IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

No. A142035

FRIENDS OF MARTIN'S BEACH,
Plaintiff and Appellant,

v.

MARTINS BEACH 1, LLC, et al.,
Defendants and Respondents.

On Appeal from the Superior Court of San Mateo County
(Case No. CIV517634, Honorable Gerald Buchwald, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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APPLICATION OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION TO APPEAR AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

Pursuant to California Rule of Court 8.200(c),[1] and for the reasons set forth in this application, Pacific Legal Foundation, California Farm Bureau Federation, and California Cattlemen's Association respectfully request permission to file the accompanying brief in support of Respondents Martins Beach 1 & 2, LLC, for the affirmance of the lower court decision.

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals nationwide support PLF, as do many organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue,

[1] *Amici* affirm that no party or counsel or any party, or any other person other than amici and its counsel authored this application or brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission.

Washington; Washington, D.C.; and Palm Beach Gardens, Florida.

The Foundation has litigated many cases defending private property rights in the Supreme Court of the United States. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF has also participated in many cases involving the public trust doctrine throughout the United States. *See, e.g., Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 44 Cal. 4th 459 (2008) (proposed expansion of the public trust doctrine over all wildlife); *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012) (legislative expansion of public beach access effecting a taking of private property); *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 955 N.E.2d 935 (Ohio 2011) (boundary of public trust land along Lake Erie). Moreover, PLF attorneys have contributed to the body of scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1 (2002).

PLF and its supporters believe that this case is of significant importance to California's landowners and has far-reaching implications for their

traditional rights in property. PLF believes that its public policy perspective and litigation experience will provide an additional and useful viewpoint in this case.

The California Farm Bureau Federation (Farm Bureau) is a non-governmental, nonprofit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing nearly 57,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Farm Bureau aims to improve the ability of individuals engaged in production agriculture to utilize California resources to produce food and fiber in the most profitable, efficient, and responsible manner possible guaranteeing our nation a domestic food supply. To that end, Farm Bureau is involved in efforts to protect the resources of the state, including air and water quality and the preservation of agricultural land. Farm Bureau also actively participates in state and federal legislative and regulatory advocacy relating to the protection of private property rights on behalf of its members.

This case raises issues of vital concern to the membership of Farm Bureau. Farm Bureau members are farmers and ranchers who utilize and depend on agricultural lands to grow food and fiber. Specifically, Farm Bureau members have a proprietary interest in their farming operations and the ability to use the land and soil without broad public interference, especially permanent interference, to produce crops.

One of the key issues in this case is the ability of the public to enter private property and interfere with land uses without complying with constitutional requirements, including the requirement to pay just compensation when appropriating private property rights. Because the members of Farm Bureau have a substantial interest in minimizing the unnecessary taking of agricultural land, and ensuring that questions regarding just compensation are resolved properly and adjudicated consistently, Farm Bureau respectfully joins in this brief.

The California Cattlemen's Association is a mutual benefit corporation organized under California law in 1923 as an "agricultural and horticultural, nonprofit, cooperative association" to promote the interests of the industry. Membership in the California Cattlemen's Association is open to any person or entity engaged in breeding, producing, maturing or feeding of cattle, or who leases land for cattle production. The California Cattlemen's Association is the predominate organization of cattle grazers in California, and acting in

conjunction with its affiliated local organizations it endeavors to promote and defend the interests of the livestock industry.

California's ranchers are confronted daily by trespassers who vandalize, litter, cultivate marijuana, operate methamphetamine laboratories, chase livestock, and often act inappropriately. Government agencies employ legions of people to protect public lands from the public. A park ranger may police nude beaches along a stream, but what is a rancher to do? Public lands can be closed to the public to protect the land. The United States Fish and Wildlife Service now claims more land than the National Park Service, but one seldom sees public access to those lands. If the public is deemed to have a right to enter private ranch land to access streams, lakes, or the ocean, who is to determine the "intent" of a trespasser? Are they accessing the river, or just enjoying mountain biking on the ranch? Who answers to the water boards for the erosion on bike trails, who is liable for injuries? Who suffers the loss from the fires? A right of access would present all those questions.

