

All three certified questions are readily answered by a single statement: the rolling easement is part of the background principles of Texas common law—so that the common-law public-beach easement, once activated, migrates with its natural boundaries, in exactly the same way that all other rights with natural boundaries also shift over time. This point establishes that (1) the rolling easement doctrine exists under Texas law—and has for at least half a century; (2) it is a creature of the common law, not statute; and, accordingly (3) no compensation is required when it attaches to property—because the rolling easement inheres in the background rules of Texas property law, no one ever had a preexisting right to exclude a proven beach easement from their land.

Plaintiff contends that it would be “unconstitutional” for the Court to recognize a rolling easement, Plaintiff’s Br. 12-14, but she is plainly wrong. All property is held subject

to “the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). As such restrictions “inhere in the title itself,” *ibid.*, their enforcement is “not a taking,” *United States v. 30.54 Acres of Land, More or Less, Situated in Greene County*, 90 F.3d 790, 795 (3d Cir. 1996). For this reason, the U.S. Supreme Court, addressing circumstances strikingly similar to this case, noted that it “assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon [a] land owner’s title.” *Lucas*, 505 U.S. at 1028-29. As a concept derived from the State’s background principles of property law, the rolling easement at issue here is precisely such a non-actionable “pre-existing limitation.”

A. The Background Principles of State Property Law Have Long Embraced the Concept of a Rolling Easement.

The rolling easement doctrine is well established under Texas law. “[O]nce a public easement to the vegetation line exists, the boundaries of the easement shift as the line of mean high tide and the vegetation line shift.” *Brannan v. State*, No. 01-08-00179-CV, slip op. at 9 (Tex. App.—Houston [1st Dist.] Aug. 28, 2009, no pet. h). Indeed, Texas courts, in a long and unbroken line of cases, have found that the easement rolls with its natural boundaries under the background common-law principles. *E.g.*, *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App.—Austin 1989, writ denied), *cert. denied*, 493 U.S. 1073 (1990); *Matcha v. Mattox*, 711 S.W.2d 95, 99-101 (Tex. App.—Austin 1986, writ ref’d n.r.e.), *cert. denied*, 481 U.S. 1024 (1987); *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ.

App.—Corpus Christi 1979, no writ); *see also Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) (“[t]he OBA safeguards the public’s common law easement for access to the ‘public beach’”; “the legal boundaries of the public easement change with their physical counterparts”); *Hirtz v. State*, 974 F.2d 663, 664 (5th Cir. 1992) (“Because of the peculiar definition of this type of easement, the location of the easement shifts as the vegetation line shifts.”).

In *Feinman v. State*, 717 S.W.2d 106 (Tex. Civ. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.), for example, the court found it “not a novel idea” that “a public easement may move with the changes in the waterways it borders.” 717 S.W.2d at 110. *Feinman* traced this rule to a series of cases from a number of jurisdictions extending back over a century. *Ibid.* (explaining that “[c]ourts have upheld the concept of a rolling easement along rivers and the sea for many years without using the phrase ‘rolling easement’”); *see also, e.g., Moody*, 593 S.W.2d at 379 (“The rule has been established that easements may shift from time to time, just as navigable rivers may change course by avulsion.”); *Galveston E. Beach, Inc. v. State*, Civ. No. 97893, Dist. Ct. of Galveston County, 10th Judicial District of Texas, Sept. 15, 1964 (“[t]his concept of a rolling or shifting easement is not a new one”), cited at USCA5 514. *Feinman*’s analysis specifically examined the “division between private and public ownership” as determined by “the daily ebb and flow of the sea,” and the common law’s related recognition of “more permanent changes . . . to a shoreline,” including the rules “governing accretions to a beach because of a receding sea, and losses to a beach because of an encroaching sea.” 717 S.W.2d at 110. The court also explained how these rules apply

identically across the relevant universe of property interests: “Not only can *title* change because of the advances and retreats of the sea, but the *location and extent of easements* along waterways can change because of accretion or erosion to land along a waterway.” *Ibid.*; see also *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d at 766 (“once a public beach easement is established, it is implied that the easement moves up or back to each new vegetation line, and the State is not required to repeatedly re-establish that an easement exists up to that new vegetation line (but only that the line has moved)”) (footnote omitted).⁵

The court in *Matcha*, as another example, embraced the same analysis: “The law in this State has recognized migrating property rights in several contexts, most of which involve land near a body of water.” 711 S.W.2d at 99; see also *id.* at 99-100 (“the rule is well-established that erosion and accretion along a river can move property lines”; also citing *Nonken v. Bexar County*, 221 S.W.2d 370 (Tex. Civ. App.—Eastland 1949, writ ref’d n.r.e.), as an example of a court “uphold[ing] a roadway easement over a creek even though the roadway had shifted some 35 feet over the years due to rains and washouts along the creek bottom”). Because there was no legal or logical basis for distinguishing the natural boundaries of the easement from the natural boundaries of other kinds of property—which

