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
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

BRIEF OF AMICUS CURIAE SURFRIDER FOUNDATION

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STATEMENT REGARDING SOURCE OF FEE

The *amicus curiae* brief is sponsored by the entities and associations listed below. The fee for preparation of the brief is being paid by those entities marked with an asterisk.

* Surfrider Foundation

The author wishes to acknowledge the significant assistance from Megan Prichard and Tyler Dockins from Surfrider Foundation and from Jacqueline Giblin, Surfrider Texas Upper Coast Chapter, and from Jeremy Heallen, Attorney at Law.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

The Surfrider Foundation by and through the Texas Upper Coast Chapter respectfully submits this brief as *amicus curiae* and in support thereof shows the Honorable Court, as follows:

AMICUS PARTY'S INTEREST IN THIS PROCEEDING

Reaffirmation of a historically and statutorily recognized beach access easement that benefits the public, which may shift with naturally caused changes in the environment, ensures that the public's rights to access, use, and enjoyment of the beach remain intact. For this reason, the Surfrider Foundation – a grassroots organization whose core mission includes securing universal, low-impact beach access and is actively

involved in protecting public beach access rights – respectfully submits this *amicus curiae* brief to assist the Court.

ARGUMENT AND AUTHORITIES

This Court has been certified to answer the three questions below interpreting the part of the *Texas Open Beaches Act* that ensures continued public beach access by allowing public beach access easements to shift along with the dynamic beach landscape.

> I. Does Texas recognize a "rolling" public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?
>
> II. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the Open Beaches Act?
>
> III. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

The State of Texas currently stands as an important example to all other states for establishing the strongest, most comprehensive and effective beach access laws in the nation. In 1959, the *Texas Open Beaches Act* was drafted in a special session of the Texas Legislature called in response to public outcry following the Court's opinion in *Luttes v. State of Texas,* 324 S.W.2d 167 (Tex. 1958), defining state-held beach lands as only extending to the median line of high tide. Private landowners used the *Luttes* decision

to justify erecting fences and barriers preventing citizens from accessing, driving on or otherwise enjoying stretches of Texas coast they had historically utilized. This history of use in many cases meant that the public had acquired an easement by prescription, implied dedication, or customary right over the dry beach extending from the median line of high tide to the line of vegetation. The Open Beaches Act restated and defined the public's existing common law rights to public beach access easement across private land. This concept has been upheld consistently in numerous Texas appellate courts and finds its roots as far back as ancient Roman times in the public trust doctrine. As the public obtains redefined beach access easements through the accretion and erosion of the shoreline, private landowners are not entitled to compensation as these easements shift to maintain the integrity of their intended purpose to provide beach access, which is a fundamental common law right for all Texans and the public.

The Open Beaches Act also provides, as a corollary to beach access, a process for removal of obstructions to public beach access. In appropriate situations, after notice and a hearing (and the right to appeal), a private property owner may be required to remove an obstruction from the public beach.

I.
As established in a strong line of Texas case law, Texas recognizes a "rolling" public beachfront easement.

Texas case law unequivocally establishes the right of the public to use and enjoy the state's beaches. Migration of an established beach access easement does not require

prescription, dedication, or customary rights to be reestablished over the redefined boundaries of the easement. As early at 1979, the Texas Court of Civil Appeals recognized the migratory nature of a beach access easement. *Moody v. White*, 593 S.W.2d 372, 378 (Tex. Civ. App. - Corpus Christi 1979) ("The general public in this state may acquire beaches…the state holds the land in trust for the use and benefit of all people.") In *Moody,* the area of a public beach acquired by prescription, dedication, or customary right that has been established over a beach extends from the line of mean low tide to the line of vegetation. *Id.* at 377. The Court recognized the establishment of an easement claimed for the public despite the fluctuations of the limits of that easement, asserting that, "although these boundaries do tend to shift occasionally, they can be determined at any given point of time." *Id.* at 379. Although the questions presented in *Moody* did not call upon the Court to explicitly rule on the issue of a shift of a beach access easement, the Court's definition of a beach access easement for the purposes of establishment of such an easement clearly acknowledged the dynamic nature of the area the easement encompasses.

