No. 09-0387

IN THE SUPREME COURT OF THE STATE 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
KIRK SISTRUNK, District Attorney for the County of Galveston, Texas,

Defendants-Appellees.

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

PLAINTIFF-APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This case comes to this Court on three legal questions certified by the Fifth Circuit Court of Appeals, all of which concern the operation of a rolling easement under the Texas Open Beaches Act (OBA). The questions are critical to thousands of property owners who own fee simple land and lawfully built homes that, under the Appellee Officials' (Officials) policies, are subject to public confiscation should a storm blow the existing vegetation landward of their property lines.

Nevertheless, in their Answering Brief, Officials seek to avoid these issues. They ask this Court to consider several entirely different and uncertified questions dealing with federal standing and Fourth Amendment rights, issues previously resolved against them by the Fifth Circuit. The Officials candidly admit that they hope the new questions "dispose of" Appellant Carol Severance's (Severance) claims so they may avoid tough questions about their "rolling easement" policy. This strategy is futile, however, because it asks this Court to go beyond the proper bounds of its relatively narrow jurisdiction on certification. The Officials must explain and defend their policy of imposing a public easement on private property simply because wind blows the vegetation line inland over such areas.

Although the Officials seek to anchor their rolling easement policy in Texas common law, they have yet to identify a Texas common law authority or doctrine that justifies the policy. Their main hope in this regard is Texas common law rules that move private shoreline boundaries when the old boundary is submerged under tidal waters by erosion. Yet, this is an entirely distinct and unsupportive doctrine. Unlike shoreline title boundary

rules, the rolling easement operates without respect to tidal waters, erosion, or submersion, and gives nothing to property owners—who already own fee simple title—when the vegetation migrates seaward of their land.

The Officials have failed to find any authority except the OBA that might establish the vegetation line as a public easement enforcement boundary. Yet, they recognize that the OBA—a statute—cannot use the vegetation line to constitutionally authorize a public easement on private areas never subject to evidence of past public use. Answering Brief, at 20. The Officials have pointed to no background Texas law that sanctions a "rolling" easement. Thus, without any meaningful common law roots, their rolling easement policy derogates from Texas common law in an unconstitutional manner by expanding public easements onto private land without the required (under common law) proof of a pre-existing public pathway there, or some certain mechanism for just compensation. The Court should strike down the rolling easement policy or limit it so that it accords with Texas' common law and constitution.

SUMMARY OF REPLY ARGUMENT

Texas common law requires the public to prove it has prescriptive or similar rights in an area of land above the high tide line before the public can use the area; and if they wish to expand the proven easement to new parcels, they must offer further proof of public occupation in the new area, or pay for the new easement area. The vegetation line is not the "natural" boundary of a proven public pathway; the line of public travel when the easement

was created is. The vegetation line is an artificial, statutorily created easement enforcement boundary.

The rolling easement doctrine accordingly conflicts with, rather than implements Texas' common law of easements, when it expands a proven public easement over new inland private areas, at the moment the vegetation line is pushed landward. Pursuant to this abdication of common law, the Officials claim the right to forcibly remove any homes that become seaward of the vegetation, even those lawfully built on land never subject to public use.

To salvage this policy, the Officials point to Texas lower court decisions. But these decisions do not hold the rolling easement policy is common law. *Severance*, 566 F.3d 490, 499, n.8. (5th Cir. 2009). They imply it from the OBA, *Town of South Hero v. Wood*, 898 A.2d 756, 764 (Vt. 2006), and analogize to shoreline title rules that move boundaries inland upon submersion. Ultimately, the Officials also pin their hopes on shoreline title submersion doctrine. But this doctrine did not create and does not justify the rolling easement, because unlike with shoreline title boundaries, the rolling easement does not depend on the waterline, submersion of old boundaries, or gradual erosion. High winds will move the vegetation (and purported easement) onto new lands, just as surely as erosion. New areas will become a public beach even if the old public beach remains dry and intact. And unlike accretion, the seaward movement of the vegetation line and rolling easement does not give any rights to private property owners who already own the area in fee simple.