5. The panel majority understood *Feinman* to “ultimately characterize[] the rolling easement as ‘implicit in the Act.’” 566 F.3d at 499 (quoting *Feinman*, 717 S.W.2d at 111). This is based on a demonstrable misreading of *Feinman*. The quoted language arises from a section of the opinion rejecting an argument that the OBA had *abrogated* the common-law rolling easement. See *Feinman*, 717 S.W.2d at 107 (describing the party’s argument). On the contrary, the *Feinman* court correctly held that the OBA endorsed the prevailing common-law rule—and this endorsement was plainly “implicit in the Act.” See *id.* at 109-11. There accordingly is nothing inconsistent about *Feinman*’s extensive discussion of the rolling easement’s common-law roots, on the one hand, and its recognition that the Legislature did not intend to repudiate the common law under the OBA, on the other—although the panel’s competing view of this case surely would render these points incompatible with each other.

indisputably *do* shift—the court held that the “easement follows the beach as it moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation.” *Id.* at 99.

Nor does this uniform Texas precedent stand alone in this area; on the contrary, the Texas “rolling easement” doctrine is cut from exactly the same cloth as the doctrine applied in other jurisdictions, addressing all other property interests defined by natural boundaries. The U.S. Supreme Court, for example, has consistently “appl[ied] the principles of accretion and erosion” in ways that permit the use of “[non-]static property boundaries.” USCA5 775 (federal district court opinion) (citing *Ohio v. Kentucky*, 444 U.S. 335, 337 (1980)). And “[c]ourts have long recognized that boundaries of property abutting waterways may shift with the movement of the water.” *Severance*, 566 F.3d at 506 n.3 (Wiener, J.) (citing *Louisiana v. Mississippi*, 516 U.S. 22, 25 (1995), *Georgia v. South Carolina*, 497 U.S. 376, 403-04 (1990), and *Nebraska v. Iowa*, 143 U.S. 359, 360 (1892)); *see also Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 954 (Tex. 1976) (“[w]e reaffirm the rules with respect to property loss and gain due to erosion and accretion”; also noting “the result of the force of the waters which takes from some owners and gives to others” as an “ordinary hazard of riparian ownership”); *TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 184 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“The boundary is not static. The boundary moves because the line of the tide moves over time, and as that line moves, so does the boundary between State-owned submerged lands and privately owned uplands.”). There is no obvious (much less compelling) justification for ripping this principle, as applied to beach

easements, from the uniform fabric of the background common law governing all other migratory boundaries.

Finally, the common-law rule is fair. It does obligate landowners who choose to locate closest to the ocean to accept the risk that their property may become subject to the beach easement. But to the extent accretions cause the beach to migrate seaward, the same owners would benefit because the easement would shift seaward as well. *See, e.g., State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1944). Because the owner would receive the benefits of any accretions, it is not inequitable that the owner also should bear the reciprocal burden of any erosion.

Perhaps for these reasons, every federal judge to have addressed the question on the merits in this case has resolved it the same way. Judge Wiener in the Fifth Circuit and Judge Hoyt in the district court both concluded that state law unequivocally provides exactly what each state appellate court has said it provides: a common-law “rolling easement” that shifts with its natural boundaries. Moreover, contrary to Plaintiff’s understanding of the law, both jurists found that this result was entirely compatible with the Constitution. *Severance*, 566 F.3d at 504-05 (Wiener, J.); USCA5 772-75.⁶

Because the background principles of Texas law confirm that littoral properties are subject to a dominant beach easement, “plaintiff’s claimed property right never

6. Although Judge Wiener’s separate opinion is properly termed a dissent—he felt the law was sufficiently clear that it was unnecessary to burden this Court with certified questions—the panel majority did *not* resolve the question on the merits. The panel majority simply believed it had found sufficient uncertainty about the status of state law that it sought this Court’s insight.

existed”—and neither did any taking. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002); *see also Lucas*, 505 U.S. at 1028-29.

B. The Open Beaches Act Reflects the Common-Law Doctrine of a Rolling Easement—It Does Not Create It.

Plaintiff contends that the OBA itself cannot authorize an uncompensated rolling easement if the common law fails to provide it. But the State has never suggested otherwise. The OBA itself plainly does not create the “rolling easement” or redefine anyone’s property interests. The statute textually restricts statutory enforcement to recognized rights: the act, for example, prohibits the interference with the use of a public beach only “*if the public has acquired a right of use or easement* to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.” TEX. NAT. RES. CODE § 61.013(a) (emphasis added). The statute accordingly is not a rights-creating document, but a mechanism for enforcing property rights that the State has previously and independently obtained. *See Arrington v. Mattox*, 767 S.W.2d at 958 (“The public acquires its easements, not by virtue of the Open Beaches Act, but through prescription, dedication, and custom.”); *State v. Markle*, 363 S.W.2d 332, 336 (Tex. Civ. App.—Houston 1962, no writ) (“The [OBA] is not relied on to create any rights in the public [A] reading of the act indicates to us that it does not purport to create any rights or interfere with any rights of the landowner, but merely declares the policy of the State to protect such rights as the public may have.”); USCA5 772 (same).