The proposed *amicus* brief does not repeat arguments made by the parties to our knowledge. The California Cattlemen's Association, to reduce the risk of duplicity, seeks to join in the attached brief authored by Pacific Legal Foundation and respectfully submits that the brief would assist the Court in deciding the matter before it. We therefore join Pacific Legal Foundation's request for leave to file the accompanying brief *amicus curiae.*

For the above reasons, Pacific Legal Foundation, California Farm Bureau Federation, and California Cattlemen's Association respectfully request this Court to grant their application to file the accompanying brief amicus curiae.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION

INTRODUCTION

This case endangers a coastal landowner's fundamental right to exclude trespassers from his property—a principle central to the existence of private property. Respondents hold fee simple title perfected by the federal government and confirmed by the United States Supreme Court without mention of any encumbrances. *See United States v. Alviso*, 64 U.S. 318 (1859); Memorandum of Decision and Order at 6-7. Nevertheless, Plaintiff-Appellant Friends of Martin's Beach contends that the public has acquired a right to invade and use Respondents' property for recreational purposes. Adoption of the Friends' constitutional argument would reduce the Respondents' property interest in the coastal land at issue to "little more than the naked fee." *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984). It would also sanction an uncompensated taking of an easement or right-of-way, which the state would otherwise have to pay for

through eminent domain. The superior court correctly rejected this far-reaching claim.

SUMMARY OF ARGUMENT

The Friends contend that Article X, Section 4, of the California Constitution guarantees the public the right to cross any private land in order to reach the tidelands. This is wrong. An unbroken line of California cases dating back more than a century squarely rejects the theory that the public's right to use navigable waters gives rise to an implied easement for the public to access private land to *reach* those waters. Courts in other jurisdictions are in accord, holding that private property rights trump any supposed right of the public to cross private land to reach public trust waters, even where the water is entirely contained within the property. If this Court holds to the contrary, such that Article X, Section 4, suddenly creates a state constitutional right to trespass on private, dry land, that constitutional provision would amount to a taking of property under the Federal Constitution's Takings Clause. On the other hand, if the Court construes the common law public trust doctrine to authorize a public easement on private land, this construction would be an unconstitutional judicial taking.

A decision creating public access would also have severe consequences. Property owners have the authority to make decisions about the management of their property. This includes the ability to decide whether to operate a fee-for-parking program and determine who may enter the property. The Friends

would force Respondent to continue the fee-for-parking operation regardless of cost and desire. But this case is about far more than access to Martins Beach. The Friends' legal theories under the California Constitution and the public trust doctrine would open up every property adjacent to public trust waters to public intrusion. In addition to being contrary to precedent, an adverse decision would destabilize long-established property expectations throughout the state.

Therefore, this Court should affirm the judgment below and uphold the rights of property owners to exclude trespassers from their property.

I

THE PUBLIC TRUST DOCTRINE—WHETHER ARISING FROM COMMON LAW OR THE CALIFORNIA CONSTITUTION—DOES NOT GIVE THE PUBLIC A RIGHT-OF-WAY ACROSS PRIVATE PROPERTY[2]

A. Article X, Section 4, of the California Constitution Has Never Been Interpreted to Create a Right-of-Way Across Private Property

The Friends' constitutional argument is premised on Article X, Section 4, of the California Constitution. That provision provides:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

Originally passed in 1879, the section codified the public trust doctrine endorsed by the Supreme Court of the United States in *Illinois Central Railroad Co. v. United States*, 146 U.S. 387, 456-59 (1892). *See State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 227 (1981); *Carstens v. Cal. Coastal*

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[2] To be clear, *amici* agree with Respondents and the superior court that the public trust doctrine is inapplicable to Respondents' property because Respondents' predecessor in-interest had his property interest confirmed by the Supreme Court of the United States free of any public trust encumbrances. *See* Statement of Decision at 9-13. But even if this Court were to find otherwise, *amici* contend that no right of access exists under either Article X, Section 4, of the California Constitution or the common law public trust doctrine.

