NO. 20-_____

In the Supreme Court of the United States

LEON OSCAR RAMIREZ, JR. ET AL.,

Petitioners,

v.

CONOCOPHILLIPS COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), the Court was unable to resolve whether the Takings Clause proscribes state courts from the elimination of established property ownership by changing or disregarding their common law. A four-Justice plurality answered in the affirmative. A two-Justice concurrence opined that the better course was to apply a due process analysis. Because the state court did not change or disregard its common law, another two-Justice concurrence concluded the question should be left for another day. Some lower courts adhere to the plurality, but others do not. The Court should resolve this important question of the meaning of the Takings Clause. The Questions Presented are:

1. Whether the Fifth and Fourteenth Amendments prohibit common law courts from eliminating property ownership by changing or disregarding their common law.

2. Whether the Texas Supreme Court violated the Fifth and Fourteenth Amendments by disregarding its 160-year-old law that a conveyance of land passes both the surface and minerals unless one is reserved or excepted by clear and express language.

PARTIES TO THE PROCEEDINGS

Petitioners

- Leon Oscar Ramirez, Jr.
- Minerva C. Ramirez, an incapacitated person through her guardian Jesus M. Dominguez.

Respondents

- ConocoPhillips Company
- The R.C. Ramirez Living Trust, successor in interest to Rodolfo C. Ramirez, Deceased and El Milagro Minerals, Ltd.
- The Ileana Ramirez Testamentary Trust, successor in interest to the Ileana Ramirez, Deceased.

LIST OF PROCEEDINGS

Supreme Court of Texas

No. 17-0822

ConocoPhillips Company et al. v.
Leon Oscar Ramirez et al.

Date of Final Judgment: January 24, 2020

Date of Rehearing Denial: May 29, 2020

Fourth Court of Appeals District of Texas, San Antonio

No. 04-15-00487-CV

ConocoPhillips Company et al. v.
Leon Oscar Ramirez et al.

Date of Final Judgment: June 7, 2017

Rodolfo C. Ramirez' motion for rehearing denied: August 29, 2017

ConocoPhillips' motion for rehearing en banc denied: September 14, 2017

ConocoPhillips' motion for rehearing denied: September 15, 2017

49th Judicial District Court Zapata County, Texas

No. 7,637

Leon Oscar Ramirez et al. v.
ConocoPhillips Company et al.

Date of Final Judgment: May 11, 2015

Fourth Court of Appeals District of Texas, San Antonio
No. 04-13-00089-CV
In Re ConocoPhillips Company
Mandamus denied: April 10, 2013

Texas Supreme Court
No. 13-0286
In Re ConocoPhillips Company
Mandamus denied: April 25, 2014

49th Judicial District Court Zapata County, Texas
No. 7,637A
Leon Oscar Ramirez et al. v.
ConocoPhillips Company et al.
(Severed claims from No. 7,637 pending)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

TABLE OF CONTENTS – Continued

Page

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioners Leon Oscar Ramirez, Jr. et al., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas, *ConocoPhillips Company et al. v. Leon Oscar Ramirez, et al.,* No. 17-0822; 599 S.W.3d 296, 2020 WL 399313 (Tex. January 24, 2020), is reprinted in the Appendix at App.1a.

The unpublished judgment of the Supreme Court of Texas, *ConocoPhillips Company et al. v. Leon Oscar Ramirez, et al.,* No. 17-0822 (Tex. January 24, 2020), is reprinted in the Appendix at App.18a.

The unpublished order of the Supreme Court of Texas denying Motion for Rehearing, *ConocoPhillips Company et al. v. Leon Oscar Ramirez, et al.,* No. 17-0822, entered on May 29, 2020, is reprinted in the Appendix at App.20a.

The opinion of the Fourth Court of Appeals at San Antonio, Texas, *ConocoPhillips Company et al. v. Leon Oscar Ramirez, et al.,* No. 04-15-00487-CV, 534 S.W.3d 490 (Tex. App.—San Antonio June 7, 2017), is reprinted in the Appendix at App.21a.

The unpublished judgment of the Fourth Court of Appeals at San Antonio, Texas, *ConocoPhillips Company et al. v. Leon Oscar Ramirez, et al.,* No. 04-15-

00487-CV 490 (Tex. App.—San Antonio June 7, 2017), is reprinted in the Appendix at App.67a.

The unpublished order denying Rodolfo C. Ramirez' motion for rehearing of the Fourth Court of Appeals at San Antonio, Texas, *ConocoPhillips Company et al. v. Leon Oscar Ramirez et al.,* No. 04-15-00487-CV, entered on August 29, 2017, is reprinted in the Appendix at App.69a.

The unpublished order denying ConocoPhillips Company's motion for rehearing en banc of the Fourth Court of Appeals at San Antonio, Texas, *ConocoPhillips Company et al. v. Leon Oscar Ramirez et al.,* No. 04-15-00487-CV, entered on September 14, 2017, is reprinted in the Appendix at App.73a.

The unpublished order denying ConocoPhillips Company's motion for rehearing of the Fourth Court of Appeals at San Antonio, Texas, *ConocoPhillips Company et al. v. Leon Oscar Ramirez et al.,* No. 04-15-00487-CV, entered on September 15, 2017, reprinted in the Appendix at App.71a.

The unpublished judgment of the 49th Judicial District Court of Zapata County, Texas, No. 7,637, judgment entered May 11, 2015, is reprinted in the Appendix at App.75a.

Findings of Facts and Conclusions of Law by the 49th Judicial District Court of Zapata County, Texas, *Leon Oscar Ramirez, Jr. et al. v. ConocoPhillips Company et al.* No. 7,637, entered on June 29, 2015, is reprinted in the Appendix at App.103a.