The OBA, however, does clearly reflect the Legislature’s longstanding view that the rolling easement is part of the Texas common law. It explicitly references the natural

boundaries of the rolling easement, *see, e.g.*, TEX. NAT. RES. CODE § 61.011(a) (“the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation”)—boundaries that, by definition, are not static in nature. *See Severance*, 566 F.3d at 508 (Wiener, J.) (“the [Texas Legislature] borrowed from the familiar common law approach to property lines expected to fluctuate over time”). And the OBA’s disclosure requirement, added approximately two *decades* before Plaintiff purchased her property, emphatically endorsed the common-law doctrine: “Structures erected seaward of the vegetation line (or other applicable easement boundary) *or that become seaward of the vegetation line as a result of natural processes* are subject to a lawsuit by the state of Texas to remove the structures.” TEX. NAT. RES. CODE § 61.025 (emphasis added) (typeface altered from original). As Judge Wiener explained, “[t]he 1985 Act makes pellucid that once an easement on the dry beach is established, its landward boundary may therefore ‘roll,’ *including over private property.*” *Severance*, 566 F.3d at 508 (Wiener, J.). But this rolling occurs under the authority of the common-law of migratory boundaries, not under the command of the statute itself.

C. Plaintiff’s Attempts to Undercut This Established Rule Are Demonstrably Wrong and Highly Misleading.

In response to this substantial body of law, Plaintiff declares the “rolling easement” a “fiction” and “fabrication,” its origins wholly “mysterious,” and its birth the product of the “imagination[.]” of state lawyers. Plaintiff’s Br. 9, 12-13, 17. Yet Plaintiff is still unable to cite a *single* relevant case rejecting the application of the bedrock doctrine of migratory boundaries to this situation. Simply calling the doctrine a “fiction” does not change the fact

that it has been uniformly endorsed by all three branches of Texas government, consistently acknowledged by state *and* federal courts for decades, and grounded in a common-law rule that has been widely accepted for more than a century. Indeed, Plaintiff’s characterization cannot even fully account for what *Plaintiff herself* said earlier in this very case: “Texas courts have repeatedly held, over many years, that no taking results when state officials conclude that an OBA beach access easement has rolled over private property due to the landward migration of the vegetation line.” Opening Br. 30; *see also* Reply Br. 13-14.⁷

At the end of the day, Plaintiff has cited a body of law that forbids only what the common-law “rolling easement” plainly does *not* do. She has failed in her burden to provide any sound justification for sharply departing—in this context alone—from the traditional rules controlling all other property interests with natural, migratory boundaries. *See, e.g., John G. & Marie Stella Kenedy Mem’l Found. v. Dewhurst*, 90 S.W.3d 268, 281 (Tex. 2002) (“We would be very reluctant to discard a rule determining seashore boundaries that has served as long and satisfactorily as the rule in *Luttes*, thereby upsetting long-settled expectations, and we could not do so absent far more compelling evidence than can be offered here.”).

1. Plaintiff has failed, first and foremost, to offer any principled distinction for treating this kind of migratory boundary differently from any other type of migratory boundary. Her attempt (Plaintiff’s Br. 18-20) to distinguish this context on the ground that

7. Plaintiff’s attempt (Plaintiff’s Br. 10) to link the origin of the “rolling easement” doctrine to a law-review article are disproved by the article itself, which cites and examines the “various courts [that] have applied versions of the concept, without calling it by name, to other situations requiring it.” *See* USCA5 501, 502-06 (reproducing the article in question).

the vegetation line is not a “tide-based” water boundary misses the point entirely: the principle is one that applies to *natural* boundaries that, by definition, are not *static* in nature. These dynamic boundaries (unlike their static counterparts) are not readily identified by metes and bounds. In any event, Plaintiff is wrong even on her own terms: the vegetation line *is* inextricably intertwined with movements of the *water*—as Plaintiff herself inadvertently acknowledged in her own brief. *See* Plaintiff’s Br. 6 (noting the discussion in *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958), that equated the “high water mark” with the “vegetation line”).

In addition, notwithstanding her claims to the contrary, Plaintiff’s cited authority does not repudiate the concept of a “rolling” easement at all. Her primary authorities fall into two separate—and equally irrelevant—categories. The first involves cases rejecting a “rolling” boundary for property interests with *fixed*, not migratory, boundaries. *See, e.g., Scureman v. Judge*, 747 A.2d 62, 67-69 (Del. Ch. 1999) (discussing a platted street included as part of a formal subdivision plat—not a property interest with a natural, dynamic boundary; also distinguishing “riparian” boundaries from the “non-riparian boundary” at issue that “remain[ed] fixed”); *McCammon v. Meredith*, 830 S.W.2d 577, 580 (Tenn. Ct. App. 1991) (holding that a *fixed* easement cannot be relocated); *Smith v. Bruce*, 244 S.E.2d 559, 569 (Ga. 1978) (addressing an easement with only one natural boundary and one *static* boundary—a

platted street);⁸ *Commonwealth v. Beeson*, 30 Va. 821, 1832 WL 1933, at *1-*2 (1832) (rejecting a migrating easement with a fixed boundary—a stationary fence).