Comm'n, 182 Cal. App. 3d 277, 288 (1986) (describing a plaintiff's argument that an amendment to a coastal development permit "violates the public trust doctrine set forth in Article X, section 4 of the California Constitution and the Coastal Act of 1976"). "Under the public trust doctrine, the state has title as trustee to all tidelands and navigable lakes and streams and is charged with preserving these waterways for navigation, commerce, and fishing, as well as for scientific study, recreation, and as open space and habitat for birds and marine life." *Santa Teresa Citizen Action Grp. v. City of San Jose*, 114 Cal. App. 4th 689, 709 (2003) (citing *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 434-35 (1983)). The "tidelands" are the area on the beach repeatedly covered and uncovered by the ebb and flow of the tide. *Marks v. Whitney*, 6 Cal. 3d 251, 257-58 (1971). The dry sand beach and upland areas have never been held to be a part of public trust lands in California. *See* Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground To Stand On*, 11 Ocean & Coastal L.J. 47, 49-50 (2006) (explaining that "the portion of the beach that is open to the public varies from state to state because states apply the public trust doctrine and custom differently" and that California "use[s] the mean high tide line" as a cutoff).

To be sure, some California courts have expansively interpreted the public trust doctrine. *See* Harry R. Bader, *An Analysis of the Potential Impact of the Public Trust Doctrine on the Sovereign's Use of its Eminent Domain Power*, 18 Hamline L. Rev. 50, 52 (1994). However, no court has recognized

a public easement across dry, non-tideland private property for the purpose *accessing* public trust lands.[3] On the contrary, a long line of California cases has expressly rejected this proposition.

For instance, in the course of adjudicating disputed claims to real estate in Oakland, the California Supreme Court in *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 160 (1897), held that the state has the right to transfer the tidelands to private owners so long as "no right of the public to their use for the purposes of navigation would be prejudiced." *Id.* at 184. The Court recognized that "the private ownership of the shore may prevent access to the navigable waters of the bay," but noted that "the private ownership of the upland [may also] prevent access to the shore and to the navigable waters, in the same sense and to the same extent." *Id.* at 185. Most importantly for present purposes, it found both possibilities unremarkable. If the existence of private land near the coast made beach access more difficult, "the laws of all civilized states provide an ample remedy"—that is, the use of the eminent domain power. *Id.* Simply decreeing a right of access was not an option.

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[3] Many authorities refer to a "public trust easement" that sovereign States cannot alienate even if they transfer title to the underlying property. *See, e.g.*, Bader, *supra*, at 53-54 ("[P]rivate lands encompassing public trust resources are encumbered by an easement which is retained by the state, (and cannot be conveyed away), as part of the state's public trust fiduciary obligations."); *Nat'l Audubon Soc'y*, 33 Cal. 3d at 434. The traditional public trust easement (not to be confused with what is sought in this case) only covers the land that is actually part of the public trust—navigable waters and the tidelands. The Friends not only seek a traditional public trust easement, but a new easement to allow the public to reach the tidelands in the first place.

In *Bolsa Land Co. v. Burdick*, 151 Cal. 254 (1909), a three-judge panel of the California Supreme Court arrived at a similar conclusion. There, a property owner sought an injunction preventing several individuals from trespassing on his land to hunt wild birds near water on the land. The defendants asserted that "these waters were and are navigable waters, and that they have a right which they enjoy as members of the public" to access them. *Id.* at 259. The panel concluded that even if the waters were navigable, the defendants would have no right to lawfully cross the private property in order to reach them. The Court recognized that "it would require much rashness and temerity to assert, that the public has a right to invade and cross private lands to reach navigable waters." *Id.* In any event, the panel held that the waters were not navigable. *Id.* at 262-63. Therefore, it directed the trial court to issue the requested injunction. *Id.* at 263.