In *Matcha*, the Third Court of Appeals held that public easements shift with the movements of the beach. The Court explains: "Although an easement is generally a static real property concept, several opinions have recognized that easements bordering a body of water may be moved by the water's action." *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App. – Austin 1986). In the case, the Court directly affirmed that the public

acquires a right of access to private beach front property where an existing easement shifts to encompass a different area. *Id.* In *Matcha*, the Court upheld the finding of a beach access easement, by prescription, dedication, and custom, to the public to use the beach from the mean line of low tide to the vegetation line. *Id.* at 98. After an easement had been established, a hurricane shifted the vegetation line defining the easement landward of a dwelling on what was, prior to the shift in the vegetation line, not considered to have been part of the easement. *Id.* at 96. The Court reasoned that if the beach access easement was to reflect the public's actual use of the beach, as the common law intends, it "must migrate as did the customary use from which it arose." *Id.* at 99. The Court further went on to explain that:

> Applying static real property concepts in this appeal would produce completely unworkable results if the beach continues to move. An 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. Such an easement, *meant to preserve the public right to use and enjoy the beach*, would then cease functioning for that purpose. *Id. (emphasis added).*

The Court explicitly stated that the purpose of the rolling easement is for the public interest and public benefit in preserving the right to use and enjoy the beach. A beach access easement in this instance is not simply a right of ingress and egress to a static parcel of land, but rather the right of the public to use and enjoy the beach. *See id.* Even though the original establishment of the easement had not physically included the lands disputed in *Matcha*, the establishment of the beach rolling access easement was itself enough to ensure the public the right to ingress and egress the beach as its boundaries

shifted with nature. *See id.*

In *Feinman*, the First Court of Appeals held for the public - that once a beach access easement over beach front property had been established by prescription, dedication, or customary right, the easement is subject to shift to encompass lands not originally included in the easement. *Feinman v. Texas*,717 S.W.2d 106, 110-11 (Tex. App. – Houston [1st] 1986). *Feinman* stands for the proposition that the *Texas Open Beaches Act* does not require the state to re-establish a public beach access easement each time the line of vegetation moves, and that the public's easement moves with the line of vegetation once the public has established an easement to a particular line of vegetation, stating "*in short, the case law certainly approves the rolling easement concept.*" *Id. (emphasis added)*. Citing both cases discussing the division of beach front rights between the public and private landowners and cases involving public easements along rivers, the Court concluded that "the location and extent of easements along waterways can change because of accretion or erosion to land along a waterway." *Id.* at 110. This holding is reaffirmed in *Arrington v. Mattox*, 767 S.W.2d 957, 957 (Tex. App. – Austin 1989). in which the Third Court of Appeals upheld the finding that a rolling beachfront easement enforced under the Open Beaches Act:

> Adheres at all times to the shore and follows the line of mean low tide and the natural line of vegetation where ever those two lines may be located by the natural processes at any given time.

The Court in *Arrington* recognized the incorporation of land into a beach access

easement already established by prescription, dedication, or customary right without any additional proof of prescription, dedication, or customary right establishing an easement over the newly incorporated land. *See also*: *Brannan v. Patterson,* 01-08-00179-CV (Tex. App. – Houston [1st] 2009). From recognition of a beach access easement that has migrating boundaries in *Moody*, the Court acknowledges in *Matcha* that beach easements should not be considered in the same way as static easements and states explicitly in *Feinman* that beach access easements upheld under the Open Beaches Act have migrating boundaries which naturally shift to incorporate more or less land into the easement. The interpretation of beach access easements found in this line of cases validates the plainest, least ambiguous reading of the language in the statute, respecting the legislature's original intent and choice of language. *Severance v. Patterson*, 566 F3d 490 (5th Cir. 2009); *see:* TEX. NAT. RES. CODE ANN. § 61.011 (Vernon 2001) ("It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have 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, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.")

Ambiguity about the interpretation of this language was clarified by the Texas

legislature in 1999 with an amendment to the Open Beaches Act. The clear statutory language of the Act states:

> 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. *(As amended*: TEX. NAT. RES. CODE § 61.025 (Vernon 1999))

The original intent of the 1959 authors of the Open Beaches Act to create a migrating boundary for beach access easements ensuring the public right to access the beach seen in the 1985 Act is still echoed today. Texas Land Commissioner Jerry Patterson rearticulated that the vegetation 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." (Patterson, J. 2006. "Plan for Texas Open Beaches.")

II.
Texas's recognition of a rolling beach access easement is derived from the common law doctrines of public trust and custom.