And the second category involves cases rejecting *legislative* attempts to expand or contract property rights—exactly the kind of imposition that the OBA (with its focus on the common law) does *not* allow. *See, e.g., Purdie v. Attorney General*, 732 A.2d 442, 666 (N.H. 1999) (holding that the legislature could not “extend[] public trust rights” by statute); *Opinion of the Justices (Public Use of Coastal Beaches)*, 649 A.2d 604, 609 (N.H. 1994) (discussing the same irrelevant question of statutory expansion of public-trust rights); *Bell v. Town of Wells*, 557 A.2d 168, 178-79 (Me. 1989) (holding that a legislative (not common law) expansion of rights was forbidden: an easement dedicated for only certain purposes—“fishing, fowling, and navigation”—could not be legislatively expanded to authorize other uses—“general recreation”—without paying just compensation); *see also Deltic Farm & Timber Co. v. Bd. of Comm’rs*, 368 So.2d 1109, 1111-13 (La. Ct. App. 1979) (examining the specific nature of the rights reserved under Louisiana’s unique “levee servitude,” which the court found specifically limited to land that is riparian at the time of severance; offering no discussion of other property rights defined and controlled by natural, migratory boundaries).

8. Indeed, the subsequent history of *Smith v. Bruce* cuts directly *against* Plaintiff. *See Bruce v. Garges*, 379 S.E.2d 783, 785 (Ga. 1989) (“it is our view that this Court did not intend to limit the lot owners’ recreational use to any area less than that which lies between the high water line and East Beach Drive and which is subject to expansion or contraction by the forces of nature”) (emphasis added).

In the end, Plaintiff has failed to identify a single controlling case that supports her theory of property law—or endorses her invitation for the Court to sharply depart from established common-law principles in this area.

2. Contrary to Plaintiff’s contention, the “rolling easement” doctrine does not “overrule[]” *Luttet v. State*, 324 S.W.2d 167 (Tex. 1958). See Plaintiff’s Br. 30-31 (“[s]ince the rolling easement doctrine imposes public rights to the vegetation line simply because that is where the vegetation is, it effectively resuscitates the losing position in *Luttet*”). This argument attacks a straw man. The State has never contended that the public has easement rights over the dry beach (much less outright *title*) without first proving a valid easement under the common law. *Luttet* said nothing about easements at all—it involved only the default rules regarding title, and it said nothing even to hint that such title was immune from the operation of other common-law rules. Indeed, under Plaintiff’s theory, no one could ever establish any easement—even a static easement—over the dry beach, a proposition that is clearly false.

Plaintiff’s reliance on *John G. & Marie Stella Kenedy Memorial Foundation* for the same point is likewise misplaced. That case establishes only that the public does not *automatically* own the dry beach; it says nothing about the respective rights of the parties once a common-law easement has been affirmatively proved. See 90 S.W.3d at 283 (“[t]his is not, of course, a case in which an owner is claimed to have abandoned property or in which a challenger claims adverse possession”).

Notwithstanding Plaintiff's misreading of this precedent, these authorities are not entirely irrelevant—they do represent yet another example of the longstanding doctrine of natural boundaries defining real property interests, the very principle that controls in this case.

3. Plaintiff's policy arguments fall flat—and prove too much. *See* Plaintiff's Br. 3, 33-38. In suggesting that a rolling easement is unworkable on a developed beachfront, Plaintiff ignores a doctrine, cut from the same cloth as the rolling easement, that indisputably disproves her point: once the *wet* beach reaches Plaintiff's land, it indisputably becomes part of the State's title. *See, e.g., Luttet*, 324 S.W.2d at 192-93. If shifting natural boundaries have not proven unworkable for the wet beach, there is no reason to presume a different result for the immediately adjacent border.

In any event, Plaintiff has sought out the wrong audience for pressing this argument. If she wishes to abrogate the common law, she must address her concerns to the Legislature. The Legislature, however, has emphatically rejected her view of the law *and* her idea of “sound” policy. Quite the contrary, it has repeatedly endorsed the common-law rules in this area, and most recently moved to give the voters an option to incorporate the OBA into the Texas Constitution. The Texas government has soundly—and constitutionally—made the decision not to reward the behavior of private parties who knowingly assume a clear risk, purchase encumbered property at a presumably lower price, and then later seek reimbursement from the public fisc. *See, e.g., Severance*, 566 F.3d at 509 n.19 (Wiener, J.).