JURISDICTION

This Court has jurisdiction to review the opinion of the Texas Supreme Court on a petition for writ of certiorari under 28 U.S.C. § 1257(a). The Texas Supreme Court issued its opinion and judgment on January 24, 2020. On May 29, 2020, the Texas Supreme Court denied Petitioners' Motion for Rehearing. This petition for writ of certiorari is timely filed within one-hundred fifty days from that date. Sup. Ct. R. 13; Order, 589 U.S. (March 19, 2020).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

In *Stop the Beach,* the Court left unanswered whether the Takings Clause forbids a state judiciary from eliminating established property ownership by changing or disregarding its common law. This case presents a better opportunity for the Court to establish a rule of decision. The case does not involve judgment on legislation or executive action; the state supreme court is the sole lawgiver and taker.

The Court's lack of majority in *Stop the Beach* augmented the uncertainty in the lower courts. Some courts abide by the four-Justice plurality that the Takings Clause proscribes judicial action eliminating established common law ownership. Other courts do not. The different views on judicial takings by members of the Court—in *Stop the Beach* and before—have significant consequences. Some courts now justify changes to their common law even when, if done by legislation or executive action, it would undoubtedly constitute an impermissible taking. This case is a perfect example.

The grant of certiorari in *Stop the Beach* demonstrates the importance of the constitutional question presented. Judicial takings by changes or disregard of the common law have far-reaching effects on established property ownership. A short-term monetary advantage for some factions usually accompanies such rulings. Here, the short-term benefit went to the oil and gas industry. But, such rulings have long-term displacements for society. Faith and predictability in

well-established common law are essential to our economic system and the rule of law.

This case is an excellent vehicle to finish the work left undone in *Stop the Beach*. It presents the Texas Supreme Court's disregard of its centuries-old common law to reach the desired result.

The judicial taking question arises because, for 160 years, the Texas Supreme Court has abided by its common law bright-line rule: a conveyance of land passes both the surface and the minerals unless one is expressly reserved or excepted. *E.g., Sharp v. Fowler,* 252 S.W.2d 153, 154 (Tex. 1952). Exceptions or reservations by implication are not permitted under any circumstances. *Id.* This case involves a will that conveyed land without any reservations or exceptions. For the first time in Texas's history, the Texas Supreme Court ignored its bright-line rule (without discussion) and held that the conveyance was an implicit surface-only conveyance. In doing so, the court erased a multi-million-dollar judgment against ConocoPhillips. By jettisoning its common law, the Texas Supreme Court divested Petitioners' ownership of the minerals.

More specifically, in 1987, Petitioners' grandmother left a will that conveyed "all [her] right title and interest in and to Ranch 'Las Piedras.'" An experienced title and oil and gas lawyer prepared the will. The trial court ruled that this conveyance did not exclude the minerals. The intermediate court of appeals, citing Texas' bright-line rule, agreed. The Texas Supreme Court, however, held that the conveyance excluded the minerals. The court did not discuss nor cite any of its numerous cases applying the 160-year-old bright-line rule.

It is common knowledge that Texas has a strong public policy of encouraging the production of hydrocarbons. Commentators opine that this public policy has swayed judicial decisions in favor of the oil and gas industry, at the expense of landowners. But, common law judiciaries have the prerogative of considering economic factors and public policy when shaping their common law. An important question, however, remains unanswered: Do the Fifth and Fourteenth Amendments prohibit common law courts from eliminating established property ownership by changing or disregarding their common law?

STATEMENT OF THE CASE

A. The Texas Supreme Court's 160-Year-Old Established Common Law

"A conveyance of the land passes to the grantee everything—the woods, waters and houses, as well as the fields, meadows, and all mines of metals, fossils, etc. beneath the surface . . . There is no word of more general and extensive import." *Williams v. Jenkins,* 25 Tex. 279, 286 (1860). As part of the corpus, oil and gas will pass by the conveyance of the land. *Japhet v. McRae*, 276 S.W. 669, 671 (Tex. 1925).

As found in the earth, oil and gas are a part of the physical aggregate which the law designates as land. *E.g., Texas Co. v. Daugherty*, 176 S.W. 717, 721 (Tex. 1915); *see also* A.W. Walker Jr. *Fee Simple Ownership of Oil and Gas in Texas,* 6 Tex. L. Rev. 125, 128 (1928). "The land is one inanimate body, towards which different persons may, under the law, bear

different relations, each constituting a status or estate in the land, as an estate for years in one, followed by an estate for life in another, and an estate in fee in another." *Bouldin v. Miller*, 28 S.W. 940, 941 (Tex. 1894) (emphasis added).

Sharp is a seminal case on land dispositions. 252 S.W.2d 153 (Tex. 1952). *Sharp* reaffirmed as elementary that a conveyance includes everything unless part of the land is expressly reserved or excepted. *Id.* at 154. Exclusions by implications are not allowed. *Id.* Additionally, *Sharp* solidified the common law in two ways. First, it held that a conveyance without reservation or exception—where the instrument described the land as "being the same land described" in a prior deed excluding minerals—did not overcome the law that "a reservation of minerals to be effective must be by clear language," not implication. *Id.* Second, *Sharp* held that "to describe land is to outline its boundaries so that it may be located on the ground and not to define the estate conveyed therein." *Id.* Since *Sharp,* the Texas Supreme Court has quoted the latter restatement of its 160-year-old rule of law three times. *Samson Expl., LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766, 789 (Tex. 2017); *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 894 (Tex. 1986); *Westbrook v. Atl. Richfield Co.*, 502 S.W.2d 551, 557 (Tex. 1973).

Indeed, the Texas Supreme Court decided *Averyt* approximately one year before the grandmother signed her will. There, the court restated the critical distinction between "estate" and "land":

> "Land" is the physical earth in its natural state, while an estate in land is a legal unit of ownership in the physical land. 1 Thompson, *Thompson on Real Property* § 51 (1939). To

> define the estate granted is to set out the portion of the physical land conveyed. In contrast, "to describe land is to outline its boundaries so that it may be located on the ground, and not to define the estate conveyed therein."

Averyt, 717 S.W.2d at 894 (quoting *Sharp,* 252 S.W.2d at 154). Significantly, in *Averyt* the court represented to the people that the court was unwilling "to change long-standing rules in the oil and gas field when doing so would alter the ownership of minerals conveyed" by reliance on the court's established law. *Id.* at 895.

