

JAMES D. BRADBURY, PLLC

**4807 SPICEWOOD SPRINGS ROAD
BUILDING 2, SUITE 400
AUSTIN, TEXAS 78759**

ALSO ADMITTED IN ARKANSAS

**OFFICE: 512-953-5801
JIM@BRADBURYCOUNSEL.COM**

December 3, 2018

Blake A. Hawthorne
Clerk of the Court
The Supreme Court of Texas
Supreme Court Building
201 W 14th, Room 104
Austin, Texas 78701

Re: No. 18-0768; In the Supreme Court of Texas; Southwestern Electric Power Company v. Lynch et al; On Appeal from the Sixth Court of Appeals

LETTER BRIEF OF AMICI CURIAE

Dear Mr. Hawthorne:

To the Honorable Justices of the Supreme Court of the State of Texas:

Amici Curiae South Texans' Property Rights Association, Texas and Southwestern Cattle Raisers Association, Texas Cattle Feeders Association, Texas Land & Mineral Owners Association, Independent Cattlemen's Association of Texas, Texas Forestry Association, Texas Wildlife Association, Texas Poultry Federation, Plains Cotton Growers, Inc., and Texas Corn Producers Association submit this letter brief concerning the Petition for Review in the referenced case. The Amici request copies of this letter be circulated to the Justices' chambers so that it may be reviewed as they consider the pending case. In accordance with Rule 11 of the Texas Rules of Appellate Procedure, I certify that copies of this Amici Letter have been served on all parties via the electronic filing system.

I. STATEMENT OF INTEREST

The South Texans' Property Rights Association ("STPRA") represents over 5 million acres of farm and ranch land near the Texas-Mexico border and works with

both the government and the general public to protect property rights of South Texas landowners. STRPA is committed to promoting the growth, prosperity, and security of South Texas property owners and to addressing critical issues to property owners.

The Texas and Southwestern Cattle Raisers Association (“TSCRA”) is a 141-year old trade association that is the largest and oldest livestock organization based in Texas. TSCRA’s membership is comprised of more than 17,500 beef cattle operations, ranching families, and businesses. These members represent approximately 55,000 individuals who are directly involved in ranching and beef production and manage 4 million head of cattle on 76 million acres of range and pasture land primarily in Texas and Oklahoma and throughout the Southwest.

The Texas Cattle Feeders Association (“TCFA”) is an agricultural trade association representing 200 beef cattle feedyards in Texas, Oklahoma, and New Mexico and approximately 4,000 cattle feeders across the United States. TCFA members feed and market approximately 6.5 million head of cattle annually, producing about 30% of the nation’s fed beef. TCFA works to promote the cattle feeding industry, which provides approximately 30,000 jobs and \$19 billion to the Texas economy and works to develop laws and regulations based on free-market principles and sound science. TCFA is a strong advocate of private property rights.

The Texas Land and Mineral Owners Association (“TLMA”) is a statewide advocacy association whose members are farmers, ranchers, and royalty owners. TLMA advocates for a business and legal environment that is accommodating to the exploration for and production of oil and natural gas and that also protects the property rights of mineral owners.

The Independent Cattlemen’s Association of Texas (“ICAT”) is a grassroots organization devoted to fighting for the rights of Cattlemen. ICAT works hard to provide an effective legislative voice for farmers, ranchers, and cow/calf producers. ICAT’s objective is to promote change that supports efforts of cattlemen and their well-being, while combating policy that hinders the progress of the cattle industry. Having over 8,000 members, ICAT provides a voice for the average Texas rancher and supports the protection of private property rights.

The Texas Forestry Association (“TFA”) was founded in 1914 to enhance and perpetuate Texas forest resources through tree planting, education, training, and political action. TFA has approximately 2,855 members which include private

landowners, professional loggers, consulting foresters, and processing mills. In East Texas alone forest lands are 94% privately owned and cover more than 12 million acres.

