No. 22-40350

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles Sheffield; Pedestrian Beach, L.L.C.,

Plaintiffs – Appellants,

v.

George P. Bush, in his official capacity as Commissioner of the Texas General Land Office; Ken Paxton, in his official capacity as Attorney General for the State of Texas,

Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of Texas
Honorable Jeffrey Vincent Brown, District Judge

APPELLANTS' OPENING BRIEF

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Certificate of Interested Persons

No. 22-40350

Charles Sheffield; Pedestrian Beach, L.L.C. v.
George P. Bush, in his official capacity as Commissioner of the Texas General Land Office; Ken Paxton, in his official capacity as Attorney General for the State of Texas

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff – Appellants	**Defendants – Appellees**
Charles Sheffield; Pedestrian Beach, L.L.C.	George P. Bush, in his official capacity as Commissioner of the Texas General Land Office; Ken Paxton, in his official capacity as Attorney General for the State of Texas
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/s/ J. David Breemer
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Statement Regarding Oral Argument

This appeal involves important issues regarding whether state officials should be preliminary enjoined from imposing a public beach on private land, in violation of constitutionally protected property rights. Appellants accordingly respectfully request oral argument.

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Statement of Jurisdiction

This case was filed in the district court pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and *Ex parte Young*, 209 U.S. 123 (1908). The district court issued an opinion and order denying Appellants' motion for a preliminary injunction on May 24, 2021. ROA.1309-1352. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

Statement of Issues

The Commissioner of the Texas General Land Office (Commissioner) issued an Order declaring that, for two years, the "public beach" extends "to a line 200 feet inland from the line of mean low tide (MLT)." Record Excerpts (RE) at 54-56. Under Texas law, a public beach is accessible to the public. Appellants (Owners) own residentially developed lots that lie wholly or partially within the 200-foot public beach area established by the Order. The Owners did not receive notice, a hearing, or just compensation before the Order authorized the public beach area on their lots. Nor did the Commissioner judicially establish the existence of a public easement before decreeing one on the lots. The district court denied the Owners' request for a preliminary injunction to halt the unconstitutional enforcement of the Order.

The question presented on appeal is:

Did the district court err in denying a preliminary injunction when the Owners are likely to prevail on their claims that the authorization of a public beach easement on their land violates the Takings Clause, Due Process Clause, and Fourth Amendment "Seizure" Clause, and there is no monetary remedy for the harm to the Owners' property and privacy interests due, in part, to the Commissioner's sovereign immunity from damages claims?

Introduction

Appellants Charles Sheffield and Pedestrian Beach, LLC (Owners) own beachfront parcels in Surfside Beach, Texas. Under Texas law, dry beaches located inland of the mean high higher tide line are private property. The Owners' lots and homes are located landward of the mean higher high tide line. ROA.252-55; RE88-91 (9/22/21 surveys). The Owners use their beach-front properties for vacation rentals, and for personal and family use. *See* ROA.213 ¶ 20 (Porter Declaration); ROA.251 ¶ 20 (Sheffield Declaration).

The Owners' properties (and their rights) changed drastically on March 29, 2021, when the Commissioner issued an Order decreeing that,

in Surfside Beach, the "public beach shall extend to a line 200 feet inland from the line of mean low tide (MLT)," for the next two years. *See* RE54-56; RE57-61; ROA.131-33; ROA.249. This new, 200-foot public beach area—which the Order sometimes calls an "easement"—covers many privately owned beach parcels, including the Owners'. Indeed, significant portions of the Owners' lots are located within the 200-foot public beach area established by the Order.

The Order's establishment of a public beach easement on their lots means their properties are now subject to public access under Texas' "Open Beaches Act" rules and regulations. *See, e.g.*, Tex. Nat. Res. Code § 61.013(a).[1] This has enormous consequences for Sheffield and Pedestrian Beach's property and privacy rights. Their titles include the fundamental "right to exclude" strangers from their private beachfront land. *Severance v. Patterson*, 370 S.W.3d 705, 726 (Tex. 2012). But because the Order places a public beach easement on portions of the

[1] Tex. Nat. Res. Code § 61.013(a) states: "It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively, lawfully and legally to enter or to leave any public beach or to use any public beach[.]"