This Court and Petitioners' grandmother are among those who have relied on Texas's bright-line rule. *See W.T. Waggoner Estate v. Wichita Cty.*, 273 U.S. 113, 119 (1927). There, the Court stated, "the lessor's right to an oil lease royalty, although not specifically mentioned, is embraced in a conveyance of the land by the lessor . . . " *Id.* (citing *Japhet*, 276 S.W. at 671).

Over and over, the Texas Supreme Court has consistently adhered to its rule. *See Perryman v. Spartan Texas Six Capital Partners, Ltd.*, 546 S.W.3d 110, 119 (Tex. 2018) ("A reservation of minerals to be effective must be by clear language.") (quoting *Sharp*, 252 S.W.2d at 154) (quotation marks omitted); *Hysaw v. Dawkins*, 483 S.W.3d 1, 8, 14 (Tex. 2016) (a will devising "land in fee simple transfers both the surface estate and all minerals and mineral rights, unless the instrument contains a reservation or expresses a contrary intention."); *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669–70 (Tex. 1990) ("the executive right [to convey minerals] . . . passed . . . because [the grantor] did not reserve or except such interest from the conveyance."); *Averyt,* 717 S.W.2d at 894 ("Because 'land' includes the

surface of the earth and everything over and under it, including minerals in place, Thompson at § 51, a description of land includes the land and all the minerals naturally existing underneath."); *Cockrell v. Texas Gulf Sulphur Co.*, 299 S.W.2d 672, 675 (Tex. 1956) ("it is fundamental that a warranty deed will pass all of the estate owned by the grantor at the time of the conveyance unless there are reservations or exceptions which reduce the estate conveyed."); *Harris v. Currie*, 176 S.W.2d 302, 304 (Tex. 1943) (same); *Holloway's Unknown Heirs v. Whatley*, 131 S.W.2d 89, 91 (Tex. 1939) (same); *Schlittler v. Smith*, 101 S.W.2d 543, 544 (Tex. 1937) ("A conveyance of land without reservations would include all minerals and mineral rights."); *Sheffield v. Hogg*, 77 S.W.2d 1021, 1026 (Tex. 1934) ("passage of unaccrued royalties . . . unmentioned in the conveyance is because they are interests in land") (quoting A.W. Walker Jr. *Fee Simple Ownership of Oil and Gas in Texas,* 6 Tex. L. Rev. at 128) (quotation marks omitted); *Bibb v. Nolan*, 6 S.W.2d 156, 157 (Tex. Civ. App.—Waco 1928, *writ ref'd*)[1] (citing *Japhet*, 276 S.W. at 669 and *W.T. Waggoner Estate,* 273 U.S. at 113).

This case marks the first time in history that the Texas Supreme Court has refused to apply its bright-line rule. Less than a month after its decision here, the Texas Supreme Court reaffirmed its bright-line rule. *See Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 748 (Tex. 2020) (citing *Sharp*, 252 S.W.2d at 154) ("any 'reservation' must be 'by clear language' and cannot be implied, and a reservation is a form of 'exception' through which the grantor excludes for itself a portion

[1] A writ refused by the Texas Supreme Court imparts the decision equal precedential value as its own opinion. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 754 n. 52 (Tex. 2006).

of that which would otherwise fall within the deed's description of the interest granted.").

When a tract of land is known by a name, as the property at issue here, a conveyance that refers to the name includes the entire property interest. "A tract of land may be so well known by name that it can be described and conveyed without other designation." *State v. Balli*, 190 S.W.2d 71, 96 (1944) (quoting *Veve y Diaz v. Sanchez*, 226 U.S. 234, 239 (1912)) (quotation marks omitted). This applies to the conveyance of a ranch or plantation. *Id.* "A grant of the land by such name passes the title to the entire tract known by that name." *Id.* at 97. Any limitation on the grant, such as reservations or exceptions, must be expressly stated. *Id.*; *see also State v. Gallardo*, 166 S.W. 369, 373 (Tex. 1914) (identifying a tract of land as "Los Ejidos" and holding that "the subject matter of the sale was a body of land having a distinct identity . . . with a survey only necessary to define its exact boundaries."). Many terms are synonymous with "land"—lot, block, survey, abstract, porcion, tract, acreage, ranch, farm, island, area, estate, parcel, etc. *Williams,* 25 Tex. at 286-87. The term lot "is therefore equally as effectual to carry with it whatever will pass by the term land." *Id.*

B. Facts and Procedural History

In 1987, Petitioners' grandmother signed her last will, prepared by her Texas lawyer. App.130a. The lawyer is presumed to have known the law established by the Texas Supreme Court. *Mitchell v. Mitchell*, 244 S.W.2d 803, 806 (Tex. 1951). The grandmother died one year later. App.5a. The will provides in clause VI:

> I give, devise and bequeath to my son, LEON OSCAR RAMIREZ, all of my right, title and

> interest in and to Ranch "Las Piedras" out of Porciones 21 & 22, and situated in Zapata County, Texas, and during the term of his natural life. Upon the death of my son, LEON OSCAR RAMIREZ, the title shall vest in his children then living in equal shares.

App.131a. Petitioners are the remaindermen, vesting on the death of their father in 2006. App.25a. Clause VII of the will is the residuary clause, which generally leaves the grandmother's estate's residue to her three children, Petitioners' father, uncle, and aunt. App.131a.

When she signed the will, and died, the grandmother owned undivided interests in Las Piedras Ranch, a 1,058-acre tract. App.23a, 24a. She owned an undivided one-fourth of the minerals, a non-participating royalty interest, and one-half of the surface. App.23a, 24a, 115a. She also owned an undivided one-fourth of the minerals and a non-participating royalty interest in other ranches (approximately 6,000 acres), none of which was contiguous to Las Piedras. App.4a, 23a, 24a.