Then, in *Bohn v. Albertson*, 107 Cal. App. 2d 738 (1951), this Court held that waters on the plaintiffs' property were temporarily navigable due to flooding and thus reversed a decree of the trial court which allowed the owner to quiet title to them. Because the waters were deemed navigable, they were within the public trust and the property owners could not exclude the public from fishing there until reclamation. *See id.* at 757. However, the Court was careful to note that the public was *not* entitled to trespass across the portions of the property not covered by the public trust to get to the navigable water. *See id.* ("Plaintiffs, until the land is reclaimed, have no right to prevent the

public from fishing on, or navigating these waters, *provided the public can do so without trespassing on plaintiffs' land*." (emphasis added)). This Court reaffirmed that view in 1982, stating that "[Article X, Section 4] prohibits the erection of structures which would block established right of way to the tide lands, but it does not authorize the invasion of private property to acquire access to the public trust area without the necessity of exercising the power of eminent domain." *Pac. Legal Found. v. Cal. Coastal Comm'n*, 180 Cal. Rptr. 858, 863 (Cal. Ct. App. 1982) (citation omitted), *vacated on other grounds by* 33 Cal. 3d 158 (1982); *see also Heist v. Cnty. of Colusa*, 163 Cal. App. 3d 841, 851 (1984) ("If there is no direct access, persons using Laux Road must trespass across private property to gain access to the Sink; as trespassers, they have no right to do so."); *Charpentier v. Von Geldern*, 191 Cal. App. 3d 101, 110 (1987) ("[I]t is settled that a person has no right to enter onto and cross private property to reach navigable water.").[4]

Thus, California courts have repeatedly rejected the notion that the public has a right to trespass across private, non-public trust lands without the owner's consent simply because public trust lands exist on the other side. The Supreme Court of the United States recognized the controlling effect of these

[4] The California Attorney General came to the same conclusion. 41 Op. Cal. Att'y Gen. 39, 41 (1963) ("In spite of the sweeping provisions of [Article X, Section 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing.").

cases in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In defending the Coastal Commission's demand for a public access easement on privately-owned dry beach as a condition of a building permit, dissenting Justice Brennan cited Article X, Section 4, which he claimed "considerably antedates any private development on the coast," making coastal landowners the "interlopers" upon the public's expectation of coastal access. *Id.* at 847-48 (Brennan, J., dissenting). But the majority, relying in part on the California cases discussed above, rejected this argument, concluding that "to obtain easements of access across private property the State must proceed through its eminent domain power." *Id.* at 832 (majority opinion). The precedent has not changed substantially since *Nollan*. Therefore, no state case—and certainly no case from the California Supreme Court—gives the public a state constitutional right to access the tidelands through Respondent's property.

B. Other States Similarly Refuse To Recognize an Easement on Private Land To Reach Public Trust Lands

The vast majority of jurisdictions outside California also reject the proposition that the public trust doctrine guarantees the right to trespass on private property to reach tidelands.

The Michigan Supreme Court recently reaffirmed the existence of the public trust doctrine and held that the public has the right to walk the shores of Lake Michigan below the "ordinary high water mark." *See Glass v. Goeckel*, 703 N.W.2d 58, 63-66, 73-74 (Mich. 2005). Even so, the court noted

that "*[t]he public trust doctrine cannot serve to justify trespass on private property*." *Id.* at 75 (emphasis added). Thus, the court sanctioned access only in the actual area of the public trust, not a right-of-way to pass over private property that abuts the lake. *Id.* at 73 ("The public trust doctrine includes walking *within its boundaries*." (capitalization deleted) (emphasis added)).