Owners' lots, people now have a beach access right to invade those formerly private areas, most of which are immediately adjacent to the homes. ROA.217 ¶ 44.

The Owners sued the Commissioner in his official capacity, seeking only prospective, equitable relief, and alleging that the Order causes an ongoing taking, seizure, and deprivation of the Owners' property rights, in violation of the Takings Clause of the Fifth Amendment, the Fourth Amendment, and the Due Process Clause. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) (government authorization of "a permanent and continuous right [in the public] to pass to and fro" is a taking); *Severance v. Patterson*, 682 F.3d 360 (5th Cir. 2012) (an "unreasonable seizure" claim arose from imposition of a public beach easement on private beach property). The district court ultimately denied the Owners' request for a preliminary injunction because it believed they had not shown "irreparable harm." RE10-53; ROA.1348-52.

This was error. The Owners are likely to succeed on the merits of their claims, and the Order causes substantial harm to the Owners' fundamental rights to exclusively use their property for the privacy and safety of their families and guests. No monetary remedy is available to

remedy that harm due to the Commissioner's sovereign immunity, and even if one were available, it would not adequately redress their loss of real property and privacy rights in this case.

I.

Statement of the Case

A. Texas Coastal Property Law

1. Background law

Gulf coast beaches in Texas are comprised of two distinct zones. The generally "wet beaches" lying between the MLT and the mean high tide line are state owned property held in trust for public use. The public has a right to access these wet beach areas. *Luttes v. Texas*, 324 S.W.2d 167, 169, 191-92 (Tex. 1958); *Severance*, 370 S.W.3d at, 714-15. The lands located inland of the mean high tide line—between that line and first line of vegetation (LOV)—are generally "dry beaches" and are privately owned. *Severance*, 370 S.W.3d at 714; *id.* at 724. Thus, the mean high tide line (sometimes called, "mean high water mark") is the default boundary between publicly and privately owned beaches in Texas. *id.* at 714; *id.* at 726 ("*Luttes* [] set the boundary between State and privately owned property at the mean high tide line.").

Like all Texas shorelands that trace to a Mexican land grant, the high tide boundary in Surfside Beach is precisely demarcated as the *mean higher high tide line*. This line or mark is determined by the average of the highest daily tides over a 19-year period. *Luttes*, 324 S.W.2d at 187; *Severance*, 370 S.W.3d at 717.

While dry beaches lying landward of the mean high tide line are private property, they can be encumbered with public access and use rights if and when the state proves that a public easement exists on the land under common law principles, such as prescription or dedication. *Severance*, 370 S.W.3d at 715 ("[W]here the dry beach is privately owned, it is part of the 'public beach' if a right to public use has been established on it."); *id.* at 719 ("The public has a right to use [ ] the beaches when the State owns the beaches or the government obtains or proves an easement for use of the dry beach under the common law[.]"); *Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923 (Tex. Civ. App. 1964) (adjudicating and establishing a public beach prescriptive easement along Galveston Island). Easements on private dry beaches "must be proved, not merely presumed." *Severance*, 370 S.W.3d at 714 ("the right to use [the privately held dry beach] is not presumed"); *id.* at 733 (Willett, J., concurring).

Thus, owners of private "dry" beach lands lying inland of the mean high tide line enjoy all incidents of private title, including the right to exclude non-owners from the land, *Severance*, 370 S.W.3d at 724; *id.* at 726, unless and until an easement is judicially established, or otherwise properly obtained, as by purchase or consent. *Id.* at 733 (Willett, J., concurring).

When private shore land is deemed to be subject to a public beach easement, the area becomes open to public access and use under the Texas Open Beaches Act and related regulations. *Moody v. White*, 593 S.W.2d 372, 377, 379 (Tex. Civ. App. 1979) ("Affirming the public policy of this State, the Act provides that the public has the free and unrestricted right of ingress and egress to, and the right of use and easement to and over, public beaches from the line of mean low tide to the line of vegetation.")[2]; 31 TAC § 15.2(6) (recognizing the public's "right to use and enjoy the public beach, including the right of free and

[2] *See also*, *Gulf Holding Corp. v. Brazoria County*, 497 S.W.2d 614, 618 (Tex. Civ. App. 1973) (The "policy of the State of Texas [is] that the beaches are to be protected for use of the public . . . . This legislation is meant to protect that right by providing a quick and effective means by which the representatives of the public can seek removal of structures which encroach upon that right.").