A. The common law pubic trust doctrine establishes a state responsibility to protect the public's right to beach access.

Beach access easements arise out of the common law public trust doctrine requiring that the state hold its coastal resources in perpetual trust for the public. The public has the right under the public trust doctrine to access and enjoy coastal areas. *See* Archer, J. 1994. "The Public Trust Doctrine and Management of America's Coasts" 19-

22; Mary Blackford, *Putting the Public's Trust Back in Zoning: How the Implementation of the Public Trust Doctrine Will Benefit Land Use Regulation,* 43 Hou. L. Rev. 1211, 1212-22 (2006). The right of access to public trust land is comprised of two factors. First, the public must have perpendicular access to the beach from public roads. Secondly, when high tides completely submerge the foreshore, the public must move along the dry sand part of the beach to access submerged public lands. *See* Kranz, E. *Sand for the People: The Continuing Controversy over Public Access to Florida's Beaches,* 83 Fl. Bar Journal 6 (2009). The public trust doctrine has its roots in both Roman law and the common law. *See id.* Under *Phillips Petroleum*, a state's public trust interest in tidal lands was expanded to encompass not only navigability, but also "swimming, bathing, and recreation." *Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988). See generally,* "The Public Trust Doctrine and Management of America's Coasts," *supra*. Courts have recognized that the state, as a trustee, has an obligation to protect its public trust lands and waters through regulation of activities outside of public trust areas including requiring access over privately held property to public trust lands. *See id.* at 14. Regardless of where the shoreline may move due to erosion, the trust attaches to the shore. *See* Caldwell, M. 2007. "No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast." Defined as such, anything other than a rolling easement would destroy the public's trust interest in the beach itself. *Id.*

Texas has fulfilled its obligation as trustee by enacting the Open Beaches Act to

ensure access to public trust lands. Texas recognizes a common law property right of the public to access dry beach, though private property owners may hold the title to the dry beach. *See,* "Plan for Texas Open Beaches," *supra.* After the Court in *Luttes* restricted public ownership to only coastal land seaward of the mean high tide line, a special session of the legislature was called to enact the Open Beaches Act to ensure beach access for the public, declaring the line of vegetation as the landward boundary of the public's easement. *Luttes, supra. See* Fisher, E. 2007. "A Line in the Sand: Balancing the Texas Open Beaches Act and Coastal Development." As the line of vegetation shifts naturally with changes in the coastline, the boundary of a beach access easement may shift as well, often encompassing areas where the public has never set foot but where the public's right to use and enjoyment continues to reside. The common law public trust interest of the state and the need for public access to dry sand areas of the coast, and not the prior use of that exact piece of land, creates the justification for an easement across private property with migrating boundaries.

B. Beach access easements shifting to maintain the integrity of their purpose also have roots in the common law tradition of custom.

Further support for the common law roots of the Open Beaches Act is seen in the doctrine of custom. Beach access easements enforced by the Open Beaches Act are originally established "by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public ... ." TEX. NAT. RES. CODE ANN. §§ 61.013 (c) (Vernon 1991). The Open Beaches Act does not empower the State to take rights away

from a private owner of land, but rather furnishes a means for the public to enforce a historically existing collective right of custom. *Arrington*, 767 S.W. 2d at 957. An easement established by custom of historical recreational use of a beach is established *via* the use and enjoyment of the beach as a whole, as opposed to any particular static parcel of land. *See Moody*, 593 S.W. 2d at 379. As the Texas Attorney General has asserted, the public "had retained a right of use and an easement because of continuous right in the public since time immemorial as recognized by law **or** custom." *Matcha*, 711 S.W. 2d at 96 *(emphasis added*).

The public does not acquire beach access easements across beach front property as a result of the Open Beaches Act, but rather, the Open Beaches Act provides a mechanism by which the public can enforce its common law public trust and customary rights to beach access. Through the Open Beaches Act, the State has fulfilled its duty to protect the public interests of recreation and ecological conservation in coastal trust land. The *Texas Open Beaches Act's* common law roots are also seen in its establishment of beach front easements based on customary public use.

III.
Under Texas law and the United States Constitution, a landowner is not entitled to receive compensation for the landward migration of an easement.

As the public acquires beach access easements by prescription, dedication, and customary right, and not by virtue of the Open Beaches Act, a beach access easement enforced under the Open Beaches Act does not require compensation at the time of

establishment nor as the easement expands due to natural changes in the environment. As the Court stated in *Arrington*:

> "[there is a] fundamental distinction between a governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use. The Open Beaches Act does not empower the Attorney General to take rights from an owner of land, but merely furnishes a means for the public to enforce its existing collective rights." *Arrington*, 767 S.W.2d at 957.

In simply creating an enforcement mechanism or an already existing public beach access easement established by prescription, dedication, or custom, enforcement of the Open Beaches Act does not create a cause of action for taking when that easement shifts.