Texas common law does not recognize the rolling easement doctrine. However, if the Court were to conclude that it should, the doctrine must be construed according to any relevant common law rules. In particular, following the title boundary rules to which the Officials themselves relate their rolling easement, a common law rolling easement would: (1) operate only when erosion, rather than avulsion, submerges an old easement; and (2) would not strip property owners of vested property rights, such as existing homes lawfully built on fee simple land.[1]

The Officials' cannot avoid scrutiny and alterations to their rolling easement policy by trying to inject new, uncertified issues into this proceeding. The proposed new issues, pertaining to Severance's federal standing and her Fourth Amendment claim, are outside the scope of this Court's review. Moreover, they have already been decided adversely to the Officials by the Fifth Circuit. This is not the place for the Officials to seek rehearing of those rulings. The Officials should have sought rehearing in the Fifth Circuit if they wished to continue contesting Severance's standing or unreasonable seizure claim, but did not do so. They cannot now present these issues to this Court in an attempt to pull an end around the Fifth Circuit.

[1] If the Court were to reach the issue, it could assist the Fifth Circuit in determining whether the rolling easement doctrine operates in a reasonable manner, and thus would be consistent with the certified questions. Indeed, the Fifth Circuit implied as much. *Severance v. Patterson*, 566 F.3d at 503, n.12 ("In *Coastal Indust. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976)," the Supreme Court "cited with apparent approval cases holding that title does not pass by avulsion, *i.e.*, sudden deposits or removals of land along a water boundary . . . *York furnishes hints but no real guidance on the issues before us.*" (emphasis added).)

ARGUMENT

I

THE OFFICIALS' "FACTS" ARE NEITHER RELEVANT OR CORRECT

A. The Facts Are Tangential, But to the Extent They Are Relevant, They Must Be Drawn from the Majority Fifth Circuit Opinion

The Officials spend much time on their view of the facts of this case, drawing heavily from the dissenting judge in the Fifth Circuit proceeding and the district court judge reversed by the Fifth Circuit. This is a waste of space, since this case comes to this Court on certification of legal questions, and not for disposition of the underlying dispute. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 (Tex.1992) ("It would exceed this court's constitutional and rule-based authority to apply our answer to the factual record before the Fifth Circuit.").

However, to the extent the facts are relevant, they must be taken from the opinion certifying the questions—the majority opinion in the Fifth Circuit. *Jones v. University of Cent. Oklahoma*, 910 P.2d 987, 989 (Okla. 1995) (on certified issues, the court would not consider facts outside those offered by certification order); *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 587 So. 2d 273, 277 (Miss. 1991) (on certification, the state court is not called upon to decide a case, nor should it go behind facts presented by certifying court). Accordingly, the Officials' repetition of the views of a dissenting and reversed judge is irrelevant.

B. Severance's Suit Is Based on Injury to Property Interests Never Before Subject to Public Use

Although the Officials' factual recitation is immaterial and incorrect, a few observations are warranted. Severance began this suit after the Officials sent her letters in 2006 stating her homes were now "on the public beach" and could be removed "at any time" because a May, 2006, beach survey found the vegetation line to be landward of her parcels. *Severance v. Patterson*, 566 F.3d at 494. The Officials offered her $40,000 to "voluntarily" remove her approximately $400,000 homes and to cede the land to the public as a "beach." *Id.*

Severance rents her properties as beach homes. *Id.* at 494. Many of the renters are families on vacation. Due to the Officials' determination her homes were "on the public beach," neither Severance or her renters could legally exclude trespassers. *Id.* at 493 (citing OBA § 61.014 (b)). This poses obvious concerns for families with children, and presents liability and disclosure issues for Severance. Other obvious and severe hardships were presented by the threat of uncompensated removal of her homes. Severance sued to protect her constitutional right to exclude trespassers—a fundamental right—and to defend her homes.

None of the properties in this suit have ever been subject to a recorded or adjudged public easement, and Severance holds title in fee simple. *Severance*, 566 F.3d at 494 ("No easement has ever been established on either parcel via prescription, implied dedication, or continuous right."). The Officials state that one of Severance's properties—which is no longer in this suit—"was specifically bound by an earlier judgment declaring it fully

encumbered by the rolling public easement." Answering Brief, at 7. Not so. The parcel, which is not adjacent to the parcels still in this suit, may have been adjudged to be partially encumbered by a public easement *properly proven* decades ago by prescription and dedication.

The Officials also misleadingly assert that the properties remaining in the suit were subject to a public easement prior to Severance's purchase. Answering Brief, at 3. This is highly disputed. *Severance*, 566 F.3d at 494 ("The *parties disagree* as to whether any part of Severance's properties was subject to a rolling easement *before* Severance purchased the properties." (emphasis added)). This factual dispute remains, and was not resolved by the Fifth Circuit on review of a motion to dismiss, in part because it implicates the question, now before this Court, of whether an easement could lawfully burden Severance's land based on vegetation migration alone.