unrestricted ingress and egress to and from the public beach"); 31 TAC § 15.3(c) (recognizing Commissioner's duty to "protect[] the public's right to use and have access to and from the public beach"). Indeed, Open Beaches Act rules and regulations prohibit the owners of shoreland subject to a "public beach" or a "public easement" from taking any action to exclude public access, under pain of stiff civil penalties. Tex. Nat. Res. Code § 61.013(a) ("It is an offense . . . for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively, lawfully and legally to enter or to leave any *public beach*[.]") (emphasis added); *see also* 31 TAC § 15.9 (penalties).

2. *Severance* confirmed the mean high tide boundary and that state officials must prove public easements under common law before asserting them on private beaches to the vegetation line

Although the mean high tide line has been the lawful public/private beach boundary for over 80 years in Texas, the Commissioner has long treated the more inland first line of vegetation (LOV), as the private/public beach boundary. *Porretto v. Texas General Land Office*, 448 S.W.3d 393, 395 (Tex. 2014) ("[T]he state has been reluctant to accept the [mean high tide boundary] line set in *Luttes*."). Under this LOV

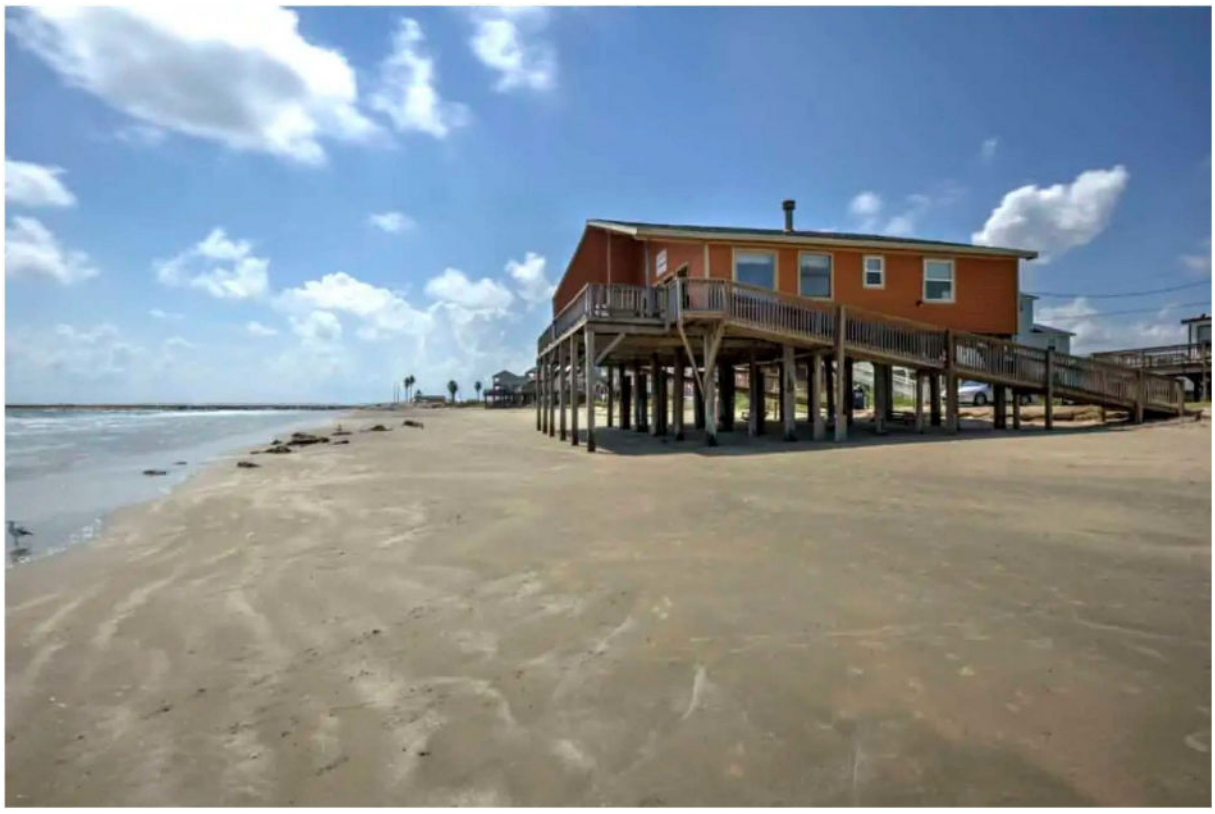
boundary policy, the Commissioner has long presumed that private "dry beaches" lying between the mean high tide line and the LOV are subject to a public beach easement. *Severance*, 370 S.W.3d at 708 ("[T]he State claims that it is entitled to an easement on privately owned beachfront property without meeting the law's requirements for establishing an easement.").

