No. 09-0387

In the Supreme Court of Texas

CAROL SEVERANCE,
Plaintiff, Appellant,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE;
GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; and
KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS,
Defendants-Appellees.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF GALVESTON CHAMBER OF COMMERCE

SUPPORTING APPELLEES JERRY PATTERSON, GREG ABBOTT, AND KURT SISTRUNK

Lynn E. Blais
Texas Bar No. 02422520
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 E. Dean Keeton Street
Austin, Texas 78705
(512) 232-1334
(512) 471-6988 fax

ATTORNEY FOR *AMICUS CURIAE*
GALVESTON CHAMBER
OF COMMERCE

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INTEREST OF AMICUS CURIAE

The Galveston Chamber of Commerce is Texas' oldest Chamber of Commerce. It was established in 1845 to promote and facilitate the development of commerce in the young city. Its current mission is much the same: To Promote and Advocate for Business.

Gina Spagnola is the current President of the Galveston Chamber of Commerce. The Chamber has 820 active members, and it serves the entire Galveston community through carefully planned programs including business development, economic development, legislative affairs, public affairs, educational activities and hurricane recovery efforts. More information about the Chamber is available at http://www.galvestonchamber.com/

The Chamber is committed to maintaining and promoting the central role that tourism plays in the Gulf Coast economy, and hence, in the economy of the State of Texas. To that end, the Chamber offers this Court its views on the fundamental importance of the public's easements to use the State's beaches, and on the sound legal and constitutional footing of those easements.

In compliance with Tex. R. App. P. 11(c), the Chamber advises the Court that the attorney who prepared this brief *amicus curiae*

did so without charge, and received no compensation for preparing the brief.[1]

[1] The author of the brief would like to thank Annie Kellough (UT Law School class of 2010) for her invaluable research assistance. Ms. Kellough also worked without charge and received no compensation for her work on the brief.

SUMMARY OF ARGUMENT

This case is about property *use*, not property *boundaries*. The common law of Texas establishes property *boundaries* between waterfront landowners and the State according to the ancient doctrines of accretion, erosion, and reliction.[2] In contrast, the common law of Texas allocates *entitlements to use* waterfront property based, in part, on the ancient doctrines of custom, dedication, and prescription. These doctrines have been applied consistently by Texas courts to recognize a public right to use the dry sand beaches of the State. Nothing in the common law requires that this easement should have fixed geographic boundaries. Rather, an implied easement of use entitles the dominant tenants (in this case the public) to use the servient estate to the extent reasonably necessary to satisfy the purposes of the easement. This principle, not the restrictive and arbitrary

[2] *Amicus Curiae* Texas Landowners Council has submitted a brief carefully detailing the effect of these doctrines on title to riparian and littoral land. *Amicus* also suggests that the common law principal of avulsion does not alter the state of title to waterfront lands. Of course, this Court has not held that the doctrine of avulsion applies to tidal lands, and there are good reasons to question whether it should. *See, e.g., State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1994); *see also Corpus Christi v. Davis*, 622 S.W.2d 640, 643-44 (Tex.App.-Austin 1981). Moreover, because the State is not claiming title to Appellant's land, Amicus' observations about these doctrines are largely inapposite to the questions certified to this Court. *See, e.g., Feinman v. State*, 717 S.W.2d 106, 114-15 (Tex.App.-Hous.[1 Dist.] 1986) ("[W]e consider [the distinction between erosion and avulsion] to be immaterial to our decision, because the only questions presented in this appeal relate to the State's claimed easement under the Open Beaches Act. The underlying title of the appellant property owners is not in issue.").

geographic boundary suggested in Appellant's brief, sets the geographic scope of the public's right to use the beaches in Texas.[3]

Private property rights are defined and limited by background principles of state law. It is not uncommon for existing rights to use and enjoy property to evolve with the application of settled background principles to changing physical landscapes. The United States Supreme Court has made clear that the Fifth Amendment does not require governments to compensate landowners for property rights lost to the vagaries of the natural world.