The Texas Wildlife Association (“TWA”) serves Texas wildlife and its habitat, including the protection of property rights, hunting heritage, and conservation efforts of stewards of wildlife resources. With a membership of over 10,000, TWA focuses its mission on private landowners and their commitment to wildlife habitat. Protection of property rights is a key aspect of this mission.

The Texas Poultry Federation (“TPF”) is the only statewide poultry organization working specifically and only for Texas’ poultry industry. It is made up the Texas Allied Poultry Association, Texas Broiler Council, Texas Egg Council, Texas Poultry Improvement Association, and Texas Turkey Federation. With over 500 members and 13,500 member employees, TPF and its members believe the protection of property rights is of critical importance to the State of Texas and all property owners in Texas.

Plains Cotton Growers, Inc. is a cotton producer grassroots organization representing around 65% of the state’s cotton producers and production from the top 41 counties of the Panhandle and Southern High Plains region.

The Texas Corn Producers Association (“TCPA”) promotes and protects the interests of Texas corn producers. TCPA’s mission is to build a strong organizational support system and work as a legislative advocate to further the interest of corn producers and the corn industry throughout Texas. The protection of private property rights is among these important interests.

The Amici membership are comprised of Texas landowners and producers concerned with protecting their farms, operations, and livestock from uncertain risk and liability and protecting the related agricultural economy in Texas, which has grown to more than \$21 billion annually. The Amici are not parties to the case and will pay all attorneys’ fees incurred in preparing this amicus letter brief. Well beyond the legal issues between the parties in this case, the Court has before it significant public policy matters regarding the interpretation and application of blanket easements between landowners and utilities, pipeline companies, and related entities. The Amici believe the Court of Appeals’ decision correctly upholds the longstanding constitutional protections of private property and should stand. The

Amici respectfully request the opportunity to present these policy matters that significantly impact individual Texas landowners and the agricultural industry and urge this Court to deny the Petition for Review.

II. INTRODUCTION

The ownership of land and the protection of private property rights are foundational American principles. People work their entire lives to save the money to buy that perfect piece of land, peppered with beautiful old trees and native landscapes. Land represents a special place to raise a family while operating a farm, ranch, or timber operation. It represents a beautiful and serene place to retire. For others, the land represents generations of their families. Texas is home to millions of acres of this mythic, privately-owned land.

And with a knock at the door or a letter in the mail, increasingly, landowners are being told that the transmission line on their property will be replaced and the easement expanded by seventy feet or that a company is planning to clear land around the pipeline on the property through a grove of 150-year-old oak trees. When the landowner resists and questions the expansion, the companies respond with a 60-year-old “blanket easement” claiming unlimited access to the property. When the landowner asks why now, the company often responds: “because we can.”

This scenario is illustrative of countless real experiences of landowners across Texas, and it is the “because we can” posture that is at the heart of the problem for landowners today. The Constitution demands more.

Too often, landowners’ rights are lost at the edges, when utilities exceed the scope of their rights, exploiting older, less formal legal instruments. Texas courts have consistently and unequivocally upheld these constitutional protections and applied the law and policies of this state to ensure landowners receive fair process and just compensation for the use, damage, or destruction of their property. The trial court and Court of Appeals followed these precedents in this case. Southwestern Electric Power Company (“SWEPCO) and other amici ask this Court to depart from these well-established protections and precedents, thereby allowing utilities and companies to exploit blanket easements to the significant disadvantage of Texas landowners. The Amici urge the Court to decline this invitation to revisit and reverse longstanding precedent and deny the Petition for Review.

III. FACTUAL BACKGROUND

Respondents are three landowners owning property along the transmission line from New Boston to DeKalb, Texas. Their deeds all contain the same material terms to include an easement for the benefit of SWEPCO. The relevant provision states:

[A]n easement or right-of-way [is granted to Southwestern Gas & Electric Company] for an electric transmission and distributing line, consisting of variable numbers of wires, and all necessary or desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys), at or near the location and along the general course now located and staked out by the said Company over, across and upon the following described lands....