In the same vein, the Officials suggest that Severance knew her properties could be lawfully burdened by the rolling easement doctrine when she bought them. Answering Brief, at 8. This is incorrect. While Severance's purchase contract contained a disclosure of the Officials' understanding that the vegetation line "customarily" demarcates a public easement, the OBA statute also contained more specific guidance, which contradicts the disclosures. The statute says that the vegetation line bounds an easement only if the area has been subject to public use sufficient to create an easement by dedication, prescription, or customary use. OBA § 61.011. Severance was entitled to, and did give weight to, the statute when she purchased her land. Further, the disclosures in Severance's contract did not advise that her

land could be subject to a rolling easement without compensation or proof of easement. Even if it had, the disclosure of the potential taking of her property could not waive Severance's right to challenge the taking on constitutional grounds. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833, n.2 (1987); *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001). Severance had every reason to believe she retained her constitutionally protected rights, including the right to keep strangers away from her renting families, when she purchased her homes.

Finally, the Officials note that there is a state constitutional amendment on the ballot this election cycle that would protect public beach access. The amendment changes nothing here because its language simply begs the same questions presented in this matter; *i.e.*, what constitutes a publicly accessible beach? How are they lawfully established on private dry sand areas? And under what circumstances and authority, if any, do public beaches expand onto new, inland private parcels without just compensation, simply because the vegetation is denuded there by storms? This case will decide the meaning of the amendment.

II

THE OFFICIALS FAIL TO POINT TO ANY DIRECT COMMON LAW AUTHORITY, OR ANY SHORELINE TITLE BOUNDARY RULE, THAT SANCTIONS THE EXPANSION OF AN EXISTING PUBLIC WAY ONTO NEW PARCELS NEVER PUBLICLY USED SIMPLY BECAUSE THE VEGETATION MOVES

In the hope of retaining their rolling easement policy, free of any constitutional limitations, the Officials continue to assert that the policy arises from Texas common law. Yet, while their Answering Brief is heavy on general proclamations to this effect, it is light

on tangible authority. This is because there is no on-point common law doctrine that moves or expands an easement created by proof of dedication or prescription, onto new properties—where there is no public use—simply because the vegetation line changes. Nor is there any link between the rolling easement and Texas' rules allowing shoreline title boundaries to shift upon submersion by erosion. Answering Brief, at 15-18. Texas lower court decisions add nothing.

A. The Nature of the Rolling Easement Doctrine

To properly measure the weakness of Officials' common law contention, it is necessary to briefly review the rolling easement doctrine at the heart of this case. That doctrine begins from the premise (conceded by the Officials) that the public must initially prove it engaged in public use along the shore, long enough to acquire an easement over that area. *See* Appendix, at 112 (Officials' federal court pleadings) (OBA enforcement begins when "public rights were proven to have ripened with respect to a ribbon of beach in a certain location."). After this predicate is satisfied, the rolling easement doctrine kicks in. Under the doctrine, the Officials claim that when the vegetation line moves inland, the once-proven easement will follow the vegetation line onto new upland parcels that were not in the original easement area, and which have themselves never been subject to public use. *See* Appendix, at 112 (Officials' federal court brief) (stating when an easement rolls with the

vegetation it will "*cover land not theretofore occupied* (or at least not occupied in recent times") (emphasis added).[2]

Significantly, the rolling easement doctrine *does not hinge on the submersion or loss of the area originally proven to host a prescriptive or dedicated easement*. It hinges on the movement of surface vegetation. 31 TAC § 15.2 (41) ("The line of vegetation is typically used to determine the landward extent of the public beach."). The rolling easement doctrine will move to swallow new upland parcels for public use, if the vegetation so moves, even if the area of the original dedication is intact. As such, it is a vehicle for *expanding* existing easements, not just replacing them. Here is how the General Land Office publicly describes the concept:

> Under the OBA the public beach has boundaries. The public beach extends from the lowest waterline inwards to the line where plants naturally take root, the line of vegetation. Yet this line is rarely fixed. The line of vegetation moves due to winds, waves, tides, storms and hurricanes. The public's right to access the beach is called a "rolling" easement because the boundaries move in an irregular pattern.

http://www.glo.state.tx.us/OC/Beach_Access/rights.html (Last viewed, Sept. 17, 2009).