When Appellant bought beachfront property impressed with an enduring public right of access, she took a gamble that nature would respect her desire for much of her lot to remain landward of the public beach. She lost that gamble, and she now asks the State of Texas to hold her harmless for her calculated risk. Neither the common law of Texas, nor the Texas or United States Constitution, requires the State to assume responsibility for the consequences of Appellant's wager.

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[3] In fact, Appellant's brief does not actually offer a definition of the boundary of the implied easement. And it is no wonder. What boundary, after all, could she offer? The line of vegetation on the Texas coast moves constantly – sometimes imperceptibly and sometimes dramatically. Any demarcation Appellant could offer would be an arbitrary point, picked seemingly at random, fixing a constantly moving boundary at some capricious point that best serves the servient estate at the expense of the dominant estate. That is not the law of easements in Texas.

ARGUMENT

I. The Public's Right to Use the Dry Sand Beaches of Texas Derives from Implied Easements Recognized Pursuant to Settled Principles of State Law

Public access to Texas beaches is an inextricable part of its storied past. Texas has over 350 miles of beaches along its Gulf of Mexico shoreline, the vast majority of which are open to and accessible by the public.[4] These beaches provide an important means of travel, commerce, recreation, and tourism – and have done so since before Texas joined the Union. Of particular interest to *Amicus*, the public's free and open use of the beaches of Galveston has been instrumental in its development as a vibrant coastal tourist destination.

Long before paved roads graced the Island, the beaches of Galveston provided a major transportation route for its residents and visitors. From at least the 1830's, evidence demonstrates that the flat, smooth beaches of the Island played host to a stagecoach line and a United States mail route, as well as general traffic between Galveston City and the ferry at San Louis Pass. *See Seaway Company v. Attorney General*, 375 S.W.2d 923, 931-34.

[4]Texas Environmental Profiles, *Beach Ownership and Beach Access*, (2004) http://www.texasep.org/html/lnd/lnd_7bch_access.html.

For much of the way between these two destinations, the beach was the only viable roadway. *Id.* at 932-33. One historian writes: "[a]t a time of unpaved, stumpy, and rutted dirt roads it was a pure pleasure to drive a light buggy with a spirited horse over the tight-packed sand bordering the surf amid the whirling cries of gulls and the low rumble of waves."[5] In 1858, the Texas Almanac reported that the beach "extend[ed] the whole length of the island, nearly east and west, almost perfectly straight, as smooth and hard as the floor, and afford[ed] room at ordinary tides for six or eight carriages to drive abreast." *Feinman v. State*, 717 S.W.2d 106, 111 (Tex.App. –Houston [1 Dist.] 1986). In fact, "[u]ntil the 1950s, Galveston beachgoers could drive off the western end of the seawall onto the beach and travel unheeded all the way to the San Luis Pass."[6]

In addition, Galveston beaches have offered the public free and unchallenged recreational opportunities for more than a century and a half. Since "[b]efore the Civil War Galveston offered a concentration of entertainment and recreation that could not be found in the countryside."[7] As the importance of the beach as a transportation route has declined, its importance for recreation use

[5] David G. McComb, *Galveston: A History and a Guide* 6 (2000).
[6] The Galveston Daily News, Leigh Jones, *Open Beaches Act Faces Legal Challenge*, July 12, 2009, available at http://galvestondailynews.com/story.lasso?ewcd=7dec44e7852f8288.
[7] David G. McComb, *Galveston: A History and a Guide* 15 (2000).

has become paramount. The public beach has been "the most important and enduring recreational asset" of the city.[8]

Beaches along the Texas coast have been used freely by the public for generations, for activities ranging from sport fishing to baptisms. "Surf bathing and fishing were the most popular outdoor activities throughout Galveston history."[9] Throughout the 20th century, "[b]oth commercial and sport fishing flourished . . . . [Sport fish] were a thrill to watch, and from 1938 – 1965, when it was possible to catch them from the piers and jetties, Galveston held annual tarpon fishing contests."[10] Other popular beach activities included "buggy rides on the beach, [and] nude swimming in the surf."[11] At the turn of the last century, the ultimate "beachside luxury was the portable, horse-drawn bathhouses that were pulled in and out of shallow water so that bathers didn't have to get sand on their feet."[12] During the same era, "[s]ections of beach were reserved on Sunday for baptisms, one area for whites, another for blacks."[13]