Together with the right of ingress and egress over my (our) adjacent lands to or from said right-of-way for the purpose of constructing, reconstructing, inspecting, patrolling, hanging new wires on, maintaining and removing said line and appurtenances....

Consistent with the practice of the time, none of the deeds contain a precise metes and bounds description of the easement. Instead, they restrict SWEPCO's easement to the "general course" that was "staked out" under the original 1949 right-of-way. Over the decades since the original transmission line was constructed, SWEPCO maintained a thirty-foot easement (fifteen feet on either side of the transmission line) on Respondents' properties.

Sixty-five years later, in 2014, SWEPCO notified landowners that it would rebuild the transmission line. At this time, SWEPCO also approached landowners about a supplemental easement to modify and clarify the width and boundaries of the 1949 easements. Respondents declined the supplemental easement. SWEPCO then approached Respondents claiming a "blanket easement" under the 1949 rights-of-way and for the first time, claimed a one hundred-foot easement. Respondents sought declaratory relief before the Bowie County district court concerning the scope of SWEPCO's easement. Over the six decades since the easement, landowners had adjusted their use around the easement. Certain Respondents had a home and pond, both existing for over forty years, within the newly claimed one hundred-foot

easement. In response to the lawsuit, SWEPCO countersued Respondents and their spouses individually for breach of easement and trespass based on the structures located within the claimed one hundred-foot easement.

Both parties filed motions for summary judgment. SWEPCO nonsuited its claims without prejudice, and the Respondents' claims were considered through a bench trial. The trial court found for Respondents' and declared the easement to be fixed and certain at a width of thirty feet based on the historical use of the easement and path of transmission line. SWEPCO never presented any evidence refuting the thirty-foot width of the easement. SWEPCO appealed claiming error in considering extrinsic evidence as to the width of the easement and claiming that there was no justiciable issue. The Sixth Court of Appeals affirmed the trial court.

IV. THE ISSUES BEFORE THE COURT

The Amici agree with the issues as restated by the Respondents. The issues before this Court therefore concern first whether the Court of Appeals erred in affirming the trial court's: 1) refusal to grant SWEPCO additional rights to expand the 1949 easement; 2) determination that SWEPCO's rights were fixed and certain; and 3) consideration of extrinsic evidence to clarify the grant and establish the width of the easement. A second issue before the Court is whether a justiciable controversy existed based on the language of the easements and the conduct of SWEPCO in asserting its rights to a "blanket easement," claiming a one hundred-foot easement, and suing Respondents and their wives for trespass and breach of easement. The Amici agree with Respondents that there was no error by the Court of Appeals or trial court and that the Petition for Review should be denied.

V. ARGUMENT AND AUTHORITIES

A. Unprecedented Growth in Texas is not Cause to Relax Protections of Private Property.

Over eighty percent—more than 140 million acres—of Texas land is rural. Tex. Dept. of Agriculture, Tex. Ag Stats, *available at* <https://ww.texasagriculture.gov/About/TexasAgStates.aspx>. These rural lands contribute more than \$20 billion annually to the Texas economy. *Id.* Texas is in an extraordinary era of growth. The population has grown by nearly 9 million people in the past twenty years and is

projected to double by 2050 if current growth rates continue. Economic development and infrastructure expansion are on the rise as they attempt to keep pace. Oil and gas production have seen a boom in recent years through production of the Barnett Shale and other shale plays. In 2016, more than 1 billion barrels of oil and more than 7 billion MCF of natural gas were produced in Texas. Railroad Commission of Texas, Texas Monthly Oil and Gas Production, available at <http://www.rrc.state.tx.us/oil-gas/research-and-statistics/production-data/texas-monthly-oil-gas-production/>. As part and parcel of this extraordinary growth, the need for updated and expanded pipelines and transmission lines has grown as well. This infrastructure, however, must cross the millions of acres of Texas rural land. The scope is daunting.