4. Plaintiff’s attack on the doctrine of customary rights is misplaced. *See* Plaintiff’s Br. 31-33. Because the public’s easement plainly rolls under the common law—and because the public established an easement over the relevant stretch of beach more than three decades ago—the Court has no occasion or need to decide if custom would independently support the public’s easement rights over Plaintiff’s property. *See Severance*, 566 F.3d at 494 (“in 1975, the State obtained a judgment in another case that an easement existed on a strip of beach seaward of Severance’s land”). In any event, “custom” plainly does provide sufficient support for the public’s easement—and it would support the State in this case if the rolling easement did not. *See, e.g., Matcha*, 711 S.W.2d at 100; *see also McDonald v. Halvorson*, 780 P.2d 714, 719-20 (Or. 1989) (en banc).

5. Plaintiff’s argument that the OBA should be construed to abrogate the common law in order to avoid a difficult constitutional issue is misplaced. *See* Plaintiff’s Br. 27-28, 38-40. Even if the rolling easement exacted a taking, such a taking would clearly be for public use—the public welfare is advanced by preserving public access to the dry beach. Such a decision is therefore not *unconstitutional*—at the very most, it would require just compensation. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (the Fifth Amendment “makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking”).

In addition, Plaintiff is wrong, legally and factually, to the extent she argues the OBA is unconstitutional for failing to provide advanced compensation. As an initial matter,

because the rolling easement is an established part of the Texas common law, the doctrine does not result in any taking. Moreover, because “the Constitution does not require pretaking compensation,” *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985), the open and available inverse-condemnation remedy is sufficient to satisfy the Constitution’s requirements.

* * *

Plaintiff’s varied attempts to attack the OBA all miss their mark. In the end, she offers no sound or reasoned basis for departing from the established rules governing natural boundaries—and certainly not a sufficiently powerful reason to justify such a dramatic unsettling of more than half a century of state legislation and decades of uniform decisions from Texas courts. Because the existence of this consistent and established legal foundation dooms her claim, the Court should answer the certified questions by holding that Plaintiff is not entitled to compensation in state courts because she has failed to show that she has any compensable interest to “take.”

II. BECAUSE PLAINTIFF’S “UNREASONABLE SEIZURE” CLAIM IMPLICATES TWO ADDITIONAL STATE-LAW ISSUES THAT INDEPENDENTLY DISPOSE OF HER CLAIM, THE COURT SHOULD RESOLVE THESE ADDITIONAL QUESTIONS WHETHER OR NOT IT CHOOSES TO RESOLVE THE “ROLLING EASEMENT” QUESTION.

A. Because the Rolling Easement Is a *Single, Dynamic Easement*—and Not a Set of Multiple, Static Easements—the Easement Attached to Plaintiff’s Property Long Before She Bought It, Leaving Her With No Relevant Property Interest Left To “Seize.”

Under federal law, the “irreducible constitutional minimum” of Article III standing includes the requirement that a litigant show a *personal* injury that can be redressed by a

favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It accordingly follows that if the alleged taking in this case pre-dated Plaintiff’s purchase of the property, she would lack standing to challenge it: “when a State has physically invaded the property without filing suit, . . . it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that *the right to compensation is not passed to a subsequent purchaser.*” *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001); *see also, e.g., Daniel v. County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002) (“A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury.”) (internal quotation marks omitted); *United States v. Land*, 213 F.3d 830, 840 (5th Cir. 2000) (“only the owner on the date of the taking is entitled to receive just compensation”).

The panel majority found standing in this case, but it did so based on a demonstrable misreading of Texas law. The panel was unanimous on the underlying legal rule: Plaintiff lacks the right to challenge any purported taking (or “seizure”) of property that occurred prior to her purchase. Under the panel majority’s analysis, however, the fact that the easement had reached only *part* of Plaintiff’s land before 2005—and purportedly occupied *additional* square footage after she bought it—left her standing to challenge the easement’s validity over the “different (and larger) segment of her properties than was covered at the time of her purchase.” *Severance*, 566 F.3d at 496. Judge Wiener dissented from this analysis, reasoning that, under Texas law, “[s]hifts in the vegetation line do not create new easements; rather they expand (or, in the case of seaward shifts, reduce) the size and reach of that *one*

dynamic easement.” *Id.* at 506 (Wiener, J.) (emphasis added). Because “Severance’s entire property was encumbered by the easement’s very real potentiality—and predictability—that the vegetation line would shift,” he concluded, a “pre-existing restriction such as this cannot be a new taking.” *Id.* at 509; *see also ibid.* (“Severance’s own personal takings claim never was ripe and can never be ripe because the only OBA takings claim related to the land she now owns ripened long before she bought it and was allowed to shrivel on the vine by the one who owned the property at the time the easement took effect on the land.”).

It accordingly follows that “[a] correct determination whether there was one easement or many”—a purely state-law issue—“is the key to the standing analysis in this case.” *Id.* at 508 (Wiener, J.); *see also Severance*, 566 F.3d at 499 n.9 (identifying this issue as one “the Texas Supreme Court must address”). Because the majority was incorrect to believe that, as a matter of Texas law, the “rolling easement” gives rise to an infinite series of new easements (and new takings claims) with every additional inch the easement advances, the entire case can be resolved by simply recognizing the proper operation of the “rolling easement” under Texas law. This issue disposes of the matter without any need to decide if the “rolling easement” is also part of the background common-law rules—a question that only a landowner with property the easement *had never before reached* would have standing to present.