Petitioners' grandmother acquired her interests in Las Piedras, partially in a 1952 gift from her husband and the rest in 1966 through his will. App.23a, 24a, 115a. Her children also owned undivided interests in Las Piedras' surface and minerals. App.23a, 115a. In 1975 and 1978, the grandmother and her children partitioned the surfaces of the various ranches. App. 137a, 141a. As a result of the partitions, the grandmother ended up with one-half of the surface of Las Piedras Ranch. App.137a, 141a. In those transactions, the grandmother and her children made certain to reserve and except the minerals from the partitions, to prevent the minerals' passage under Texas's bright-line rule. App.137a, 141a. Consistent with the rule,

they reserved and excepted minerals repeatedly and redundantly. App.137a, 141a. For example, in the 1978 instrument, the grandmother was granted the title:

> . . . in and to the surface to undivided one-half interest to 1,058 acres of land in Zapata County, situated partly in the North one-half of Porcion 21 and partly in Porcion 22, known as LAS PIEDRAS PASTURE . . . the North one-half of Porcion 21 and partly in Porcion 22 in Zapata County, LESS AND EXCEPT Ileana Ramirez' undivided interest in and to the oil, gas and other minerals in and to 1,058 acres . . .

App.141a.

The name of the 1,058-acre tract, "Las Piedras Ranch," first appeared in the chain of title in 1946. App.149a. That year, the grandmother joined her husband and other family members in an oil and gas lease for Las Piedras Ranch.[2] App.149a. They described the minerals as "[a]ll of Las Piedras Ranch." App. 149a. In 1983, after the first oil and gas lease terminated, the grandmother and other family members signed another oil and gas lease for Las Piedras Ranch.

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[2] An oil-and-gas lease is not a "lease" in the traditional sense. *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003). The "lessor" is a grantor and grants a fee-simple-determinable to the lessee/grantee. *Id.* The lessee/grantee acquires the minerals in place, subject to the possibility of the estate reverting to lessor/grantor upon an event specified in the lease, like lack of production. *Id.* The grantor reserves a royalty and the possibility of reverter. *Id.*

App.155a. They once more described the minerals as "Las Piedras Ranch." App.156a.[3]

In 1993, after the 1983 oil and gas lease terminated, family members (including the grandmother's children) granted ConocoPhillips' predecessor-in-title oil and gas leases in Las Piedras Ranch. App.22a, 25a. ConocoPhillips purchased those interests in 1995. App.22a. In 1997, family members granted another lease to ConocoPhillips. App.22a. Petitioners did not join in those oil and gas leases.[4] App.22a. Petitioner Minerva C. Ramirez did not have mental capacity to join in the leases. App.22a. All the leases described the minerals as "Las Piedras Ranch." App.40a.

In 1997, ConocoPhillips discovered and acknowledged it did not have title to the grandmother's share of the minerals. App.160a. It approached grandmother's children, but not Petitioners, and requested that they sign a mineral interest stipulation, mathematically including ConocoPhillips' missing grandmother's share. App.160a. ConocoPhillips drafted the stipulation, and the grandmother's children signed it, describing the minerals as "Las Piedras Ranch." App.160a, 164a.

When Petitioners vested at the end of their father's life-estate, they sued ConocoPhillips and other family members to clear their title in the minerals. App.25a. Petitioners also sought an accounting of their share of the minerals. App.25a. The trial court granted Petitioners a summary judgment, holding that Petitioners

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[3] The recorded copy of this document has the upper half of the name cut off, but the name can be made out in the actual copy.

[4] Under Texas law, the remaindermen, not the life tenant, own the minerals. *Moore v. Vines,* 474 S.W.2d 433, 439-40 (Tex. 1997).

inherited their grandmother's interest in the minerals. App.75a. The intermediate court of appeals affirmed. App.66a. Both courts applied the centuries-old bright-line rule. App.35a, 111a, 1122a. The court of appeals quoted *Sharp,* "[t]o describe land is to outline its boundaries so that it may be located on the ground, and not to define the estate conveyed therein." App.35a. It held that the "[u]se of a name to refer to the physical land on the surface does not mean the conveyance excludes the minerals." App.35a. The court of appeals added, "all my right, title and interest," without "qualifiers or reservations, is comprehensive by its nature and does not require explanation." App.35a.

The Texas Supreme Court granted discretionary review. There, Respondents solely relied on a novel, convoluted theory, not addressed by the Texas Supreme Court. App.166a. As they made that argument, Respondents repeatedly and falsely stated in passing that in the 1975 and 1978 partitions of the tracts' surfaces, "Las Piedras Ranch" was defined as solely a "1,058-acre surface tract." The falsehood is refuted conclusively by those documents describing the entirety of the tracts by name and then making reservations of the minerals, repetitively stating that the partition only covers the surface of Las Piedras Ranch. App.137a, 141a. Additionally, the 1946 and 1983 oil and gas leases covering "Las Piedras Ranch" reveals the manifest untruth. App.149a, 155a.

In its decision, the Texas Supreme Court never mentioned Texas's bright-line rule nor why it was wrong for the courts below to rely on it. It instead honored Respondents' demonstrable falsehood, stating "[t]hese documents clearly designate the 1,058-acre tract

of land known as Las Piedras Ranch . . . as a surface estate only." App.12a.

An exchange at a CLE seminar between a distinguished law professor and two Texas respected appellate lawyers, one a former justice of the Texas Supreme Court, best describes the court's indifference to its longstanding common law:

> Professor Wayne Scott: You're not saying they did away with those rules? You're saying they just ignored those rules?
>
> Craig Enoch: I'm just saying you can't-the rule that the grant is as broad as reasonably interpreted is now becoming much more defined in looking, well, just precisely what did you grant? As opposed to, how broadly did you grant?
>
> David Gunn: Yeah, the ranch has a name. It has a name in capital letters. And, QED, QED. That all right, title, and interest to the ranch in capital letters? Well, that means the surface. So there.

Texas Supreme Court Update (February 2020), http://www.texasbarcle.com/CLE/AAPlayer5.asp?lEventID=18469.