Tourism has always been an essential part of Galveston's commercial base. Indeed, "[t]he beach with its warmth, water, and

[8] David G. McComb, *Galveston: A History and a Guide* 6 (2000).
[9] *Id. at* 37.
[10] *Id. at* 38.
[11] *Id. at* 15.
[12] Gary Cartwright, *Galveston: A History of the Island* 147 (1991).
[13] *Id.*

sunshine has been a constant interest for visitors from the beginning of Galveston's history."[14] After a 1904 resolution by the Galveston Board of Commissioners ended nude bathing during the daytime, 'surf bathing' in the gulf became the number one attraction in town.[15] In fact, "[o]ne weekend in 1910, trains delivered more than 6,000 visitors from every part of Texas."[16] Many events were scheduled that weekend and "[i]t was likely that a visit to the beach was on everyone's agenda."[17]

The allure of Texas beaches reaches well beyond the citizens of the Lone Star State. Today "[t]ourism in Galveston stimulates an $800 million economic impact to the Island with five million visitors annually."[18] In fact, in May of this year, Galveston was selected as the number one attraction in Texas by leisure travelers outside of the state, according to a report prepared for the Office of the Governor, Economic Development and Tourism.[19]

This universal and age-old understanding of the right of public access to the state's beach is the general story. More specific proof

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[14] McComb, *Galveston: A History and a Guide* 52 (2000) (caption to photo from Rosenburg Library, Galveston, TX picturing 5 women in bathing attire with parasols on a beach.)
[15]Jodi Wright-Gidley and Jennifer Marines, *Galveston: A City on Stilts* 37 (2008).
[16]*Id.*
[17]*Id.*.
[18] Galveston Island Convention and Visitors Bureau, *Galveston Island: Where the Texas Coast Begins, Galveston Island: Number One Attraction in Texas*, (2009), *www.galveston.com/pressreleases/2009_0511_galvestontopattraction.doc.*
[19]*Id.*

of the public easement has been offered in cases in which the existence of a public beach easement is contested. This specific proof speaks of dedication, prescription, and custom, and has been sufficient in case after case to demonstrate a public easement of access to the dry sand beach. *See, e.g., Brannan v. State*, 2009 WL 2837037 (Tex.App.-Hous. [1st Dist.] 2009) (recognizing a public easement by implied dedication in the Village of Surfside Beach); *Feinman v. State*, 717 S.W.2d 106 (Tex.App. – Hous. [1st Dist.] 1986, writ ref'd n.r.e.) (recognizing a public easement by dedication over West Beach on Galveston Island); *Villa Nova Resort, Inc. v. State*, 711 S.W. 2d 120, 125 (Tex.App.-Corpus Christi 1986, no writ) (recognizing a public easement by dedication in South Padre Island); *Matcha v. Mattox on Behalf of the People*, 711 S.W.2d 95, 99 (Tex.App. –Austin 1986, writ ref'd n.r.e.), cert. denied, 481 U.S. 1024 (1987) ("No one doubts that proof exists from which the district court could conclude that the public acquired an easement over Galveston's West Beach . . . ."); *Moody v. White*, 593 S.W.2d 372, 379 (Tex.Civ.App –Corpus Christi 1979, no writ) (recognizing a public easement by dedication over the beach at Mustang Island); *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923 (Tex.Civ.App. –Hous. 1964, writ ref'd n.r.e.); *see also, Arrington v. Mattox*, 767 S.W.2d

957 (Tex.App.-Austin 1989, writ denied), cert. denied, 493 U.S. 1073 (1990) (the district court held that the public had acquired an easement on West Beach, Galveston, and that finding was not appealed).

II. Easement Rights are Defined by the Purpose of the Easement, not by Geographic Boundaries

The purpose of the easement, not geographic boundaries, is the touchstone of the right granted. There is no reason – in the law, in logic, or in experience – to define the public's right to use the State's beaches in terms of a seemingly arbitrary fixed geographic boundary offered by the servient tenant.