B. Texas Appellate Courts Fail To Ground the Rolling Easement in Common Law; Some Rely on a Construction of the OBA; Others Analogize to Inapposite Title Submersion Doctrines

At the outset, it should be noted that the Officials do not attempt to ground the rolling easement policy in the common law of prescription or dedication. This is understandable.

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[2] Severance has never argued and does not argue that the rolling easement continually creates "new easements.". The rolling easement doctrine surely burdens new areas when it migrates uplands, and imposes new burdens on the affected property owners, but it is best characterized as a doctrine that expands and contracts easements, not one that continually makes new easements.

Severance, 566 F.3d at 502 ("[t]here are obvious conceptual difficulties in concluding that an easement is established by implied dedication or prescription, for example, over areas on which the public has never set foot."). After all, easements arising by the common law of prescription, dedication, and the like are generally static, being defined and bounded by a proven line of public use. They do not expand to publicly unused areas based on vegetation lines or anything else.[3]

The Officials thus search for some supportive common law theory independent from the common law of dedication and prescription. This effort initially results in a grandiose claim that every Texas authority to consider the rolling easement has found it to be common law. Answering Brief, at 12, 14. This is absurd, as the Fifth Circuit recognized. Texas courts do not hold the rolling easement is traditional common law. *Severance*, 566 F.3d at 499, n.8 ("Indubitably, no 'fixed' background principles of state law are articulated, only mutually inconsistent post hoc rationales."); *id*. at 502 ("Texas caselaw fails to afford a

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[3] It is basic that public travel easements created by prescription or dedication are generally static ways confined to the line of travel existing when the easement was created. 26 C.J.S. Dedication § 18, at 434 (1956) ("In order that use by the public may create a way by dedication or prescription, the travel must be confined to a definite and specific line."); 4 Tiff. Real Prop. § 1209 (1975) (The "extent of a prescriptive right-of-way is determined not by what is strictly necessary, but by the use made of it during the prescriptive period."); 4 Tiff. Real Prop § 1218 (1975). ("The width of a highway is determined by the extent of the user during the prescriptive period" and must generally "be confined to a specific and precise line."); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 211 (Tex. 1963) ("Some degree of definiteness in the scope or extent of an interest is essential to its recognition as a property interest.").

This means that public access ways created by pubic travel cannot substantially shift to take in new areas for new paths of travel, unless dedication or prescription is again proven in the new area. *Id.* ("After a right of way that has been established along a certain line on the basis of prescriptive user of the servient tenement along that line, it cannot be changed . . . to another line."); 3 Tiff. Real Prop. § 1203 (Access to a public easement "cannot be changed" until a "new point of access continues for the prescriptive period."); *Town of South Hero*, 898 A.2d at 763-64) (a public beach easement created by implied dedication is limited to the area of travel at the time of dedication); *Ellis v. Simmons*, 619 S.E. 2d 88, 91 (Va. 2005) (a party entitled to the use of a right of way easement could not "use it as an easement for the benefit of any other place than that for which it was originally established" (quoting *Clark v. Reynolds*, 125 Va. 626, 634, 100 S.E. 468, 470-71 (1919)).

consistent rationale for the creation or sustaining of a rolling beachfront easement."). The very reason the Fifth Circuit certified rolling easement questions is that Texas appellate decisions are contradictory on the issue. *Id.* at 499 ("[t]he state courts' decisions are utterly inconsistent.").

Some Texas appellate court OBA decisions do not even recognize a rolling easement. *Seaway Company, Inc. v. Attorney General of Texas*, 375 S.W.2d 923 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120 (Tex. App.—Corpus Christi, 1986). Those court decisions that do ground it *in the OBA*, not common law. *Feinman v. State*, 717 S.W.2d 106, 111 (Tex. App.—Houston (1st Dist.) 1986, writ ref'd n.r.e.) (the rolling easement is "implicit in the Act"); *Arrington v. Texas General Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Hous. [14 Dist.] no. pet.) (2001) (citing *Feinman* for the principal that "it is implicit in the Act that a public easement . . . moves with the new vegetation line"); *Town of South Hero*, 898 A.2d at 764. Some of these same courts analogize the OBA's implied rolling easement doctrine to title boundary changes occurring upon submersion due to erosion. *Severance*, 566 F.3d at 502, n.11. This is the same inadequate course charted here by the Officials. Answering Brief, at 15-18.