In their motion for rehearing, Petitioners complained that the Fifth and Fourteenth Amendments proscribed the court's *sua sponte* action. The court denied it without explanation.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD ESTABLISH WHETHER THE TAKINGS CLAUSE CONSTRAINTS JUDICIAL ACTION.

The Court has not unequivocally established a rule of decision whether the Takings Clause prohibits courts from changing or ignoring their common law if doing so will eliminate established ownership. There has been some non-binding indication by the Court that the Takings Clause might not apply to state courts' changes to their common law. Unlike executive and legislative action, it remains unsettled whether state judiciaries are constitutionally limited by the Takings Clause when they change established property law. Some courts agree that the Takings Clause forbids retroactive changes to common law that eliminate property ownership. Others disagree. As here, the mere indication of a disagreement by members of the Court has animated common law jurisdictions to change or ignore their common law, without regard to established property ownership. The Court should grant certiorari to resolve this critical question of the meaning of the Takings Clause.

a. History of This Court's Decisions Leading Up to *Stop the Beach.*

Ironically, the origin of the Doctrine of Incorporation involved a case concerning judicial action and a taking. *See Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226 (1897); *see also Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994) (citing *Chicago* 166 U.S. at 239) (the Takings Clause is applicable to the states

through the Fourteenth Amendment). In *Chicago*, although the Court did not expressly mention the Fifth Amendment, the Court stated:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Id. at 241. The case, however, did not present the question of whether judicial changes to the common law constituted a violation of the Takings Clause. The only question presented was whether, in the city of Chicago's condemnation of a railroad's right of way, the Fourteenth Amendment prohibited the state judiciary from awarding only one dollar in compensation for a right worth more.

In *Muhlker v. New York & Harlem R.R. Co.,* 197 U.S. 544 (1905), an owner sought compensation resulting from the elimination of air and light easements by the construction of elevated railroad structure abutting the owner's building. The state high court's denial of compensation was contrary to one of its precedents recognizing the air and light easements. *See, i.d.* at 570. The Court reversed without grappling with the issue of judicial takings. A four-justice plurality stated, "[w]hen the plaintiff acquired his title . . . the law of New York . . . assured to him that his easements

of light and air were secured by contract as expressed in those instruments, and could not be taken from him without payment of compensation." *Id.* The plurality, however, concentrated its analysis on the Contract Clause. Justice Holmes issued a four-Justice dissent claiming the Court was unjustified in intruding on state property law. *Id.* at 572. In Justice Holmes' view, common law courts could constitutionally change property law at will. *Id.* at 575–76; *see also*, *O'Neil v. N. Colorado Irr. Co.*, 242 U.S. 20, 27 (1916) (suggesting that courts' departures from established property law do not necessarily violate the Fourteenth Amendment.).

In *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill,* 281 U.S. 673, 674-77 (1930), the state supreme court, contrary to an earlier decision, effectively deprived a taxpayer of a forum for challenging the constitutionality of a state tax. Justice Brandeis, writing for a unanimous court and reversing on procedural due process grounds, stated in *dicta*, that state courts' changes in the common law did not present a constitutional question. *Id.* at 680. According to the dicta, the Constitution did not present restrictions to changes in the common-law:

> The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may

> have acted to their prejudice on the faith of the earlier decisions.

Id. at 681 n.8.

In *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358, 359 (1932) the Court faced the question of whether a state supreme court could overrule a prior decision only prospectively, thereby depriving a carrier of a tariff in effect before the decision. The Court found no constitutional violation, stating that the common law courts are free to:

> hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.

Id. at 365.

On the other hand, the Court continued to follow *Muhlker*, applying a due process analysis in cases where the owner contested legislative or executive action as a taking, and the state court had ruled that there was no property to take. The test was whether there was a fair or substantial basis for the state court decision. *See Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36, 42 (1944); *Broad River Power Co. v. South Carolina,* 281 U.S. 537, 540, *aff'd on rehearing,* 282 U.S. 187, 191 (1930); *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 654-57 (1927).

In *Hughes v. Washington*, 389 U.S. 290 (1967), Justice Stewart's single-Justice concurrence opined that the state supreme court was bound to adhere to

an earlier decision that accretions belong to the littoral owner. *Id.* at 298. He acknowledged that a state "is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing . . . property rights . . . " *Id.* at 295. Justice Stewart, however, concluded that a state cannot "take [property] without just compensation." *Id.* at 295.

> to the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id. at 296-97.

After that, the Court reversed a state supreme court's action allowing, under a state statute, a county to keep bank interest generated by a private fund deposited in the registry of a state court. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980). The Court held:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court.

> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. Because the taking involved interpretation of legislative action, the Court did not address whether sole judicial action would constitute a taking.

In *PruneYard Shopping Center v. Robins,* 477 U.S. 74 (1980), the Court applied its regulatory-takings jurisprudence in evaluating a state supreme court's interpretation of the state constitution. *See id.* at 78-79. The decision involved whether the state supreme court's interpretation of the state constitutional provision violated "reasonable investment backed expectations." *Id.* at 82-84. The Court ultimately found the state court's interpretation of the state constitution did not amount to a taking. *Id.*

In *Stevens v. City of Cannon Beach,* 510 U.S. 1207 (1994), Justice Scalia, joined by Justice O'Connor, dissented from the denial of a petition for writ of certiorari. Justice Scalia objected to a state court's action of invoking nonexistent rules of property:

> just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings . . . neither may it do so by invoking nonexistent rules of state substantive law . . . . Our opinion in *Lucas,* for example, would be a nullity if anything that

> a state court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights. [A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id. (citations omitted).

b. The Various Views in *Stop the Beach.*

In *Stop the Beach*, the state court of last resort held that a beach restoration statute did not unconstitutionally deprive beachfront owners of riparian property rights because those rights did not previously exist under state law. *See Stop the Beach,* 560 U.S. at 712. The property owner petitioned for certiorari, arguing that the state high court's decision constituted a judicial taking proscribed by the Takings Clause because the court made up nonexistent state law rules, overruling a century of precedents. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,* Petition for a Writ of Certiorari, No. 081151, 2009 WL 698518 (filed Mar. 13, 2009). The Court granted the petition, but it could not secure a majority to decide the central question presented: whether a state court's change in its common law—eliminating established property rights—constituted an impermissible taking.