An easement is a non-possessory property interest that authorizes its holder to use the property of another for a particular purpose. *Marcus Cable Assocs. V. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). The owner of the easement is the dominant tenant and the land burdened by the easement is the servient estate. "A grant or reservation of an easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." *Coleman v. Forister*, 514 S.W.2d 899 (Tex. 1974); *see also,*

City Public Service Bd., etc. v. Karp, 585 S.W.2d 838, 841-42 (Tex.Civ.App. –San Antonio 1979, no writ) ("An easement owner, being the dominant tenant, is entitled to the free and undisturbed use of its property for the purpose of the easement.)" Moreover, "[a]t common law, a fee owner may not interfere with an easement holder's reasonable use and enjoyment of the easement." *Still v. Eastman Chemical Co.*, 170 S.W.3d 851, 854-55 (Tex.App. – Texarkana 2005, no pet.)

Thus, an easement created for a particular purpose will not support a right of use for a different purpose – even if the proposed new use follows the precise geographic boundaries of the original easement and imposes no additional burden on the servient estate. *See Marcus Cable Assocs.*, 90 S.W.3d at 701-03 (holding that an easement that permits its holder to use private property for the purpose of constructing and maintaining "an electric transmission or distribution line or system" cannot be used for cable-television lines, even though those lines would be placed in the same geographic location as the electric lines and impose no increased burden on the servient estate). Similarly, dominant tenants are not permitted to use easements of ingress and egress for the benefit of lands to which they are not appurtenant, regardless whether the

use imposes an increased burden on the servient estate. *Holmstrom v. Lee*, 26 S.W.2d 526, 534 (Tex.App.-Austin 2000) ("It is well established that an easement cannot be used to pass onto another parcel of land; it can only be used to serve the land to which it is appurtenant.").

In contrast, an easement created for a particular purpose will not be cabined by geographic boundaries if those boundaries are insufficient to sustain the easement's purpose. Rather, "[e]very easement carries with it the right to do whatever is reasonably necessary for the full enjoyment of the rights granted." *Whaley v. Central Church of Christ of Pearland*, 227 S.W.3d 228, 231 (Tex.App. –Houston [1st Dist.] 2007).

Defining the scope of an easement by its purpose, as opposed to fixed geographic boundaries, is particularly appropriate in the context of implied easements. Express easements must conform to the Statute of Frauds, and therefore the document creating an express easement must contain, *inter alia*, an adequate description of the easement's location. *See West Beach Marina, Ltd.*, 94 S.W.3d 248, 264 (Tex.App.-Austin 2002, no pet.). Of course, this description may cover the entire servient estate, if the purpose of the easement so requires. And if it does not cover the entire

servient estate, the geographic description in the grant will not necessarily limit the geographic scope of the easement. *See Kothmann v. Rothwell*, 280 S.W.3d 877, 880 (Tex.App.-Amarillo 2009) (rejecting a servient tenant's claim that an easement for drainage of surface waters was constrained by specification in the conveyance of the precise location of five drainage tracts and holding instead that drainage over the entire parcel was permitted if necessary to serve the general purpose of the easement.). Implied easements, by contrast, offer no concrete evidence of the parties' intent with respect to the geographic limits of the easement. Rather, implied easements are defined by the circumstances that give rise to the implication. These circumstances most often speak to the purpose of the easement in general terms, and the general purpose then defines the scope of the easement.

The easement of surface use implied into an oil and gas lease illustrates the importance of purpose in defining the scope of an implied easement. Absent an express limitation, the conveyance of an oil and gas lease necessarily implies the conveyance of an easement over the surface estate. *Sun Oil Co. v. Whitaker*, 483 S.W.2d. 808, 810-11 (Tex. 1972). The oil and gas lessee's estate is the dominant estate, and the surface estate is the servient estate.

By virtue of the oil and gas lease, "the lessee has an implied grant . . . of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate." *Sun Oil*, 483 S.W.2d at 810; *see also Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967). This easement, implied by virtue of the grant of the mineral interest, is defined and limited by the purpose of the easement, not by geographic boundaries within the servient estate.