For more than a century, Massachusetts courts have consistently affirmed that the public has "no right to cross, without permission, the dry land of another for the purpose of gaining access to the water or the flats in order to exercise public trust rights." *Sheftel v. Lebel*, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998). This principle dates back to *Slater v. Gunn*, 49 N.E. 1017 (Mass. 1898), when the Supreme Judicial Court ordered that an injunction issue preventing individuals from trespassing on the plaintiff's property to reach a navigable pond. In rejecting the claimed public access, the court stated that "it never has been understood that the public were at liberty to cross private lands lying between a highway and the sea, for the purpose of gaining access to the latter." *Id.* at 1020. Instead, "an express easement . . . granting the right to walk across the private dry land of another to reach the public trust area between the high and low water marks, [is] essential in order to make such access lawful." *Sheftel*, 689 N.E.2d at 505. Maine courts have generally followed Massachusetts. *See Bell v. Town of Wells*, 557 A.2d 168, 173-75 (Me. 1989) (refusing to extend public easement in the tidelands to recreational activities).

In *City of Montpelier v. Barnett*, 49 A.3d 120 (Vt. 2012), the Vermont Supreme Court held that a municipality could not prevent the public from recreating on a pond that provides its drinking water. Because the state held title to the pond as a navigable waterway under the public trust doctrine, the City had no power to regulate activity on the pond without authority granted by the state. *Id.* at 128-29. But the court's decision did not affect the City's right to exclude trespassers from the land surrounding the pond. Rather, the court explicitly agreed with the City that the public could not cross City lands to reach the pond without the City's permission. *See id.* at 141-42. It held that "[t]he City may strive to prevent indirectly the recreational use of [the pond] by denying access to its lands that surround [it], but it may not directly regulate use of the pond itself." *Id.* at 143.

Texas also refuses to recognize a common law right to access privately-owned dry beach above the line of mean high tide. *See Severance v. Patterson*, 370 S.W.3d 705, 732 (Tex. 2012) (rejecting the state's claim that it acquired a "rolling easement" across private property after the vegetation line moved without any proof of prescription or dedication). *See also Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 929 (Tex. Civ. App. 1964) ("We suppose they seek to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power to cut off convenient access. We know of no such rule of law. In our

extensive research we have found no cases so holding nor have any been cited us.").

The list of similar decisions goes on. *See Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 198 P.3d 219, 233 (Mont. 2008) (noting that prior public trust cases have included a "cautionary note that nothing herein . . . shall be construed as granting the public the right to enter upon or cross over private property to reach the State-owned waters hereby held available for recreational purposes.")[5]; *Cavanaugh v. Town of*

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[5] The Montana legislature attempted to reverse those prior decisions, *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984), and *Montana Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984), by passing the Stream Access Law, Mont. Code Ann. § 23-2-201 *et seq.* *See Bitterroot*, 198 P.3d at 233-34. The Montana Supreme Court struck down that law in part in *Galt v. State*, 731 P.2d 912 (Mont. 1987). There, the court stated:

> We reaffirm well established constitutional principles protecting property interests from confiscation. Landowners, through whose property a water course flows as defined in *Curran* and *Hildreth*, have their fee impressed with a dominant estate in favor of the public. This easement must be narrowly confined so that impact to beds and banks owned by private individuals is minimal. Only that use which is necessary for the public to enjoy its ownership of the water resource will be recognized as within the easement's scope. The real property interests of private landowners are important as are the public's property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible.

Id. at 916. Thus, even after passage of the Stream Access Law, the public did not enjoy the right to cross privately-owned land not covered by the public trust to reach the bed and banks.

Naragansett, No. WC 91-0496, 1997 WL 1098081, at *9 (R.I. Super. Ct. Oct. 10, 1997) ("[G]enerally the [public trust] doctrine does not provide rights of perpendicular access across non-trust lands to reach trust lands.")[6]; *Kellogg v. Harrington*, 149 Wash. App. 1054, at *10 (2009) (holding that the public has no right even to traverse privately-owned *tidelands*).