Furthermore, as a valid exercise of the state's police power under the Tenth Amendment, use of the Open Beaches Act to enforce the public's established beachfront easement is non-compensable. Valid legislation, like the Open Beaches Act, which prohibits a particular use of property to prevent injury to "health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887). The health and safety of the public is protected by removing unstable and dangerous storm damaged houses on public beach access easements. A state's police power has also been held to encompass not only protecting the health and safety of the public, but also promoting public convenience and general welfare. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429 (1935). In defining the landward boundary of a public beach access easement to be the line of vegetation, the State of Texas has deliberately exercised its police power to

protect the health and safety of the public while promoting public beach access.

Regulation of property by the state in a constitutional exercise of police power must only be compensated when regulation goes too far in diminishing returns on reasonable distinct, investment-backed expectations of a property's value. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). Here, state compensation to homeowners for removal of homes obstructing public beach access easements would frustrate the state's goal and policy to make the beaches safe and open for public use and enjoyment. Texas law currently requires a person selling beachfront property fronting the Gulf of Mexico to include a disclosure in any executory contract for conveyance that, "the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public since time immemorial as recognized by law or custom." TEX. NAT. RES. CODE ANN. §§ 61.025 (Vernon 1999). The sale contract must include the following notification clause:

> 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*.

By virtue of this contractual notice, homeowners are reminded of the easement existing on their property. A reasonable homeowner should expect the existence of a rolling easement and factor the possibility of a shifting easement into their investment decisions concerning the property. It is not only common sense that the private property

owner should have known of the possible outcome, but from a public policy standpoint, the state should not be made to compensate homeowners when easements shift. Compensating a homeowner who is fully notified of the public's interest in beachfront lands forces the public to pay for a risk assumed by a private homeowner.

IV.
The Fifth Circuit Majority Appears to Rely on an Unusual Application of Fourth Amendment Jurisprudence

In stark contrast to the Fifth Circuit majority's view, Judge Weiner's dissent argues the majority is violating a significant aspect of "the venerable principle of judicial restraint, *viz.*, deciding a case on constitutional grounds when the same result is available on non-constitutional grounds." *Severance,* 566 F3d at 510; see also, *Liverpool, N.Y. and P.S.S. Co. v. Emigration Com'rs*, 113 U.S. 33, 39 (1885). More recently the Supreme Court held in *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.,* 527 U.S. 173, 184 (1999) that "it is . . . an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on narrower ground." By allowing Ms. Severance to have standing, the Fifth Circuit majority is asking this Court to answer a question it could answer by considering another legal concept. *Severance,* 566 F3d at 510. Severance's case is one in which the Fifth Amendment may apply, but the Fourth Amendment seems irrelevant. *Id.* Allowing Severance standing to sue under the Fourth Amendment could increase litigation in private property cases, and provide a new means

to sue by attaching Fourth Amendment claims to Fifth Amendment litigation. *Id.*

In the opinion *United States v. Jacobsen*, the Court defined a "seizure" under the Fourth Amendment as a "meaningful interference with an individual's *possessory* interests in his property." *Id.* (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The Court should rely on the foregoing definition – a definition sufficient to defeat a claim of standing for Fourth Amendment seizure (arguing there was no interference with a personal property right that ever belonged to Severance.) *Id.* Without a possessory interest in the property there can be no seizure. Furthermore, without an intrest to be deprived of, there can be no injury. Without an injury there can be no standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Severance never acquired the "right to exclude" the public from portions of her property that constitute dry beach, unlike those who owned the property before her. *Id.* Because Severance never "had the right to exclude the public from dry beach, [she] has suffered no injury and thus has no standing – a quintessential example of, no harm, no foul." *Severance,* 566 F3d at 510.

In addition to Severance not having standing to bring a Fourth Amendment claim, the Fourth Amendment is inapplicable to her case. The Fourth Amendment is designed to protect an individual's expectation of privacy in the property he or she owns, and the State must not interfere with this right unless the interference is reasonable. *Id*. at 511. (citing U.S. CONST. amend. IV). The Fifth Amendment, not the Fourth, protects individuals from uncompensated or unjustified government acquisitions of their property

rights. *Id.* The Fifth Amendment "Takings Clause" has certain conditions the government must follow when acquiring private property: 1) it must be for public use; and 2) the property owner must be justly compensated. *See,* U.S. CONST. amend. V.