C. Rules Moving Title Boundaries upon Gradual Inundation Do Not Justify a Rolling Easement That Moves Inland Without Respect to Waterline, Gradual Erosion, or Submergence of Prior Boundaries

Ultimately, the Officials' common law defense of the rolling easement doctrine hinges on rules dealing with the movement of shoreline title boundaries after submersion of an old

boundary. But this is not enough, because the rolling easement functions entirely differently than title boundary change.

1. Shoreline Title Boundaries Shift Inland Due to Gradual Submersion of an Old Boundary Under Water

The doctrine of title submersion and shifting shoreline ownership boundaries was set out in *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976). York stated: "The general rule is that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly added or taken to or from his fast bank or shore" by accretion or submersion. *Id.* at 952, 954.

The potential movement of shoreline title boundaries is based on these specific common law understandings and conditions:

(1) that *lands under tidal waters* are generally State-owned; *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413-14 (Tex. 1943) ("The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State.");

(2) thus, it is the *submersion* of a private shoreland title boundary that potentially moves that boundary inland; *id*. ("[I]t has been the policy of the State to retain title to lands *covered* by navigable waters.") (emphasis added); *York*, 532 S.W.2d at 954, *see also City of Port Isabel v. Missouri Pacific R.R. Co.*, 729 S.W.2d 939, 942 (Tex. App.—Corpus Christi, 1987) ("[A] grantee from the sovereign who takes to the shoreline does not have title to *submerged* lands.") (emphasis added);

(3) *gradual erosion*, not a sudden avulsive event, must cause the submersion of private land to cause an inland movement of title boundary; *York*, 532 at 952; *Brainard v. State*, 12 S.W.3d 6, 17 (Tex. 1999);

(4) there is a corollary rule: when there is a gradual accretion of dry land at the water line or the waterline recedes seaward, the private property owner gains new and larger land boundaries. *York*, 532 S.W2d at 952; and

(5) even submersion of private land does not necessarily destroy vested private rights, at least with respect to lands granted in full fee simple. *State v. Lain*, 349 S.W.2d 579, 583-86 (Tex. 1961).

2. The Rolling Easement Doctrine Is Not Based on Water, Submergence of Old Boundaries, or Slow Erosion, and Cannot Add Anything to Property Owners Who Already Hold Title

The rolling easement doctrine has nothing in common with the title submersion doctrine. First, the rolling easement is not based on public ownership of land under water. It is not contingent on water at all; it is contingent on where the vegetation is. 31 TAC § 15.2 (41); *Matcha v. Mattox on Behalf of the People*, 711 S.W.2d 95, 97 (Tex. App.—Austin,1986) (enforcing expanded easement because Alicia "eroded *the natural vegetation line* landward about one hundred twenty-five to one hundred fifty feet from its prior position") (emphasis added). Nor is the rolling easement doctrine derived from public ownership of dry sandy areas, since this Court has held that private individuals own dry sand areas. *Luttes v. State*, 324 S.W.2d 167, 192-93, 198-99 (Tex. 1959).

Second, unlike with shoreline title boundaries, the rolling easement doctrine does not hinge on submersion of an old easement boundary. The doctrine is based on plants disappearing, not submersion of easements or their boundaries. *See* Texas General Land Office, http://www.glo.state.tx.us/OC/Beach_Access/rights.html (Last viewed, Sept. 17, 2009) ("The line of vegetation moves due to winds . . . ."); *Matcha*, 711 S.W.2d at 97. Because vegetation movement is the sole trigger, the rolling easement will expand inland even when the land mass of a prior, established easement area remains relatively intact. *See*, *e.g.*, *Arrington v. Mattox*, 767 S.W.2d 957 (Tex. App.—Austin,1989) (after vegetation line moved landward of property owners' home, seaward area is sufficiently intact for building). Or the vegetation line (and rolling easement) can move inland far out of proportion to any shoreline erosion that does occur.

This thoroughly distinguishes the rolling easement from rules that move shoreline titles based only on submersion of the old title line. It also helps explain why enforcement of the rolling easement against existing homes after the vegetation moves is so controversial. In many of these cases, the land under and immediately around the homes is still there. *See id*; *Matcha*, 711 S.W.2d at 96 (Alicia destroys home, but land sufficiently intact so that owners begin to rebuild on same land.). The critical change is that the plants no longer grow on the seaward side. *Id.*

Third, the rolling easement doctrine makes no distinction between gradual or sudden movements of the purported property boundary. *Feinman*, 717 S.W.2d at 115. Unlike shoreline title boundary change, which requires a gradual movement of the tidal water line,

the rolling easement will expand inland even when sudden, avulsive events destroy the vegetation. *See id.* at 114 ("vegetation line moved in a landward direction 60 to 100 feet after Alicia").