Justice Scalia's four-Justice plurality was of the view that "[t]he Takings Clause is not addressed to the action of a specific branch or branches . . . " but is instead "concerned simply with the act" of taking private property. *Stop the Beach,* 560 U.S. at 713-14.

The plurality determined that "the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking." *Id.* at 715. "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property . . . " *Id.*

Justice Kennedy's two-Justice concurrence was of the view that the Due Process Clause provides a remedy and therefore, there was no need to invoke the Takings Clause. *Id.* at 737. The four-justice plurality responded by quoting Court's precedents, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Id.* at 721, (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (four-Justice plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (quotation marks omitted).

Justice Breyer concurred in the judgment, joined by Justice Ginsburg. Since the state court of last resort did not change its common law, the Justices found it unnecessary to decide whether judicial takings claims are cognizable. *See id.* at 742-45 (Breyer, J., concurring). Instead, he concluded that the question of whether the Takings Clause constrains judicial action is "better left for another day." *Id.* at 742.

c. Lower Courts' Division Prior to *Stop the Beach.*

Before *Stop the Beach,* some lower courts rejected judicial takings challenges based on changes to prior court decisions. *See, e.g.*, *Brace v. U.S.*, 72 Fed. Cl. 337,

358-59 (Ct. Fed. Cl. 2006) ("court orders have never been viewed themselves as independently giving rise to a taking.") (citing *Brinkerhoff-Faris Tr. & Sav. Co.*, 281 U.S. at 680); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987) ("The question of whether courts, as opposed to legislative bodies, can ever "take" property in violation of the Fifth Amendment is an interesting and by no means a settled issue of law."); *Carolina-Virginia Racing Ass'n v. Cahoon*, 214 F.2d 830, 831-33 (4th Cir. 1954) ("the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law") (quoting *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) (quotation marks omitted); *Sunray Oil Co. v. Commissioner,* 147 F.2d 962, 963-64 (10th Cir.1945), *cert. denied*, 325 U.S. 861 (1945); *Baumann v. Smrha,* 145 F. Supp. 617, 625 (D. Kan.), *aff'd*, 352 U.S. 863 (1956).

Others accepted a judicial takings doctrine based on changes to precedent. *See, e.g., Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985); *Sotumura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978): *Republic Natural Gas. Co. v. Baker*, 197 F.2d 647, 650 (10th Cir. 1952); *Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir. 1940), *cert. denied,* 311 U.S. 655 (1940).

d. Lower Courts' Division After *Stop the Beach.*

In *Vandevere v. Lloyd,* 644 F.3d 957, 963 n.4 (9th Cir. 2011), the Ninth Circuit "observe[d] that any branch of state government could, in theory, effect a taking." It also noted that "a federal court remains free to conclude that a state supreme court's purported definition of a property right really amounts to a

subterfuge for removing a pre-existing, state-recognized property right." *Id.* In *PPW Royalty Tr. by & through Petrie v. Barton,* 841 F.3d 746, 756 (8th Cir. 2016), the Eight Circuit recognized a judicial takings doctrine but held that the state court did not eliminate an established property right. In *In re Lazy Days' RV Ctr. Inc.,* 724 F.3d 418, 425 (3d Cir. 2013) the Third Circuit quoted *Stop the Beach*, "[t]he Takings Clause protects property rights as they are established" *Id.* at 732.

The Seventh Circuit rejected a doctrine of judicial takings, stating that there is no binding precedent on judicial takings, noting the four-Justice plurality in *Stop the Beach*. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 626 n. 10 (7th Cir. 2014). The same is true of the Federal Circuit, refusing to determine a judicial taking claim because the plurality in *Stop the Beach* did not constitute binding precedent. *Petro-Hunt, L.L.C. v. United States,* 862 F.3d 1370, 1386 & n. 6 (Fed. Cir. 2017) *cert. denied*, 138 S. Ct. 1989 (May 14, 2018) (Mem). Some federal district courts agree with the Seventh and Federal circuits. *See, e.g., Burton v. Am. Cyanamid Co.,* 775 F. Supp. 2d 1093, 1098-99 (E.D. Wis. 2011) (also refusing even to analyze the issue because *Stop the Beach's* plurality is not binding "authority for the proposition that there can be a judicial taking.").

e. The State Courts Are Divided as Well.

The same is so at the state level. Some courts have adopted the plurality in *Stop the Beach. See, e.g., Town of Ellettsville v. DeSpirito,* 111 N.E.3d 987, 995-96 (Ind. 2018) ("By retaining the common-law rule, we avoid having to consider whether the Restatement

so fundamentally alters a property right in the easement that abandoning the rule amounts to a taking of that right requiring the payment of just compensation."). Others have rejected the plurality in *Stop the Beach. See, e.g., N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 939, 296 P.3d 1106, 1127 (2013) ("Northern relies upon a plurality opinion with no precedential value.").

f. The Lack of a Rule of Decision Is a Seductive Proposition in Common Law Jurisdictions Confronted with the Decision to Eliminate Property Ownership.

The judicial takings doctrine remains unsettled. *See, e.g., Jonna Corp. v. City of Sunnyvale, Ca,* No. 17-CV-00956-LHK, 2017 WL 2617983, at *6 (N.D. Cal. June 16, 2017) (the contours of a judicial takings doctrine are not clear); *Petro-Hunt,* 862 F.3d at 1386 & n.6 (whether judicial takings are cognizable is the subject of judicial and scholarship debate.); *Republic of Argentina v. BG Grp. PLC*, 764 F. Supp. 2d 21, 38-39 (D.D.C. 2011) (there is no clear standard of what constitutes a judicial taking.).