Fourth Amendment seizures are most commonly associated with criminal law. Under the Fourth Amendment, a seizure is required to be reasonable, and a court will look to see if a particular interference with a person's possession is justified. *See,* U.S. CONST. amend. IV. Severance's Fourth Amendment civil seizure claim is a novel one, and there is little precedent to support it. No seizure claim has ever "required the State to put the property to a particular use or [to] pay the owner" for the interference with that person's property. *Severance,* 566 F3d at 512. Nowhere in the Fourth Amendment do the Framers state compensation is required for a seizure of personal property. *See,* U.S. CONST. amend. IV. This supports the contention that Severance's claim is a Fifth Amendment one, and not an issue to be resolved under a manipulated interpretation of the Fourth Amendment.

In *Freeman v. Brown*, 242 F.3d 642, 644 (5th Cir. 2001), the Fifth Circuit Court of Appeals reversed a ruling of the United States District Court in the Northern District of Texas relating to a Fourth Amendment seizure of buildings deemed a nuisance by the city. The buildings were deteriorating and did not comply with the City's Minimum Urban Rehabilitation Standards Code, and the City ordered the plaintiff to repair or demolish the structures after a Standards Board reviewed the case as required by the city code. *Id.* at

645. The plaintiff did neither and the City tore down the structures. *Id.* at 647.The district court held that the City violated the plaintiff's Fourth Amendment rights because the seizure was unreasonable. *Id.* at 645. The Fifth Circuit held that the defendant met the test for reasonableness because the City adhered to their policy and procedures, which safeguarded against arbitrary government invasion of property. *Id.* at 654. Additionally, the Fifth Circuit found no warrant was necessary to order the plaintiffs to repair their building or demolish it. *Id.* at 647.

In *Freeman*, the majority defines the reasonableness standard as one that balances government interests with private interests. *Freeman*, 242 F.3d at 649 (citing *Soldal v. Cook County, Ill.*, 506 U.S. 56, 71 (1992) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)). The majority found the plaintiff's argument, that a warrant was required to seize his property, was misplaced. *Id.* at 650. The cases the plaintiff relied on in his argument dealt with warrant requirements for health and safety code inspections in order to gather evidence of violations. *Id.* The code violations were previously established, so no warrant was necessary and the seizure was found to be reasonable. *Id.* The City was not invading the plaintiff's privacy since the City was not investigating any violations, but merely seizing a property already deemed to be in violation of city ordinances. *Id.* at 651. The Fifth Circuit held in *Freeman* that the seizure of the buildings was reasonable because it did not invade the plaintiff's rights and complied with all required standards and procedures necessary to deem property uninhabitable. *Id.* at 653.

Even if the Court finds the Fourth Amendment applies to this case, the seizure of Severance's beachfront houses by the State of Texas (or by the ocean for that matter) was reasonable. Like *Freeman*, where the court held the seizure of buildings to be reasonable, the Texas General Land Office acted reasonably as well by notifying Severance of that she might be required to remove her obstruction now on the public beach. Analyzing reasonableness under the Fourth Amendment requires consideration of the totality of the circumstances and the interests at stake. *Severance,* 566 F3d at 513. The Open Beaches Act requires each coastal property sale to be accompanied by a disclosure statement as an addendum to the contract . TEX. NAT. RES. CODE ANN. §61.025 (a) (Vernon 1999). The disclosure statement admonishes coastal property owners as to what might happen to their property if natural beach erosion occurs. *Id.*

Balancing the interests of all parties involved in *Severance* includes consideration of the interests of the "public in continued access to beaches that the people have enjoyed for decades if not centuries, against a private landowner's interest in excluding members of the public." *Severance,* 566 F3d at 513. Severance's interest in using the beach for her private purposes and excluding the public from the public beach flies "in the face of a 50 year old, well-noticed statute" which Severance has acknowledged and accepted by signing the Open Beaches Act addendum when purchasing her properties. *Id.* The Fifth Circuit's holding in *Freeman* clearly applies in *Severance*. When Severance bought her property in 2005, she was required to sign the Open Beaches Act addendum under Texas

law. TEX. NAT. RES. CODE ANN. §61.025 (Vernon 1999). By signing this contract, Severance was notified that she, "could be sued by the state of Texas and ordered to remove the structure; … ." *Id.* Her purchase was conditional; her property rights were subject to Open Beach Act conditions that function much like deed restrictions. This clause (required in sales of beachfront property) serves as an unequivocal notice that her structure might be judicially condemned and ordered to be removed, and that to accomplish the removal of the obstruction, the General Land Office would be acting through regular procedures and laws.