Finally, unlike changes in shoreline title boundaries, the rolling easement doctrine operates only in one direction; it takes private rights but does not add to them. This is because the rolling easement burdens dry land held in private fee simple ownership. If the easement moves off such land, it is not giving the property owner anything; she already owns the fee simple title. If the rolling easement moves seaward so it covers less of the land, it also is not giving her anything, she is just losing less. For a property owner to gain from the rolling easement doctrine in a manner similar to the doctrine of accretion, the owner would have to sometimes acquire rights *in a new area of land* which she did not own before. This never happens.

Perhaps it is these fundamental distinctions that cause the Officials to turn so often to vague declarations that "property" lines always shift with their "natural" boundaries. Answering Brief, at 1, 14. This is baseless hyperbole. The rarity of the phenomena is aptly shown by the Officials inability to produce any concrete example except that of title boundaries moving due to encroachment of tidal waters. As the foregoing shows, the rolling easement doctrine is a different concept altogether.

Further, the Officials' general contention that a public beach easement should move with its "natural" boundary—by which they mean the vegetation line—rests on a fundamentally mistaken assumption. The vegetation line is *not* the "natural" boundary of a

prescriptive or dedicated public easement; the natural boundary is the general line of travel at the time the easement was created. 4 Tiff. Real Prop § 1218 (1975). ("The width of a highway . . . is determined by the extent of the user during the prescriptive period.") The vegetation line is a wholly artificial boundary, created by the OBA, for demarcating the scope of the State's willingness to use its resources to enforce properly *proven* easements (rather than leaving that burden on members of the public).[4]

3. If the Rolling Easement Policy Is Validly Related to Shoreline Title Boundary Rules, the Policy Must Operate Within Such Rules

The rolling easement policy is not derived from the common law rules of shoreline title boundaries. But if the Court should hold otherwise, the policy must be constrained by those rules. The Officials cannot have it both ways. They cannot claim the rolling easement is an aspect of title shoreline boundary rules, but then enforce it without regard for those rules. If the rolling easement doctrine is to be grounded in the law of shoreline title boundary change, it must be construed to operate within the existing legal framework. This would mean that rolling easement policy could shift an easement landward onto new private land only upon submersion of an old, proven easement area by erosion, not avulsion. *York*, 532 S.W.2d at 952.

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[4] An easement created by prescription or dedication along the shore extends to the line of public travel, whether it is seaward or landward of any particular vegetation. The OBA sets the vegetation line as the limits of state enforcement of a proven beach easement. But setting the vegetation line as a boundary for State enforcement of properly proven easements (and absolving the public of the enforcement burden) hardly means that the easement itself is bounded by the vegetation line every time it moves. Under common law, the easement is dependent on public use. If the vegetation line moves, the OBA gives the Officials *potential* authority to enforce an easement, once it is proven to exist by past public use in the area. But the easement area must still be proven under the common law. Imposing and enforcing an easement to the vegetation line on private property before such proof of pre-existing public use and rights is outside the common law and a taking of private property.

Finally, any such landward shift must accommodate pre-existing, vested private property rights. *See City of Galveston v. Menard*, 23 Tex. 349, 1859 WL 6290, at *40 (Tex. 1859); *Lain*, 349 S.W.2d at 583-84. When a property owner obtains and holds shoreline property that can be traced to a full and fee simple grant of fee simple interests from the State, the owner does not lose his land even upon submersion. *Id.* The same should hold true for the rolling easement. If an owner lawfully bought or built a home on fee simple land, the rolling of a public beach access easement should not divest the owner of his home. *Menard*, 23 Tex. 349, 1859 WL 6290, at *40. The easement should accommodate a lawful, pre-existing home as it impresses the land, just as the public's rights in tidal waters must accommodate vested private rights in fee simple lands. *Lain*, 349 S.W.2d at 583-84. This would strike a balance: if and when erosion destroyed an old easement area and thus lawfully moved the vegetation line landward onto new private areas, the public would retain beach access rights, but existing private homes would remain. *See Menard*, WL 6290, at *31 ("This species of property, being land covered with navigable water, embraces several rights that may be separated, and enjoyed by different persons, and may become thereby, partly private and partly public.").