The Electric Reliability Council of Texas (“ERCOT”) estimates that it manages over 46,500 miles of transmission lines across the state. The Texas Railroad Commission estimates that there are 466,623 miles of pipelines in Texas. And these numbers are on the rise. Pipeline companies and utilities constructing, operating, and maintaining these pipelines and transmission lines rely on negotiated easements with landowners, and failing agreement, eminent domain proceedings to acquire the rights-of-way for the lines. The process can be lengthy, contentious, and costly both in time and money for the companies and utilities managing these projects. As a result, utilities and energy companies have resorted to creatively interpreting their rights under older easements to avoid constitutional limitations.

B. Private Property Rights are Fundamental to Texas Life and Policy and Have Long Enjoyed Protection Under Texas Law.

Private ownership of property is a keystone to the history, strength and politics of Texas, even more so to agricultural and ranching interests that rely almost entirely on the land they own. All land has both intrinsic and economic value, both of which belong to the owner. Alexander Hamilton described “the security of property” as one of the “great ob[jects] of Gov[ernment].” *Kelo v. City of New London, Conn.*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting). Constitutional application of state laws, therefore, requires that statutes and cases that diminish or take private property must receive the highest scrutiny. Expedience in the name of expansion, development, and growth cannot supplant constitutional protections and limits.

In recent years, this Court reaffirmed the importance of private property rights and the constitutional protections sheltering those rights. This Court discussed the critical importance of these rights:

This Court has repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to “freedom itself.”...Individual property rights are “a foundational liberty, not a contingent privilege.” They are, we affirm today, “fundamental, natural, inherent, inalienable, [and] not derived from the legislature,” and “preexist[] even constitutions.”

Harris County Flood Control Dist. v. Kerr, 499 S.W.3d 793, 804 (Tex. 2016) (quoting Justice Willett) (internal citations omitted). *See also Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 205 (Tex. 2012). Even the Texas Legislature stepped in to limit certain pipeline easements to 50 feet. Tex. Nat. Res. Code Ann. § 111.0194(a). The protection of these private property rights has strengthened in recent years, not waned.

Texas courts have been no less diligent in protecting landowners where easements are concerned. While older blanket easements remain generally valid under Texas law, courts have consistently found that an express easement that does not specify the exact location or size of the easement can be limited. The size and location of a right-of-way under a blanket easement is determined by the grantee’s selection of the location of the easement through constructing the transmission line or laying a pipeline. *Elliott v. Elliott*, 597 S.W.2d 795, 802 (Tex. Civ. App.—Corpus Christi 1980, no writ). Once the path is chosen by the grantee, the easement becomes fixed and certain. *E.g., Houston Pipe Line Co. v Dwyer*, 374 S.W.2d 662, 666 (Tex. 1964). Such easements cannot become a perpetual license in the hands of private corporations to later take what they need without compensation or deference to the rights of the property owner.

Blanket easements are primarily a creature of times past. They took place in the years when cooperation and handshakes were the guiding principles. Easements today are more carefully negotiated, including specific details and descriptions of the location, size, and scope of the easement acquired. Many years ago, however, the practice was different. Landowners agreed to cooperate for the good of the

project with the understanding that the utilities would take no more than needed recognizing the landowners' superior rights. The result is significant for Texas landowners as many acres of rural land are today encumbered by these decades-old easements. Blanket easements, like those at issue in this case, included no specific metes and bounds description of the location of the right-of-way. As such, companies and utilities have in recent years attempted to use these blanket easements to justify significant expansions of the rights-of-way without additional payment to landowners. Many of the landowners are successors to the original parties to the easements, largely uninformed as to the existence or impact of such easements and did not negotiate the terms of the original easements.