In *In re: Prudential Insurance Company*, this Court addressed the issue of waiver regarding commercial leases and the waiver of trial by jury. *In re: Prudential Ins. Co.*, 148 S.W.3d 124, 127 (Tex. 2004). The parties to the commercial lease signed a contract waiving the right to a trial by jury in any suit involving the lease, and after the tenants filed suit against their proprietors for rescission and damages, the tenants demanded a trial by jury. *Id.* This Court noted "a waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences." *Id. at 132.* The tenants in *Prudential* claimed they were unaware of the waiver provision in the contract and did not knowingly, intelligently and voluntarily waive their right to a trial by jury. *Id. at 134.* The tenants admitted they had negotiated commercial leases before and had utilized legal counsel throughout negotiations with Prudential, including having their counsel review the lease with them during the six-month negotiation period. *Id.* Based on

undisputed facts, this Court held that the tenant's "waiver of a trial by jury was knowing and voluntary as a matter of law . . . *and the waiver was crystal clear*." *Id. (emphasis added)*. The tenants were "charged with knowledge of all of the lease provisions absent some claim that they were tricked into agreeing to them, which they [did] not assert." *Id.* at 134.

Similar to the tenants in *Prudential*, Severance was required to sign a disclosure addendum to her real estate contract in order to purchase her beachfront properties. TEX. NAT. RES. CODE ANN. §61.025 (Vernon 1999). Severance acknowledges she read the documents, but argues she was deceived and nothing she read implied her properties could be taken without just compensation. Leigh James, *Open Beaches Act Faces Legal Challenge*, GALVESTON COUNTY: THE DAILY NEWS, July 12, 2009, *available at* http://galvestondailynews.com/story.lasso?ewcd=5abe85f4fce39971 (last visited July 21, 2009). However, much like *Prudential (In re: Prudential Ins. Co.*, 148 S.W.3d at 134), Severance cannot argue she did not waive her Fourth or Fifth Amendment constitutional right knowingly, intelligently, and voluntarily. The tenants in *Prudential* where held to have knowingly and voluntarily waived their right based on their admitted interaction with their attorney. *Id.* Likewise, Severance is not only an attorney herself, but also a licensed real estate broker in both California and Texas. *Severance,* 566 F3d at 507 n8 (Severance is a real estate broker licensed in Texas; she would have difficulty claiming that she did not know the import of what she was signing.). Either constructively or

actually, Severance has the requisite knowledge to understand the disclosure addendum she was required to sign in order to purchase her beachfront properties in Galveston. TEX. NAT. RES. CODE ANN. §61.025 (Vernon 1999).

Even if this Court finds the Fourth Amendment applies to this case, the seizure of her beachfront houses was reasonable. By admitting she reviewed the required addendum to the real estate contract, and by the constructive notice she should have had since she is a Texas real estate broker and attorney, it is clear Severance understood the requirements of the *Texas Open Beaches Act*. Severance agreed she understood her beachfront property could become public property because of natural erosion or a weather-related event, and by signing the required addendum, Severance cannot claim she waived her Fourth or Fifth Amendment rights unknowingly or involuntarily.

V.
Public Policy Consideration

Allowing Severance standing to bypass fifty years of enforcement of the Open Beaches Act and creating law justifying standing when there is a pre-existing restriction will not only lead to additional litigation by beachfront property owners, but could lead to the conclusion that the *Texas Open Beaches Act* is unconstitutional and unenforceable. If this Court finds Severance has standing to sue under the Fourth Amendment, this finding could not only increase litigation in private property cases, but also would provide a new means to sue by attaching Fourth Amendment claims to Fifth Amendment litigation.

CONCLUSION

Texas case law recognizes the legality of a rolling beach access easement based on a strong line of appellate case law. Texas Appellate Courts uphold the legislature's intent in the creation of the Open Beaches Act to ensure public safety and beach access. Responsibilities to preserve an unobstructed beach under the Open Beaches Act are required by the public trust doctrine, a common law creation dating back to ancient times. As beach access easements enforced under the Open Beaches Act are created, no compensation is necessary when the easement shifts.

PRAYER

The Court should hold that the rolling easement is a longstanding common-law doctrine with a significant history thus warranting no compensation to Plaintiff-Appellee.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I certify that on this the ____ day of October, 2009, a true and correct copy of the foregoing Brief of Amicus Curiae, Surfrider Foundation Texas Upper Coast Chapter was served *via* overnight mail as follows:

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