III

THE OFFICIALS' PROPOSED STANDING AND UNREASONABLE SEIZURE ISSUES ARE OUTSIDE THE CERTIFICATION ORDER, IMPROPERLY ADDRESS THE VIABILITY OF SEVERANCE'S FEDERAL CLAIMS, AND SECOND-GUESS THE FIFTH CIRCUIT

The Officials ask this Court to consider two new issues pertaining to Severance's standing, under federal law, to bring her federal constitutional claims, and the viability of her Fourth Amendment seizure claim. But the new questions are beyond the scope of this proceeding, as they are uncertified, already decided by the Fifth Circuit, and improperly ask the Court to resolve Severance's claims.

A. This Court Will Not Consider Entirely New, Uncertified Issues

This Court has made clear that, in a certification proceeding, it will not consider issues that stray beyond the certification order. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d at 798 (A "certified question is a limited procedural device that constrains us to answer only the question certified 'and nothing more.'") (quoting *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 349 (Tex. 1990); *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 620 (Tex. 2004) ("[W]e decline to extend our answers in this case to the issue of sovereign immunity, which is well beyond the scope of the questions certified.").

This Court is, of course, not confined to the precise form of the certified issues. But this Court's ability to reformulate the questions for clarity envisions staying within the general parameters of the certification order, not adding wholly new issues. *See* Uni. Certification of Questions of Law § 4, 12 U.L.A. 67 (1995) (comment) (The right to

reformulate envisions "a retention of the specific terms and concepts of the question while allowing some flexibility in restating the question."). Here, the Officials are not asking the Court to recast the certified issues; they are asking this Court to interpose two new standing and unreasonable seizure issues not fairly included in the certified questions. This is aptly demonstrated by the fact that the Officials themselves present their proposed new issues as *distinct additional questions*, that might moot the issues actually certified. Answering Brief, at 2. The proposed new issues cannot be added. *Amberboy*, 831 S.W.2d at 798, *Moreno*, 787 S.W.2d at 349; *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 620.[5]

B. The New Issues Are Particularly Misplaced Because They Improperly Seek To Resolve Severance's Federal Claims and Rehear Fifth Circuit Rulings

The federal standing and Fourth Amendment issues the Officials seek to insert are particularly misplaced here because they improperly ask this Court to inject itself into the merits of Severance's claims and to overrule parts of the Fifth Circuit's opinion.

A court answering a certification order is limited to the legal issues, and does not address the underlying dispute. *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 587 So. 2d 273 (Miss. 1991) (In answering a certified question, the state Supreme Court is not called upon to decide the case); *Tabor v. Metal Ware Corp.*, 168 P.3d 814 (Utah 2007) (the state Supreme Court answers the legal questions presented without resolving the underlying

[5] For out of state decisions to this effect, *see Kitsap County v. Allstate Ins. Co.*, 964 P.2d 1173 (Wash. 1998) (When a federal court certifies a question to the state Supreme Court, it answers only the discrete question that is certified and lacks jurisdiction to go beyond the question presented.); *Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo. 1994) (court would not address arguments which were propounded by the parties but which were not comprised within question certified); *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991) (Court would not go beyond specific questions asked by federal court because doing so might impose on comity relationship with certifying court in pending case or otherwise constitute advisory opinion for issues not presented by certification.).

dispute). Further, the answering court has no power to review the certifying court's existing rulings or its factual understandings. *Scheehle v. Justices of the Supreme Court of the State of Arizona*, 120 P.3d 1092 (Ariz. 2005) (It is not the role of the state court in responding to a certified question of state law to review the prior federal law rulings of the certifying federal court).

The foregoing rules preclude the Officials from interposing their new issues. First, the Officials are candid that their proposed federal standing and unreasonable seizure issues are primarily designed to resolve Severance's claims against Severance at this level. The new issues, the Officials contend, are "dispositive to the outcome of Plaintiff's claim," Answering Brief, at 2, "disposes of Plaintiff's [seizure] claim; *id.* at 4, "independently dispose of her claim," *id.* at 28, "bar . . . Plaintiff's cause of action," *id.* at 35. It is simply not the province of this Court to address arguments on the viability of Severance's claims; that is the Fifth Circuit's role.

Second, unlike the certified issues, the Officials' proposed standing and unreasonable seizure issues *have already been addressed at the Fifth Circuit*. That court rejected the Officials' position. *See Severance*, 566 F.3d at 496 ("We . . . reject the Officials' argument that Severance lacks standing" and reject the contention that "if a state informs a property owner that it has imposed an easement on a particular parcel of land . . . the state could assert an easement on different and larger portions of the parcel without effecting a new constitutional injury."). The Fifth Circuit also rejected the Officials' attack on Severance's

Fourth Amendment claim. *See id.* at 502 (Severance "sufficiently asserts the elements of a Fourth Amendment claim.").