1. Texas law on this point is clear: as a matter of Texas statute, the unanimous body of state-court precedent, the underlying Texas common-law rules, and the state executive’s clear and consistent enforcement policy, the “rolling easement” is a *single*, dynamic

easement. It therefore plainly burdened Plaintiff's *entire* property before she bought it: "There is and always has been one and only one easement; and that easement already encumbered the entirety of Severance's land at the time she bought it, even though the easement's maximum effect and coverage remained inchoate while the vegetation line lay seaward of her property." *Severance*, 566 F.3d at 507 (Wiener, J.); *see also supra* Part I (describing the easement, its definition, and its legal foundation).

To be sure, the easement only grants the public the right to use land consistent with the easement's conditions—and so the public only has the right to use the dry beach (when it is on Plaintiff's property), and nothing beyond the dry beach. But this clearly does not mean that "with each shift of the vegetation line, a new easement is born." *Severance*, 566 F.3d at 506-07 (Wiener, J.). That understanding of state law—construing "the vegetation line as ever having been a fixed point"—"ignores (1) the plainest interpretation of the unambiguous statutory language, (2) later legislation that reasserts this principle, (3) the ease with which the Texas Legislature could have, had it wanted to, fixed the easement's boundary permanently by specifying a fixed date at which to set the line, (4) interpretations of the Texas courts, and (5) [the Fifth Circuit's] own prior acknowledgment of this phenomenon." *Ibid.* (footnotes omitted). It is simply not true that Texas law contemplates "the possibility of infinite mini-takings" following "an infinite number of infinitesimal accretions to the dry beach." *Id.* at 508. And, indeed, the panel majority had no response to this argument—it simply deferred the matter to this Court. *Severance*, 566 F.3d at 499 n.9.

2. Nor is there any doubt that the rolling easement had attached to Plaintiff's land before she bought it. *See* USCA5 609 (purchase date of April 5, 2005). Plaintiff's own complaint confirms that the public's easement rights had attached to her property at least as early as 1999. *See* USCA5 613 (conceding Plaintiff's property was on the Commissioner's 1999 list of land "on the public beach easement"); USCA5 762 (same finding by the district court). And Plaintiff also concedes the public's easement was officially recognized—yet again—on the same parcels in 2004. USCA5 614 (citing the Commissioner's 2004 Notice which included Plaintiff's property); USCA5 762 (same). And, indeed, Plaintiff's own theory of the case rests on the premise that these official "determinations" that the easement burdened her property had "immediate" consequences, including the "plac[ement of] a cloud on the title of her land and homes." Opening Br. 4, 17. There is no dispute that what Plaintiff bought was land already encumbered by an easement—and because that easement had dynamic boundaries, it necessarily "encumbered the entirety of [Plaintiff's] land" all at once. *Severance*, 566 F.3d at 507 (Wiener, J.).

3. In response, Plaintiff is wrong (Plaintiff's Br. 40-41) to rely upon the Federal Circuit's decision in *Owen v. United States*, 851 F.2d 1404 (Fed. Cir. 1988). It is certainly true that a *fixed* easement cannot be expanded without compensating the owner for the additional land taken, which is all that *Owen* held. *See* 851 F.2d at 1415 ("Since the government only acquired a right to flood the land above elevation 76 occasionally, the easement by its terms does not contemplate a complete and permanent flooding of the land above elevation 76 as alleged to have occurred here."). But because the rolling easement

includes the right to use the dry beach as the area shifts, *this* dynamic easement “by its terms” *does* “contemplate” burdening the entire parcel at once.

Contrary to Plaintiff’s contention (Plaintiff’s Br. 42-44), nor does *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), support her position. It is one thing to purchase property after a mere warning of a potential taking (as happened in *Nollan*), but quite another to purchase property *after the taking itself*. See, e.g., *Arrington v. Mattox*, 767 S.W.2d at 958 (“The California Coastal Commission sought to *establish* an easement across land belonging to the Nollans in exchange for the permit where no easement had previously existed, unlike the present case, where the court merely *enforced* an already existing public easement established by custom, prescription, or public dedication.”) (emphasis in original). Because the original imposition of the public’s easement on her property was the only possible “taking” in this case, the right belonged to the pre-existing owners, not to Plaintiff.

4. Plaintiff’s theory is also entirely unworkable as a practical matter. As noted above, her theory would “mire the State in the absurdity of endless litigation over an infinite number of infinitesimal accretions to the dry beach.” *Severance*, 566 F.3d at 508 (Wiener, J.). Indeed, under Plaintiff’s theory (and the panel majority’s analysis), a Plaintiff would have the right to sue for a new taking for every *inch* the beach advances over her land. Moreover, Plaintiff’s theory ignores that the beach sometimes *recedes*—does Plaintiff have to compensate the State when it does? “If the State must pay for a new taking with each landward shift, surely the property owner must pay reasonable compensation to the State to buy back his right to exclude the public with each seaward shift.” *Id.* at 508 n.16. And if

not, Plaintiff’s static-boundary theory would result in the dramatic waste of taxpayer dollars—as the State would have paid for public-beach access over an area that is no longer on the public beach. *See Matcha v. Mattox*, 711 S.W.2d at 100 (echoing this “unworkable” result— “[a]n easement fixed in place while the beach moves would result in the easement being either under water or left high and dry inland, detached from the shore”). It was already clear that Plaintiff’s theory is bad law—this proves it is also bad policy.