Overall, the weight of authority in other jurisdictions strongly supports the conclusion of California courts that the public has no right—whether grounded in the state constitution or common law—to a perpendicular right-of-way over private land to reach public trust-impressed tidelands. In asserting otherwise, the Friends seek an unprecedented expansion of the public trust doctrine, one that would eviscerate property owners' fundamental right to keep their land private. This Court should reject that argument and affirm Respondent's right to control access to private property.

C. A Ruling Granting Access to Private Land Adjacent to Public Trust Areas Would Destabilize Property Expectations Throughout the State

If this Court grants the public a right to cross private property because that property is adjacent to public trust waters, it would undermine property rights and expectations across the state. This case is not just about the rights of one landowner. Rather, the right of access the Friends desire would burden

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[6] The *Cavanaugh* court said that "some states have broadened the trust's protections so as to provide reasonable perpendicular access across non-trust property to access trust lands." *Id.* But the court provided no citation to any out-of-state decision or law to support that assertion.

all California residents who own property adjacent to the public trust. All of these property owners would then be potentially subject to public easements, eviscerating their right to control the persons or activities allowed on their property.

The right to exclude others from private land at the heart of this case is not just about saying "no" to trespassers. It also gives property owners the ability to *allow* access, while controlling the time, place, and manner of that access so as to protect their resources and privacy. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 373 (1954) ("Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision."). The Friends' arguments would not only take this core right to decide what happens on one's own property from Respondent; they would undermine it for all Californians who own coastal land next to public waters. Oceanfront farm land,[7] timber land, and developed lands all potentially would be subject to public use, and the owners' core right to control access to their property would be jeopardized. This goes too far. Even in the First

[7] California has a significant amount of coastal farmland that would be potentially affected by the outcome of this case. *See Important Farmland in California, 2002*, FARMSREACH, http://blog.farmsreach.com/wp-content/uploads/2013/08/StateMapwithPSUFarmland_001.jpg (last visited May 4, 2015).

Amendment context, this Court has recognized that non-public establishments do not have to permit trespassers onto their property for the purpose of expression. *See Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662, 1669-71 (1991). Similarly, this Court should confirm that coastal property owners have the right to control the use of their land by strangers, even when there is high demand for access, and thereby avoid a ruling that would destabilize the rights and expectations of multitudes of landowning Californians. *Cf. Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (an unforeseeable change in state property law by a state court that upsets property owners' "reasonable expectations" is not entitled to deference by the Supreme Court in a takings case).

What is more, the Friends' novel theories do not only endanger coastal property rights. The public trust covers all navigable waters in the State, including lakes and rivers, not just Pacific shore lands. *Santa Teresa Citizen Action Grp.*, 114 Cal. App. 4th at 709. If this court decrees public access to land that lies adjacent to public trust waters, there is nothing in the State Constitution or the public trust doctrine to limit that access only to certain types of property or certain landowners. After all, Article X, Section 4, says that it applies to any person claiming possession of any "harbor, bay, inlet, estuary, or other navigable water in this State."

Consequently, if the Court rules that the public may enter the coastal land in this case to reach public trust lands, any land with a navigable (public

trust-impressed) river or lake on it or near it may suddenly become open for trespassing. This possibility would upset established property rights throughout California and likely generate increased conflict and litigation between property owners and the public. *Compare Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482-83 (1988), *with id.* at 493-94 (O'Connor, J., dissenting) (in a public trust case, both the majority and dissent contend that their results would not upset settled property rights expectations in Mississippi and elsewhere); *see also Escobedo v. Estate of Snider*, 14 Cal. 4th 1214, 1227 (1997) (rejecting an interpretation of the Uniform Aircraft Financial Responsibility Act, Cal. Pub. Util. Code § 24230, *et seq.*, that would likely cause "confusion" and "increased or renewed litigation").