Other implied easements similarly demonstrate the importance of purpose, rather than geographic boundaries, in describing the scope of an implied easement. For example, in *Ulbricht v. Friedsam*, 325 S.W.2d 669 (Tex. 1959), this Court recognized the creation of a "quasi-easement" of use and enjoyment, as well as ingress and egress, from the boundary of plaintiff's land at the 1,020 foot contour line over defendant's privately owned riparian land to the water's edge of Lake Buchanan. *Id.* at 677. This easement, created by implication from prior use, was for the use and enjoyment of the land, "to the extent that the same may be reasonably necessary to the use and enjoyment of the land as lakefront property." *Id.* The easement extended to the waterfront

notwithstanding the fact that "we have a lake with a fluctuating shore line; the lake level goes up and down and as it does so it covers or uncovers the land" impressed by the easement. *See also, West Beach Marina, Ltd. V. Erdeljac*, 94 S.W.3d 248, 262 (Tex.App. –Austin 2002, no pet.) (upholding the validity of an easement conveying rights of access and docking rights on the shore of Lake Travis, even though "the area of dry land described in the . . . easement . . . expands and shrinks from time to time as the shoreline of Lake Travis moves with changes in its surface level").

III. The Public's Right to Use the Dry Sand Beaches of Galveston Island Attached to the Entire Tract as it was Owned at the Time the Easement Arose, and Every Lot Derived From that Tract is Servient to the Public's Dominant Right of Use

The public's right to use the dry sand beaches of the State arises from implied easements. To the extent the easements are implied by custom, dedication, or prescription, the character of the evidence establishing the implication defines the scope of the easements. That evidence, in turn, demonstrates the intent that the easements provide access for the public to use the dry sand beach, regardless whether the location of the dry sand beach has been shifted by time and weather. This purpose – not an arbitrary

declaration of a fixed boundary – defines the scope of the public's right to use the State's beaches as well as the servient tenants' concomitant duty to refrain from interfering with that right.

Although the State and lower courts have referred to this easement as a "rolling" easement for descriptive purposes, in fact the underlying public use right does not move at all. Rather, the public easement to use the dry sand beaches of Galveston Island – implied from evidence of dedications occurring more than 100 years ago – attached to the entire parcel of land owned by the beachfront landowners at the time of the dedications. These parcels were likely to have been very large tracts of land. The 1840 patent from the Republic of Texas to Levi Jones and Edward Hall, for example, encompassed 18,215 acres, covering "all of Galveston Island except the land covered by the Menard Grant covering the east portion of the Island." *Seaway v. Attorney Gen.*, 375 S.W.2d 923, 928 (Tex.Civ.App. –Hous. 1964, writ ref'd n.r.e.) The Menard Grant referenced by the *Seaway* court encompassed the entire east end of the Island, and was conveyed by a patent issued by the Republic of Texas to Michel Menard in 1838. *See City of Galveston v. Menard*, 23 Tex. 349 (1859); *see also State v. Lain*, 349 S.W.2d 579, 583 (Tex. 1961). Although Menard quickly sold lots on the

northeast part of the Island for the development of the City of Galveston, *City of Galveston v. Menard*, 23 Tex. 349 (1859), the land on the Gulf side and westward in the Island's countryside most likely stayed largely intact in the ownership of the original grantee or his successors for a long time. These large tracts, as they existed at the time of the dedications established by extensive evidence introduced by the State in case after case, comprise the servient estates to which the easements of public use of the Galveston beaches are attached.

Thus, Appellant's entire parcel, as well as all the other parcels granted out of the tracts from which the public's easement first arose, is burdened by the public's right to use the dry sand beach. The burden of an easement remains attached to the entire servient estate, regardless whether it is subdivided over time.[20] Thus, the public's right to use the dry sand beach – dedicated by the owners of virtually the entire Island more than a century ago – burdens the entire fee held by those landowners at the time of the dedication, including the entirety of the current beachfront lots.

[20] Imagine an easement of ingress and egress implied on a roadway over a large tract of land. If that tract were to be subsequently subdivided, the dominant tenant's right to use the roadway would not attach to only one of the smaller parcels. If it did, the dominant tenant would be stranded, with no right of access to the public road.