* * *

In sum, Plaintiff lacks standing to press her claim once state law is properly construed. Property rights consist of “the ‘bundle of rights’ that [purchasers] acquire when they obtain title to property,” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992), and therefore purchasers “cannot, by virtue of their purchase, obtain greater rights than those held by their predecessors in interest,” *Daniel*, 288 F.3d at 382. Whether or not Plaintiff’s predecessors-in-interest—the ones who owned the property in 1999—would have a valid claim, Plaintiff plainly does not. The “rolling easement” is a *single* easement that attached to the entire property at once, not an unworkable series of a virtually infinite number of separate inch-by-inch exactions. Because it is not possible for the State to take an interest that was “not part of [a subsequent purchaser’s] title to being with,” *Lucas*, 505 U.S. at 1027, Plaintiff lacks standing to challenge the pre-existing rolling easement.

B. Because Texas Law Provides a Robust Inverse-Condemnation Remedy, No Litigant Will Ever Be Able To Prove That a Protected Property Interest Was “Unreasonably Seized”—Irrespective of How the Court Resolves the “Rolling Easement” Question.

The panel majority was the first in over 200 years of our Nation’s history to find that an “ordinary” takings claim can be recast as an “unreasonable seizure” under the Fourth Amendment.⁹ This alone is extraordinary. But the panel’s logic was also predicated on an incorrect assumption about state law—one that, if allowed to stand, threatens to supplant Texas’s traditional inverse-condemnation remedy with “unreasonable seizure” claims (under 42 U.S.C. § 1983) filed in federal court. Because, under a proper understanding of state law, it is clear that no litigant can ever prevail on an “unreasonable” seizure claim—as the State has no power, under the Texas Constitution, to refuse compensation for valid claims—this state-law issue stands as an independent bar to Plaintiff’s cause of action. In order to preserve the practical viability of the traditional inverse-condemnation remedy, the Court should resolve this question no matter how it resolves (if at all) the rolling-easement issue.

9. The panel purported to identify one additional case that had also authorized a Fourth Amendment “takings” claim, *see* 566 F.3d at 501 (citing *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006)), but *Presley* did no such thing. In that case, the plaintiff had not alleged a seizure based on only an ordinary takings claim—a mere failure to provide just compensation for private land taken for public use. On the contrary, the state actors in *Presley* had accidentally encouraged public trespass on private property, “acknowledged their error,” and yet continued the same course of conduct (and even passed an ordinance targeting the plaintiff’s attempt to defend her property). *See* 464 F.3d at 480-83; *see also Severance*, 566 F.3d at 514 (Wiener, J., dissenting) (distinguishing *Presley*). The “unreasonable seizure” claim was therefore premised on other facts *besides* the purported failure to provide immediate compensation, unlike Plaintiff’s claim here. In any event, *Presley* was not even unanimous on the (easier) facts of that case. According to the dissent, the *Presley* majority “depart[ed] from a long and well-established body of law under the Fifth Amendment and drastically change[d] important substantive and procedural aspects of federal inverse condemnation actions.” 464 F.3d at 491 (Traxler, J., concurring in part and dissenting in part). The 2-1 *Severance* panel stands alone in rewriting the scope of the Fourth Amendment.

1. The panel majority found that Plaintiff had stated a viable claim for an “unreasonable seizure.” But the panel’s logic turned on a misreading of state law—and a crucial misunderstanding of how our State’s robust inverse-condemnation remedy works.

Under settled doctrine, Texas courts are open and available to award full relief if state action has deprived a litigant of a protected property interest. *See, e.g., Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546 (2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998); *see also John Corp. v. City of Houston*, 214 F.3d 573, 581 (5th Cir. 2000) (endorsing Texas’s “inverse condemnation procedures” and citing the sweeping takings clause of Article I, § 17 of the Texas Constitution). These suits will compensate for any interest taken as calculated from the moment of the taking. The end result is clear: any party seeking relief in state court for any putative taking will either be fully compensated (if a protected property interest was in fact taken) or not compensated (if plaintiff lacked a protected property interest in the first place).