This Court should reject this outcome and affirm California landowners' traditional right to determine who may access their land and when and how that access can occur. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

II

IMPOSITION OF THE CLAIMED RIGHT-OF-WAY WOULD BE AN UNCONSTITUTIONAL TAKING UNDER THE FEDERAL CONSTITUTION

There is another significant problem with the Friends' argument that the California Constitution guarantees a right-of-way across Respondents' property: creation of such an easement would effect a taking under the United

States Constitution. Because federal constitutional rights supersede any guarantee that may exist under the California Constitution or state common law, this court cannot sanction an interpretation of California law that contravenes the Takings Clause. U.S. Const. art. VI, cl. 2. A declaration of a public access easement here would have the effect of depriving Respondent of property without just compensation. It would therefore be unconstitutional.

A. Imposition of Public Access on Private Land Amounts to an Unconstitutional Physical Taking

For decades, the Supreme Court of the United States has recognized that a physical invasion of private property, no matter how small, constitutes a *per se* taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). An unconstitutional physical occupation of property occurs when the government authorizes a person to intermittently use another's property. *Nollan*, 483 U.S. at 831. As a result, if a government entity authorizes the public to access to a landowner's property, it must pay just compensation. *Kaiser Aetna*, 444 U.S. at 179-80. Put another way, "a [*per se*] taking would occur if the Government appropriated a public easement" no less than if its own agents or equipment permanently occupied a parcel. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 24 (1990) (O'Connor, J., concurring) (citing *Nollan*, 483 U.S. at 831-32); *see also Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent

basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, *we have no doubt there would have been a taking*." (emphasis added)).

The strict physical takings standard governing the imposition of public easements stems from the primacy of the property owner's right to exclude strangers, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176. Any government action that divests a property owner of the right to exclusive control of property, by forcing the owner to share its use and access with the public, amounts to a physical taking. *Nollan*, 483 U.S. at 831; *McKensie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

Typically, when the government divests property owners of their right to exclude, it does so through legislative or executive actions. *See Nollan*, 483 U.S. at 828 (California Coastal Commission); *Loretto*, 458 U.S. at 421 (New York statute). However, it is now settled that courts can also commit unconstitutional takings. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 714-15 (2010) (plurality opinion) ("It would be absurd to allow a State to do [to property rights] by judicial decree what the Takings Clause forbids it to do by legislative fiat.").

B. If the State Constitution Were Construed To Impose Public Access on Respondents' Private Land, It Would Create a Taking Under the Federal Constitution

The Court should not construe Article X, Section 4, of the California Constitution to require public access on private property, because such an interpretation would violate the Fifth Amendment to the United States Constitution. Under the Supremacy Clause, the United States Constitution is "the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." *McCullogh v. Maryland*, 17 U.S. (4 Wheat.) 316, 382 (1819). Indeed, since 1897, the states have been bound by the Fifth Amendment's Takings Clause. *See Chicago, Burlington & Quincy R.R., Co. v. City of Chicago*, 166 U.S. 226, 239 (1897). State laws, including state constitutions, are therefore subject to the Federal Takings Clause. *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994).

The Court has consistently declared unconstitutional state laws that transform private property into public property without just compensation. *See, e.g., Loretto*, 458 U.S. at 441 (invalidating a New York statute that required landlords to permit a cable television company to install equipment on private property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (striking down a Florida statute that allowed a county to take interest accruing in an interpleader fund deposited with a court, stating that "a State, by *ipse dixit*, may not transform private property into public property

without compensation"). It also has not hesitated to strike down state constitutional provisions found contrary to a federal constitutional guarantee. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down Colorado constitutional provision that prohibited the State or its subdivisions from granting homosexual persons protected status under any anti-discrimination law); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating Virginia constitution's poll tax for state elections); *Guinn v. United States*, 238 U.S. 347, 368 (1915) (invalidating clause in the Oklahoma Constitution that imposed a literacy test to register to vote, but exempted those who had been eligible to vote before January 1, 1866).

Here, the court is urged to construe Article X, Section 4, of the California Constitution to require property owners to open up their property to public access if the public "needs" a route to get to the tidelands. But, as noted above, the Federal Takings Clause forbids the government from forcing a property owner to dedicate an easement over fee simple private property, like that here, without compensation. *Kaiser Aetna*, 444 U.S. at 179-80. Therefore, this Court would put Article X, Section 4, in conflict with the Federal Takings Clause—a conflict the Takings Clause must win—if it held that the state provision indeed requires a public right of way over Respondents' property.