The lack of majority in *Stop the Beach* will only increase claims of judicial takings. Common law courts will read too much in the Court's inability to provide a rule of decision in *Stop the Beach*. Petitions for a writ of certiorari abounded before, and continue after, *Stop the Beach*.

Critics say that the Texas Supreme Court has been brash and dismissive of landowners' rights over the last thirty years, apparently favoring the interests of the oil and gas industry. John Burritt McArthur, *How the Texas Supreme Court Lost Its Position as a*

Leading Oil and Gas Royalty Court: A Tale of 18 Cases, 49 Tex. Tech L. Rev. 263 (2017). That during that period, the industry has prevailed over landowners in more than 87% of the Texas high court cases. *Id.* at 393. That the Texas Supreme Court has changed settled law without explanation in favor of the industry and against landowners' rights. *Id.* at 394. That in the last three decades, it is a foregone conclusion in the Texas Supreme Court that "the producer wins." *Id.* at 392.

Texas courts acknowledge a policy of encouraging production of hydrocarbons as being essential to the state's economy. As one court recently stated: "We confess to an impulse to safeguard an industry that is vital to Texas's economic well-being . . . And we are acutely aware that California courts might well be philosophically inclined to join the lawfare battlefield in way far different than Texas courts." *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558, at *20 (Tex. App.—Fort Worth June 18, 2020, no pet. h.) (mem. op.); *see also Browning Oil Co. v. Luecke*, 38 S.W. 3d 625, 646 (Tex. App.—Austin 2000, pet denied) ("Factors such as the prevention of waste . . . and maximized recovery of minerals bear upon this area of law and necessarily affect the rights of the parties.").

Seemingly, landowners are an obstacle toward Texas's public policy. Efficient production supposedly means a reduced share for landowners.

Whether that is true or not, as a common law court, the Texas Supreme Court has the prerogative to change its common law if it believes it is furthering Texas's public policy. But, it must do so within constitutional bounds. Ignoring or changing its common law is

not an option if the decision will eliminate private property ownership. Here, the Texas high court went beyond those bounds. The Court should grant certiorari to decide this issue of constitutional importance.

II. THE TEXAS SUPREME COURT VIOLATED THE TAKINGS CLAUSE AND PETITIONERS' DUE PROCESS RIGHTS.

This Court's establishment of a rule of decision respecting judicial takings by eliminating established property rights will require a reversal of the decision below. The Texas Supreme Court's decision extinguished Petitioners' well-established ownership of the minerals under Texas's longstanding common law.

Petitioners' grandmother left them "all her right title and interest in and to Ranch 'Las Piedras.'" Under Texas's bright-line rule, this made Petitioners the owners of both surface and minerals. The intermediate court of appeals applied the bright-line rule. The Texas Supreme Court did not even mention it.

The Texas Supreme Court's silence is telling. The court could not address the court of appeals' reasoning, so it simply ignored it. It could not apply its basic 160-year-old bright-line rule. Not if it desired the result it reached. The simplicity of the facts and the common law ignored makes the decision incomprehensible.

The opinion presented eight pages of charts, full of fractions, containing the irrelevant title history. The court seemed to suggest that there was something unique about the title history. But the title history to the Ramirez family lands is typical. As families' new generations grow in number, they typically partition surfaces and keep the minerals in undivided interests. *See Multi-Party Ownership of Minerals—Real Property*

Consequences of Joint Mineral Development, 25 Rocky Mt. Min. L. Inst. 7 (1979) (explaining the commonality of owning minerals in undivided interests).

The court only cited five cases for unremarkable general propositions of will interpretation. The court's entire reasoning rests on the premise that the Petitioners' grandmother intended to narrowly define the scope of the phrase "'Las Piedras' Ranch" by using capitalization and quotation marks. Because she used capitalization and quotation marks, the court held, she must have meant to give the phrase a "specific meaning." Of course, the court's opinion leaves obvious unanswered questions:

1) if the grandmother wanted to define a term, why did she not simply include a definition in the will?

2) if she only meant surface, why did she not simply include the familiar and widely used limiting phrase "the surface only?"

3) if she used quotation marks to designate a specific meaning for the land, as opposed to emphasizing a foreign phrase as such, why did she not place quotation marks around *Ranch*?

The court's opinion ignores basic grammar and common usage. First, the grandmother capitalized each word in the phrase "Las Piedras Ranch" because it is a proper noun. Bryan A. Garner, *Garner's Modern English Usage* (4th ed. 2016). For example, whenever the Texas Supreme Court refers to the fictional estate known as "Blackacre," it always capitalizes the "B." *See Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968).

The court's opinion on the use of quotation marks is equally pretextual. Modern usage places foreign language phrases in italics. *The Blue Book: A Uniform System of Citation* 31 (13th ed. 1981); Bryan A. Garner, *Garner's Modern English Usage* (4th ed. 2016). But, back when italics were not readily available in old typewriters or word processors—as they are now with the advent of computers and word processing software—it was common to place such phrases in quotation marks. That was the case in 1987 when the grandmother signed her will. A similar convention was that lawyers would underline case names in briefs; now, lawyers italicize case names. *The Blue Book: A Uniform System of Citation*, R. 7, B2, B7 (21st ed. 2020).