The movement of the vegetation line effects the manifestation of the public's right to use the beach in response to the changing circumstances of a dynamic coast. But this movement does not deprive Appellant of any right she had in the past. Her entire lot is, and has been for more than a century, servient to the dominant right of reasonable public use.[21] The rights inherent in this dominant estate are defined by the purpose of the public's easement, not by the line of vegetation.

Properly understood, then, the vegetation line is best viewed as the State's articulation of the common law *limitation* on the public's rights under the implied easement. As noted above, a dominant tenant enjoys "only those rights reasonably necessary to the fair enjoyment of the easement with as little burden as possible on to the servient estate." *Whaley v. Central Church of Christ of Pearland*, 227 S.W.3d 228 (Tex.App. –Houston [1st Dist.] 2007). The vegetation line marks the State's determination of the point beyond which use by the public is not reasonably necessary to the fair

[21] Appellant's hyperbolic concern about where the "boundaries" of the easement will stop – ("Where will a rolling easement stop? At the Intercoastal (sic) Canal? At Canyon Lake?" *see* Appellant's Brief on the Merits at 13) – misapprehends the important role played by the boundaries of the *original* servient estate in cabining the reach of the easement. Moreover, it bears noting that if the vegetation line of Galveston Island's Gulf Coast beaches recedes to Canyon Lake, the State and its residents will have much more important worries than the public's right to use the dry sand beach.

enjoyment of the easement, and would therefore impose an unjustifiable burden on the servient estate.[22]

IV. Property Rights are Limited by Background Principles of State Law, and Particular Entitlements of Fee Ownership Often Change when the Background Principles are Applied to Evolving Facts and Circumstances

Easements are not the only background legal principles that have the potential to alter the particular mix of property entitlements held by fee owners when facts and circumstances change. Rather, many well-settled and widely-accepted background legal principles impose limitations on property rights that manifest themselves in different ways depending on changes in the underlying facts and circumstances.

The navigational servitude is perhaps most like the public easement of beach access in this regard. The navigational servitude, which attaches to all navigable waters of the United States, impresses a substantial burden on privately owned riparian land in navigable waters. Moreover, this servitude follows the changing boundaries of the navigable waterway, just as the public

[22] The vegetation line also serves as an important visual demarcation of the reach of the public's right. As noted above, Appellant does not offer any alternative boundary line, and claims that an easement whose manifestation moves with the vegetation line will cause a host of ills, including confusion and economic uncertainty. The contrary appears more likely. Indeed, the absence of a visible, observable landmark to delineate the boundary between the landowner's right to exclude and the public's right of access would cause unnecessary confusion and uncertainty and would be, essentially, unworkable.

beach access right follows the changing contours of the dry sand, *even if* the boundaries of the navigable waterway are changed dramatically by a one-time event. *See Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 330-32 (1973) (observing that the navigational servitude burdens the riparian property under the Colorado River even after it was "deepened and rechanneled").

The navigational servitude is an implied easement that empowers the United States government to take any action reasonably necessary to aid navigation and interstate commerce. *See Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (stating that the riparian owner's title was, "a qualified title, a bare technical title, . . . to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."). The geographic reach of the easement is defined by the government's power to aid in navigation, not by any set geographic boundary, and the exercise of this authority in changing circumstances often alters dramatically the uses to which riparian landowners may put their property. *See, e.g., Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (U.S. 1913) (holding that the government was entitled to dredge a navigable channel, destroying the riparian

landowner's cultivated oyster beds, and was not obligated to compensate the landowner for the loss).

Nuisance law is another example of a background principle that, when applied to changing circumstances, alters the particular rights of the property owner to use and enjoy her land. A nuisance "is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities." *Schneider Nat. Carriers, Inc., v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004). Thus, nuisance law imposes a general background limit on a landowner's rights to use her property, and that limit is defined by reference to unreasonable interference with the property rights of others. The application of this settled background limitation on property rights can, and often does, change with changes in the natural world. *See* 54 Tex. Jur.3d, *Nuisances* § 5 (2003) (explaining that a nuisance in fact exists when an act, occupation, or structure becomes a nuisance as a result of its circumstances or surroundings). As a result, a landowner may have a legally protected right to use her property in a certain way one day, and lose that right by the application of the nuisance doctrine the next.