It is settled, however, that courts should "wherever possible" construe provisions "to avoid constitutional infirmity." *Arias v. Superior Court*, 46 Cal.

4th 969, 984 (2009). Under that rule, this Court should not reach out to declare that Article X, Section 4, requires Respondents to allow the public to invade the property when a reasonable alternative construction exists. In this case, the alternative construction is the one adopted by courts in California and many other jurisdictions for many years: the public has a right to use areas covered by the public trust doctrine, but this does not give rise to a corollary right in the public to an access easement over all adjacent coastal property. *See, e.g.*, *Bolsa Land Co.*, 151 Cal. at 259; *Bohn*, 107 Cal. App. 2d at 757. This Court should reaffirm that construction to avoid an unconstitutional taking.

C. If the Court Construed the State's Public Trust Doctrine To Authorize Public Access, a Judicial Taking Would Result

If this Court creates a public access easement on private land based on the common-law public trust doctrine, it would be in danger of committing a judicial taking. A judicial taking occurs when "a court declares that what was once an established right of private property no longer exists." *Stop the Beach*, 560 U.S. at 715 (emphasis deleted). Because state law defines the precise contours of property rights, whether an established property right exists in a particular case is a question of state law. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). Consequently, a judicial taking arises when a court construes state law to eviscerate private property rights, without

supporting state law precedent or in the face of contrary case law. *Stop the Beach*, 560 U.S. 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."); *Lucas*, 505 U.S. at 1032 n.18 ("[A]n affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.").[8] A court decision that violates the Constitution as a judicial taking under this framework is void. *See Stop the Beach*, 560 U.S. at 715.

The Friends essentially ask this Court to judicially appropriate Respondents' land by suddenly construing the public trust doctrine to give them access to the land. Plainly, no inherent public right exists in California to invade private land to reach the tidelands. There is no "authority for the proposition that background principles of [California] property law preclude private beachfront property owners from ever having had the right to exclude strangers from their land, as other [California] property owners do."

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[8] *See also Lucas*, 505 U.S. at 1029 ("Any limitation so severe [as to effect a regulatory taking] cannot be newly legislated *or decreed* (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." (emphasis added)); *Webb's Fabulous Pharmacies*, 449 U.S. at 164 ("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." (emphasis added)).

*Severanc*e, 370 S.W.3d at 730. On the contrary, California cases have held just the opposite, establishing the right to exclude even where access was necessary to reach the public trust lands. *See, e.g.*, *Oakland Water-Front Co.*, 118 Cal. at 185; *Bolsa Land Co.*, 151 Cal. at 259. Reversing that precedent would upset long-settled expectations and be tantamount to a judicial declaration eviscerating the right to exclude. *Loretto*, 458 U.S. at 435. It would therefore be an unconstitutional judicial taking to ignore prior public trust doctrine precedent for the purpose of creating a new "public trust" easement on dry, upland private property.

CONCLUSION

This Court should reject the argument that the public has a right to cross private property to reach the tidelands and affirm the judgment of the San Mateo County Superior Court.

DATED: May 12, 2015.

Respectfully submitted,

J. DAVID BREEMER
CHRISTOPHER M. KIESER

By /s/ Christopher M. Kieser
CHRISTOPHER M. KIESER

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE is proportionately spaced, has a typeface of 13 points or more, and contains 6,866 words.

DATED: May 12, 2015.

/s/ Christopher M. Kieser
CHRISTOPHER M. KIESER

DECLARATION OF SERVICE

I, SUZANNE M. MACDONALD, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On May 12, 2015, a true copy of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 12th day of May, 2015, at Sacramento, California.

/s/ Suzanne M. MacDonald
SUZANNE M. MACDONALD