These are the *only* two possible results under state law. There is *no* outcome, under settled Texas precedent, that could ever satisfy the conditions the panel identified as mandatory for stating a valid “unreasonable seizure” claim. Contrary to Plaintiff’s contention, the outcome of a state-law inverse-condemnation suit is *never* that compensable property was taken but just compensation is withheld. *See Severance*, 566 F.3d at 502.¹⁰ It therefore inexorably follows that Plaintiff’s seizure claim—once state law is properly

10. The panel also noted the possibility that the seizure is unreasonable as “unjustified by state law.” 566 F.3d at 502. As established above, however, there is no serious argument that state law *forbids* the enforcement of a rolling easement—a contention doomed by the OBA’s disclosure requirements alone.

understood—unavoidably fails no matter how this Court answers the certified questions about the rolling easement. Because compensation will always be provided for valid “takings” claims, at least one necessary element of Plaintiff’s “unreasonable seizure” theory will never be met: an actual “seizure” will never be “unreasonable” because it will always be compensated; and if compensation is not provided, it is because nothing was “taken” or “seized” in the first place. Under either scenario, Plaintiff would fail to demonstrate a protected interest that was seized but not compensated. *Cf. Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 646 (Tex. 2004) (“because Stafford has obtained adequate compensation through state procedures, it has no federal claims to be reached. Stafford’s rights under the United States Constitution simply were never violated”).

Indeed, this result is apparent from the 2-1 panel opinion itself. The panel declared that a direct *condemnation* proceeding could never lead to a viable “seizure” claim, because compensation would always be provided for any property “taken.” *See Severance*, 566 F.3d at 502 (“In the ordinary case, public authorities condemn private property according to fixed rules and regulations; the process that occurs and the compensation paid could hardly be challenged as ‘unreasonable.’”). That analysis, however, is indistinguishable from the analysis that applies to inverse-condemnation suits: as established above, compensation is always paid, as a mandatory requirement under state law, for any property actually “taken.” Plaintiff’s “seizure” claim thus runs headlong into a legal impossibility: whether or not Plaintiff would win or lose in an proper “takings” claim filed in state court, the existence of the procedure itself forecloses her Fourth Amendment claim.

2. There are only two conceivable objections to this point, but neither has any merit. First, Plaintiff may suggest that a condemnation proceeding is different in kind than an inverse-condemnation suit, because in the former compensation is guaranteed and paid in advance. But this objection fails under controlling precedent from both state and federal courts: pre-taking compensation is *not* required, *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), and an inverse-condemnation procedure is an acceptable means of satisfying the requirement to provide just compensation, *id.* at 196-97. *See also Town of Flower Mound*, 135 S.W.3d at 645 (“The Fifth Amendment prohibits the taking of property without just compensation but does not require payment before the taking occurs.”). Plaintiff’s contrary view, if left uncorrected, would effectively foreclose inverse condemnation as a viable option—notwithstanding its established use for decades by States across the country. *See, e.g., Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007). Plaintiff is simply incorrect that the Fourth Amendment forbids what the Fifth Amendment plainly allows.

Second, Plaintiff may contend that a state-court action is insufficient because the Texas courts may err in refusing to provide compensation. But such a suggestion—premised on the unfounded belief that state courts will get the law wrong—is strictly incompatible with our system of federalism. The U.S. Supreme Court has repeatedly reaffirmed that state courts are entitled to equal respect in our dual system of government. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 342-43, 347 (2005). And this principle holds especially true in the takings context. Indeed, *Williamson County* itself

reflects that state courts are not only capable of resolving takings claims, but that litigants *must* pursue state-court remedies, as a matter of federal law, before a takings claim is even ripe. 473 U.S. at 195. And in *San Remo*, the Court emphatically rejected the notion that state courts were not “fully competent to adjudicate constitutional challenges” in this area: “Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.” 545 U.S. at 347.

If Plaintiff wishes to seek review of her Fifth Amendment claim in a federal court, the answer has always been her right to petition for review in the U.S. Supreme Court following a final disposition of her claim in the Texas courts. But Plaintiff does not have the right to do what she has now done—a plain attempt to evade Texas courts by invoking the Fourth Amendment to state an ordinary “takings” claim in federal court. No matter how this Court answers the rolling-easement question—if it chooses to answer it at all—the Court should, at a minimum, confirm that state law provides a full and adequate procedure for evaluating Plaintiff’s claim, and accordingly no “seizure” will ever be “unreasonable” under a proper understanding of state law. Plaintiff should not be permitted to open a sweeping backdoor attack on available, and mandatory, state inverse-condemnation procedures. *See Williamson County*, 473 U.S. at 195.

PRAYER

The Court should hold that (1) the rolling easement is a longstanding common-law doctrine with significant historical underpinnings—and accordingly has an established

foundation in the background principles of Texas property law, warranting no compensation for Plaintiff; (2) the rolling easement is a *single* easement—and therefore the same easement that attached to Plaintiff’s property long before she purchased it is the same easement she impermissibly seeks compensation for now; and (3) state law provides a full and robust inverse-condemnation remedy that guarantees compensation for any actual “taking”—establishing, under the panel’s framework, that any “taking” here cannot possibly double as an “unreasonable” seizure, no matter how the certified questions are answered (if they are directly answered at all).

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I certify that, on September 4, 2009, a true and correct copy of this brief was served via electronic mail and U.S. certified mail, return receipt requested, on the following appellate counsel of record:

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