In South Texas, where chains of title often date back to the Spanish Crown, it was common practice to place Spanish words in quotation marks. *See Gallardo*, 166 S.W. at 373 (the Texas Supreme Court identified a tract of land as "Los Ejidos," holding that "the subject matter of the sale was a body of land having a distinct identity . . . with a survey only necessary to define its exact boundaries."). The Texas Legislature adhered to this convention whenever its legislation included property descriptions.[5] This Court, too, has

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[5] *See* Act of July 26, 1870, 12th Leg., 1st C.S., ch. 27, § 2, 1870 Tex. Gen. Laws 40, 40 ("That the line dividing the counties of Hidalgo and Starr, shall begin on the margin of the Rio Grande, at the rancho 'las Cuevas,'. . . . "); Act of Jan. 30, 1917, 35th Leg., R.S., ch. 7, §§ 1 & 2, 1917 Tex. Gen. Laws 8, 8-11 ("the grant to Pedro De la Garza, known as the 'Santa Rosa de Arriba' . . . the northwest corner the 'La Parra' grant . . . the most northerly point of land known as 'Piedra del Gallo' . . . the partition of the 'San Juan de Carricitas' grant . . . the southwest corner of the 'Palo Alto' grant . . . north line of said 'Los Sauces' grant . . . on the south end of the 'Laureles Peninsula'. . . . "); Act of Feb. 27,

adhered to this convention when discussing Spanish and Mexican land grants. *See In Re Fossat*, 69 U.S. 649, 694 (1864).

Despite these well-established old conventions, the court concluded that the capitalization and quotation marks required it to examine the 1975 and 1978 partitions. The court concluded that those partitions define "Las Piedras" as a surface-only estate. But, the opinion is devoid of any textual analysis of those partitions. Those documents conclusively prove the opposite. They establish that the grandmother and her children knew how to adhere to Texas's bright-line rule. In 1975 and 1978, she and her children did not

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1917, 35th Leg., R.S., ch. 47, § 1, 1917 Tex. Gen. Laws 81, 81 ("the S.W. corner of the 'Santa Maria de los Angeles de Abajo' Grant, also known as the 'El Mesquite' Grant. . . . "); Act of Mar. 17, 1919, 36th Leg. R.S., ch. 85, § 1, 1919 Tex. Gen. Laws 273, 274-75 ("the Lino Cavazos Grant called 'La Blanca' . . . 2630 acres, Maximo Dominguez Grant, called 'Los Torritos', 1960 acres, Benigno Leal Grant, called 'Santa Ana', 1815 acres, J. J Balli Grant, called 'San Salvador del Tule', 81850 acres, J. Hinojosa de Balli Grant, Called 'Llano Grande 4280 acres, Vincente de Hinojosa Grant, called 'Las Mestenas', ... "); Act of April 2, 1921, 37th Leg., R.S., ch. 104, § 1, 1921 Tex. Gen. Laws 200, 201-03 ("a tract of land known as 'Llano Grande' . . . the northwest corner of the grant to Pedro de la Garza, known as the 'Santa Rosa de Arriba' . . . the northwest corner of 'LaParra' . . . the most northerly point of land known as 'Piedra de Gallo' . . . the most southerly point of the main land known as 'Griffin's Point' or 'Pisacho' . . . the most northerly point of the grant known as 'Penascal' . . . the line dividing 'San Salvador del Tule' in the name of J.J. Balli from 'Las Mestenas' . . . the northeast corner of said 'Las Mestenas' also a corner of 'San Salvador del Tule'. . . . "); Act of Mar. 9, 1925, 39th Leg., R.S., ch. 152, § 1, 1925 Tex. Gen. Laws 441, 442 ("the northern boundary line of the 'Los Sauces' grant . . . the eastern half of the 'Paso Ancho de Arriba' grant and the western half of the 'Paso Ancho de Abajo' grant.")

want to convey the minerals, so they identified the ranches by name and then expressly excluded the minerals from those conveyances. In 1946 and 1983, the grandmother signed oil and gas leases that referred to the minerals as "Las Piedras Ranch." Five years later, she signed the will devising "all [her] right title and interest in and to Ranch 'Las Piedras,'" full stop.

States judiciaries are entitled to deference in changes to their common law. But, that deference does not include a change or disregard of that common law to eliminate property ownership. The decision of the Texas Supreme Court amounts to an *ad hoc* declaration "that what was once an established right of private property no longer exists." *Stop the Beach,* 560 U.S. at 715 (plurality opinion). If left undisturbed, this decision will eliminate Petitioners' ownership of their property. The Texas Supreme Court's decision constitutes a prohibited taking of private property under the Fifth and Fourteenth Amendments.

The decision of the Texas Supreme Court also violates the Due Process Clause. It eliminated "or substantially changed established property rights, which are a legitimate expectation of the owner." *Stop the Beach*, 560 U.S. at 737 (Kennedy, J., concurring). The Texas Supreme Court has held consistently since 1860 that a conveyance includes everything in the "one body" known as land unless part of the land is expressly reserved or excepted. Ignoring the law now "substantially changes" the rights "legitimately expected." *Id.* Petitioners' grandmother undoubtedly relied on this bright-line rule when she drafted her will (with the help of a lawyer). Significantly, this is the first time in Texas history that an appellate court

has held that a conveyance of land was implicitly a surface only conveyance.

Because Respondents did not ask the court to depart from Texas's settled law, Petitioners did not initially brief these constitutional issues. However, once it became apparent that the court was jettisoning established property law, Petitioners promptly raised their constitutional arguments in their motion for rehearing. *Ramirez* Motion for Rehearing, Texas Supreme Court, April 10, 2020, pp. 4-5. The court denied the motion without explanation.

III. This Case Is an Excellent Vehicle to Decide Whether Judicial Action Can Constitute a Taking.

After the Court decided *Webb's Fabulous Pharmacies*, the uncertainty regarding judicial takings caused an increase in the number of judicial-takings-based petitions for a writ of certiorari filed in this Court. App.169a. Such petitions have increased rapidly after *Stop the Beach.* App.171a.

This case involves undisputed facts and a centuries-old basic black-letter law. The grandmother's lawyer prepared the will under a legal framework of a bright-line rule in existence for over a century and a half. This Court has relied on that legal framework. The Texas Supreme Court has constantly reaffirmed it. The question does not involve the judicial interpretation of a statute or constitutional provision.

"[W]here the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review." *Stop the Beach*,

560 U.S. at 712 & n.4. That is what happened here. The court jettisoned established property law, *sua sponte*, in its decision. Petitioners promptly raised their constitutional arguments in their motion for rehearing. The court denied the motion without explanation.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this petition.

Respectfully submitted,

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AUGUST 26, 2020