For example, in *Atlas Chemical Industries, Inc., v. Anderson*, 524 S.W.2d 681 (Tex. 1975), a manufacturing plant discharged acid, fly ash, carbon and lignite into creeks upstream from the plaintiff's land for more than forty years. This discharge affected approximately four acres of plaintiff's land and was considered a permanent nuisance for which the statute of limitations had run. *Id.* at 686. Thus, the defendant was entitled to continue to operate the manufacturing plant. But the winter of 1968 brought heavy rains causing the creeks on plaintiff's property overflowed their banks and spread the discharged pollutants much more broadly over plaintiff's property. This overflow, caused by the heavy rains, was held to be a new nuisance, for which the defendant was liable. In effect, the weather changed defendant's property rights – actions that were legally protected before the heavy rains were rendered unlawful by the consequence of this natural force. *See Schneider Nat. Carriers, Inc., v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004) (discussing *Atlas Chemical*). Indeed, in articulating the difference between permanent and temporary nuisances, this Court recently acknowledged that the application of the settled principles of nuisance law can reallocate property rights depending on changing circumstances. *See id.*, at 283 ("The presumption of a connection

between [the character of the plaintiff's injuries and the defendant's operations] can be rebutted by evidence that defendant's noxious operations cause injury only under circumstances so rare that, even when they occur, it remains uncertain whether or to what degree they may ever occur again."); *see also LJD Properties, Inc. v. City of Greenville*, 753 S.W.2d 204, 207 (Tex.App.-Dallas 1988) ("Although it is fundamental that the government cannot destroy the property of private citizens at will and without justification, the government is given, through its police powers, the ability to abate public nuisances."); *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 894 (5th Cir. 2004) (same).

The doctrine of necessity is another example of a settled background legal principle that alters property rights when applied in the context of a changing physical world. In *Miller v. Schoene*, 276 U.S. 272 (1928), for example, the state of Virginia destroyed Miller's cedar trees to prevent the spread of cedar rust to adjacent apple orchards. Before the infestation of cedar rust, Miller had a legal right to grow cedar trees on her property, and owned the cedar trees she was growing. After the infestation, the background principle of necessity operated to alter those rights. Miller still, of course, owned title to the land. But her right to cultivate cedar

trees – indeed her property right in the cedar trees themselves – was lost to the changing circumstances caused by the infestation of cedar rust.

V. Changes in the Entitlements of Fee Ownership that Result from the Application of Settled Background Principles to Changing Facts and Circumstances Do Not Give Rise to Takings Liability

Background principles of state law, applied to changing facts and circumstances, often result in alterations of the entitlements attendant property ownership. Indeed, they may result in a loss of the right to exclude, or even deprivation of all economically viable use. As long as these changes in the entitlements of landownership result from the application of settled background principles of state law, they will not give rise to takings liability. This is precisely the point made by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

In *Lucas*, the Court explained that a limitation on property rights that would otherwise be a compensable taking would not give rise to takings liability if the limitation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id. at* 1029. To explain this exception to the compensation

requirement, the Court provided three examples in which settled background principles were applied to changing circumstances, resulting in the loss of significant property rights.

The first example, involving navigational servitudes, is a precise analogy to the public's right to use the dry sand beaches protected by the common law of the State of Texas. Viewing the navigational servitude as a pre-existing easement, the Court said, "we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land." *Id. at* 1028 (emphasis in original).[23] Similarly, the State of Texas is entitled to enforce the public's easement to use the dry sand beach, which is a pre-existing limitation on Appellant's entire parcel.

The Court also offered a nuisance example, explaining that "the corporate owner of a nuclear generating plant [would not be entitled to compensation] when it is directed to remove all improvements from its land upon discovery that the plan sits astride an earthquake fault." *Lucas*, 505 U.S. at 1029. It would not matter to the Court's analysis whether the earthquake fault

[23] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) is not to the contrary. In *Kaiser Aetna* the U.S. Supreme Court held that the landowner was entitled to compensation for an assertion of the navigational servitude on his property because the Army Corps of Engineers had issued a permit authorizing the excavation of a private pond into a navigable waterway with full knowledge that the landowner intended to exclude the public from the newly created marina. In this case, in contrast, the relevant public officials did all that they could do to ensure that Appellant was fully aware of the background limitation on her property right before she purchased the property.

had always existed below the corporate owner's land, or had been newly formed after the nuclear plant was built. The point is the same – the background principle of nuisance law prohibits the operation of a nuclear power plant on an earthquake fault. Similarly, the public's easement to use the dry sand beach limit's Appellant's right to exclude the public from the beach, regardless whether that beach moves due to natural forces.