The Officials' real complaint is that the Fifth Circuit did not rule their way. By re-raising the same standing and Fourth Amendment questions here, the Officials hope to have a second bite. But this is not the place for that effort. If the Officials' believe the Fifth Circuit rulings are incorrect, their remedy was to file a Petition for Rehearing. They failed to exhaust this remedy. They cannot now come to this Court and ask it to engage in the functional equivalent of rehearing at this level so as to "dispose" of Severance's claims. Nor can they demand that this Court wade into issues of federal standing and Fourth Amendment law.

C. The Officials' Curious, Unsupported, And Previously Rejected "Inchoate" Easement Theory Is Not Properly Presented, But The "Rolling" Easement Must Be Addressed in Any Event

As part of its proposed standing issue, the Officials argue that the public access easement they seek to enforce on private land, wherever the vegetation line goes, is some sort of "inchoate" encumbrance. Answering Brief, at xiii, 2. As such, they suggest the rolling easement binds property when it is touched by the vegetation line, but does not shift away when the vegetation line moves seaward again. *Id.* The Fifth Circuit rejected the inchoate easement argument because "[t]he Officials offer no support for this proposition." *See Severance*, 566 F.3d at 496. It is also unworkable. How is a property owner or purchaser to know a parcel is subject to the rolling easement doctrine if the current vegetation line is

not the actual marker of the easement, but the past and nonevident reach of the vegetation is? Certainly, there is no disclosure of this. *See* Answering Brief, at 5.

There is no mention of the Officials' "inchoate easement" theory in any existing Texas case law, the OBA, or any administrative rule. *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ. App. 1980) (the easement's "boundaries" shift); *Matcha*, 711 S.W.2d at 100 (the rolling "easement must migrate" back and forth). The officials have identified no case law anywhere and no property treatise that recognizes the idea of an inchoate easement that burdens property even when the rights that make up the easement (public access) cease to exist.

The Officials did not even concoct the inchoate easement theory until oral argument in the Fifth Circuit. In the federal district court, they recognized that the rolling easement shifts seaward with the vegetation line, as well as landward. *See* Appendix at 112, line 6-8 (Officials' federal court pleadings). In the Fifth Circuit briefing, the Officials did not propose an "inchoate' easement, they argued that "the easement would shift seaward as well." Appellees' Joint Answering Brief in the Fifth Circuit, at 44.

Because the "inchoate" easement argument is not part of the certified issues, devoid of any plausible authority, rejected by the Fifth Circuit, and effectively asks this Court to overrule the Fifth Circuit's decision on Severance's standing, it should not be addressed.[6] However, if the Court were to address it, the rolling easement doctrine must still be

[6] The Officials state that the Fifth Circuit said that this Court "must address" the inchoate easement issue. But the Fifth Circuit clearly did not mean for this to happen in *this particular case* (but rather at some point in the future) because: (1) the inchoate easement issue was not certified, and (2) the Fifth Circuit has already addressed and rejected the inchoate easement theory here in upholding Severance's standing. *Severance*, 566 F.3d at 496.

considered first. After all, if there is no constitutionally valid "rolling" easement doctrine, as Severance argues, then it is irrelevant whether that easement rolls an "inchoate" encumbrance or not.

The inchoate easement argument is worthy of notice now only because it demonstrates that State Officials will craft clever, but entirely unsupported, legal theories to evade potential liability from their OBA policies. The inchoate easement theory would strip the rolling easement of its ability to return seaward with the vegetation. A property owner who buys a home landward of the vegetation would be unable to challenge the easement when the vegetation line suddenly rolls onto his land if the vegetation line had ever been there at any time in the past. The past presence of vegetation would have left, in the Officials view, an inchoate easement that is unaffected by future vegetation changes. This creative, but entirely unsupported, interpretation is exactly how the rolling easement got started. When Officials discovered it was too burdensome to prove prescription or dedication, they discovered the

"rolling" easement. Now that they wish to foreclose suits against the rolling easement, they have found a "shadow" easement. Neither theory has the backing of law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff-Appellant's Reply Brief on the Merits was filed with the Clerk this 18th day of September, 2009, via U.S. Mail Certified, postage prepaid. I further certify that two copies of the foregoing brief, and an electronic copy on diskette in pdf format, were served this day via first-class mail upon each of the following:

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