Texas courts look to the prior use of an easement to determine its scope. *See Bland Lake Fishing & Hunting Club v. Fisher*, 311 S.W.2d 710, 716-717 (Tex. Civ. App.—Beaumont 1958, no writ); *Adams v. Norsworthy Ranch*, 975 S.W.2d 424, 429-430 (Tex. App.—Austin 1998, no pet.). A blanket easement does not provide grantees unfettered rights or access to a landowner's property. Rather, grantees are entitled to a reasonably necessary use—one that is reasonably necessary to the fair enjoyment of the easement with the least intrusion on the landowner. *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974). Nothing is implied by a blanket easement other than what is reasonably necessary to the enjoyment of the rights expressly granted. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002). In determining what constitutes a reasonably necessary use, courts have relied on surrounding circumstances and past use for the purposes specified in the easement to set the boundaries of an easement. *See Fisher*, 311 S.W.2d at 716-717; *Adams*, 975 S.W.2d at 429-430. Reasonably necessary use cannot create rights where none are given.

C. Power and Gas Companies are Actively Using Blanket Easements to Circumvent Constitutional Protections of Private Property.

The conduct of the companies and utilities toward landowners has been egregious, growing worse with time. Money and legal advantage have displaced cooperation. Stories of companies approaching landowners with easements dating back to the 1940s (or earlier) as a basis for clearing large swaths of land over long-existing pipelines are all too common. Clearing of trees and land that was never seemingly necessary before is being newly enforced on landowners without

negotiation, compensation, or concern. One landowner encountered a gas company seeking to clear a 50-foot path over an old pipeline along his property that would take out a grove of giant oaks on his land. When he asked why the company needed to clear the path now after the pipeline had been in existence for decades, the company responded “because we can.” *See* Bobby Horecka: Easement, eminent domain battles persist with utility companies, Waco Tribune-Herald, Apr. 25, 2010, *available at* https://www.waco-trib.com/news/farm_and_ranch/bobby-horecka-easement-eminent-domain-battles-persist-with-utilitycompanies/article_3058a9a8-ce11-5040-81f7-2ee24c8b8dfc.html. The Constitution demands more.

Another landowner in Bastrop, Texas recently faced a similar situation when a pipeline company attempted to use a decades-old blanket easement to replace a pipeline and expand the existing easement. This time the casualties would be giant, 80 to 200-year-old loblolly pine trees. The company attempted to change the route of the original pipeline, taking it straight through the grove of trees instead of along the original easement. It was not until the landowner threatened legal action that the company backed down and moved the route back to the original easement. The landowner, however, was faced with finding people to keep watch over the trees and personally installing protective fencing to ensure the trees would not be disturbed, damaged, or destroyed. *See* Warning—Gas Pipeline: Beware of a Blanket Easement, Lost Pines Life, July 16, 2018, *available at* <https://lostpineslife.com/warning-gas-pipeline-beware-of-blanket-easement/>.

These are only two of countless similar stories. Power and gas companies show up to these properties waving a 70-year old piece of paper that says they have unlimited access to use the property, coercing landowners into allowing their property to be taken, damaged, and destroyed for a pittance or nothing at all as compensation. Landowners are left vulnerable after relying on the historic use and size of easements on their land when companies suddenly determine to expand.

SWEPSCO’s actions in this case specifically illustrate this type of conduct. SWEPSCO offered landowners \$1000 to come onto their property, repair or replace the transmission lines, and expand the width of the easement by 70 feet. When the landowners in this case refused and stood on their rights, suing to have the easement determined based on the historical path and use of the easement, SWEPSCO upped the stress and countersued for trespass against the landowners and their families. The

message to landowners was clear. Power and gas companies are skirting the longstanding constitutional protections of private property in the name of expansion, while transferring the costs onto landowners whose property is damaged or taken without due process or compensation.