Similarly, the Court made clear that the destruction of Miller's cedar trees did not constitute a taking because it was justified by the application of the background principle of necessity to the changing circumstances caused by the infestation of cedar rust. *See Lucas*, 505 U.S. at 1029, n.16 (noting that by background principles it meant to include doctrines "absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of fire' or to forestall other grave threats to the lives and property of others.") (citations omitted).

The fact that the public's right to use the dry sand beaches of the State was first expressly recognized by state courts within the past fifty years does not undermine its claim to rest on settled principles of background law. "Property interests, of course, are

not created by the [U.S.] Constitution," but rather "by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). In determining the scope of private property rights, state courts do, and must, apply settled background principles to new facts and circumstances on a regular basis. If they didn't, the common law of the state would become ossified and irrelevant over time. *See Georgia v. Randolph*, 547 U.S. 103, 144 (2006) ("There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change.")

In fact, the issues certified to this Court became relevant only recently as a result of this Court's exercise of the authority to apply background principles to novel claims and issues. In 1959, this Court applied 13th century principles to determine, for the first time, the boundary between State-owned submerged lands and privately owned littoral property. *Luttes v. State*, 324 S.W.2d 167 (Tex. 1959). That decision – defining current property rights by application of settled background principles – generated uncertainty about the public's right to use the beachfront land – a right that had previously been taken for granted. This uncertainty,

in turn, required state courts to look to settled background principles to resolve the competing claims of the landowners and the public.

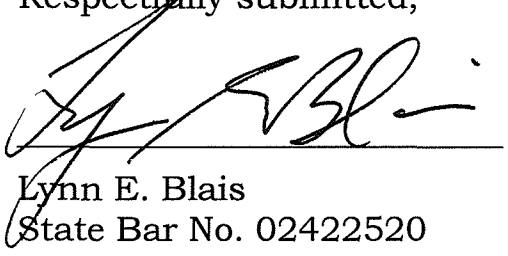
This Court's ongoing commitment to applying settled principles to resolve newly arising questions involving state property rights is precisely the role protected to the state courts by the so-called "nuisance" exception in *Lucas*. As the *Lucas* Court made clear: "such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029-30.

CONCLUSION

Appellant bought beachfront property impressed with an easement protecting the public's right to use the dry sand beach. The rights afforded to the public by this easement burden

Appellant's entire lot, and the public is free to use Appellant's lot in any way that is reasonably necessary to effectuate the purposes of the easement. That the State has decided that the line of vegetation marks the limit of that reasonably necessary use does not render the vegetation line talismanic for purposes of defining Appellant's property rights. Appellant never had the right to exclude the public from the dry sand beach, and the destructive consequences of coastal weather do not change that fact. Because Appellant never had this right to exclude, the State of Texas is under no obligation to compensate her for its enforcement of the public's right of access.

Respectfully submitted,



Lynn E. Blais
State Bar No. 02422520
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 E. Dean Keeton
Austin, Texas 78705
(512) 232-1334
(512) 471-6988 (fax)

ATTORNEY for Amicus Curiae
Galveston Chamber of Commerce

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Amicus Curiae Brief were sent by electronic and U.S. mail on November 12, 2009, to the following counsel of record:

Mr. Daniel L. Geyser
Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548

Mr. J. David Breemer
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834

Mr. Brian E. Berwick
Assistant Attorney General
Environmental Protection
and Admin. Law Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Mr. Barry C. Willey
Galveston County Legal Dept.
727 Moody, Fifth Floor
Galveston, TX 77550-2317

Mr. Kenneth C. Cross
Assistant Attorney General
Environmental Protection
and Admin. Law Division
Office of the Attorney General
P.O. Box 12548

Lynn E. Blais