D. The Sixth Court of Appeals' Decision Correctly States the Law on Blanket Easements and Should Stand.

The trial court in Bowie County got it right. The courts decisions limiting the SWEPCO easement to a width of thirty feet is supported by Texas law and should stand.¹ *Dwyer*, 374 S.W.2d at 666; *see also Fisher*, 311 S.W.2d at 716-717; *Adams*, 975 S.W.2d at 429-430. As evidenced by the record of this case, the trial court and Court of Appeals undertook a Four Corners review of the easement language. Both courts found the language lacking in sufficient detail and clarity, making the consideration of extrinsic evidence permissible. The courts then determined the appropriate width of the easement by considering the prior and historic use of the easement and the placement of the original transmission line, which the courts found to be limited to a width of thirty feet and a reasonably necessary use of the easement.² The Amici believe the courts' analysis and reasoning in this case was correct, ensuring the continued protection of private property rights while giving effect to the rights granted by the easements. The holdings below are consistent with good country logic—the parties' agreement reached in 1949 cannot be rewritten sixty-five years later.

Contrary to the arguments of SWEPCO and the other amici in this case, the effect of the Court of Appeals' decision does not prevent companies from expanding their easements, constructing additional lines, or relocating existing lines. Rather, the Court of Appeals decision makes clear that, absent the express grant of additional

¹ The Amici agree with Respondents arguments regarding the admission of extrinsic evidence concerning the easements at issue and the existence of a justiciable issue and incorporate those arguments by reference herein.

² The Amici agree with the Court of Appeals and Respondents that the Petitioner's reliance on the *Knox*, *Central Power*, and *Lone Star* cases is misplaced and applies solely to easements that expressly include the right to construct additional lines. *See Southwestern Electric Power Company v. Lynch*, 2018 WL 2925891, *9 (June 12, 2018). No such rights were included in the SWEPCO easements, making that line of cases inapposite. *Id.*

powers in the original easement (i.e., the right to construct additional lines or relocate existing lines), companies wanting to expand their easements must secure these additional rights through the processes in place for further negotiation with and compensation of landowners for such rights. Power and gas companies cannot avoid the longstanding constitutional protections for private property rights by bullying landowners with the threat of some unlimited blanket easement. Texas law is unequivocal on this point. *See e.g., Dwyer*, 374 S.W.2d at 666. The Amici agree with Respondents that there was no error by the Court of Appeals or trial court and that the Petition for Review should be denied.

IV. CONCLUSION

The Court of Appeals' decision supplies an additional and important precedent for Texas landowners, strengthening the shield against the "because we can" mindset of utilities and private corporations holding blanket easements. The interpretation urged by SWEPCO and other power and gas companies would not only open the door to further exploitation of landowners but would condone such egregious conduct and circumvention of well-established law. SWEPCO's chosen path for the transmission lines was made fixed and certain at the time it constructed the lines decades ago. To the extent SWEPCO desires to expand, it can make use of the processes in place to fairly negotiate, acquire, and compensate landowners for these additional rights. The Amici respectfully urge this Court to deny the Petition for Review.

Respectfully submitted,

/s/ James D. Bradbury

James D. Bradbury
State Bar No. 02814500
Courtney Cox Smith
State Bar No. 24045711
James D. Bradbury, PLLC
4807 Spicewood Springs Road
Building 2, Suite 400
Austin, Texas 78759
Telephone: 512-953-5801
jim@bradburycounsel.com
ccox@bradburycounsel.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)

This is to certify that the foregoing Letter Brief of Amici Curiae consists of 4,093 words, in accordance with Texas Rule of Appellate Procedure 9.4(i)(2).

/s/ James D. Bradbury

James D. Bradbury

CERTIFICATE OF SERVICE

On this 3rd day of December 2018, a true and correct copy of the forgoing electronically filed document was served on the following parties through the electronic filing manager:

James T. Carroll IV
Rickey L. Faulkner
Coghlan Crowson, L.L.P.
P.O. Box 2665
Longview, Texas 75606

C. David Glass
Smith Weber, L.L.P.
5505 Plaza Drive
Texarkana, Texas 75503

/s/ James D. Bradbury

James D. Bradbury