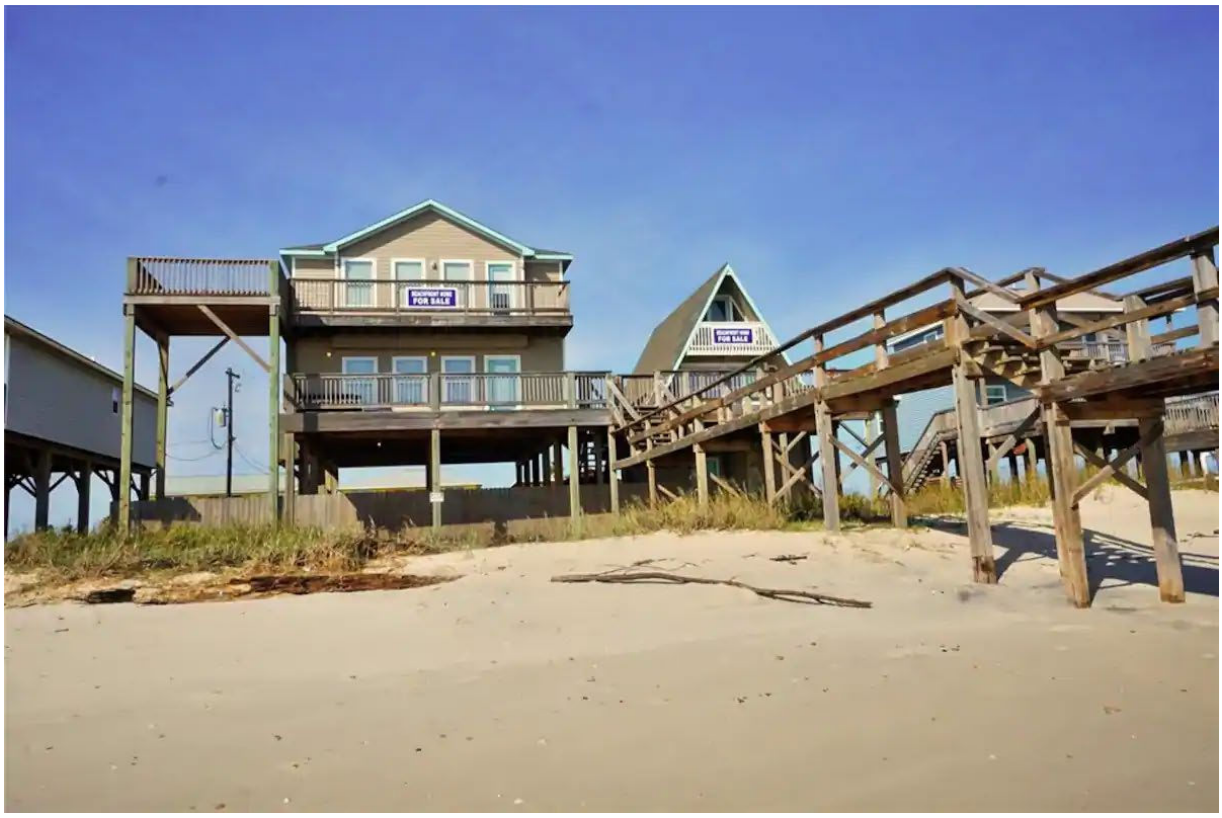
In 2012, after certification of state law questions from this Court, *Severance v. Patterson*, 566 F.3d 490, 503-04 (5th Cir. 2009), the Texas Supreme Court rejected the Commissioner's policy of using the LOV as the landward boundary of the public beach. The Court confirmed the mean high tide line boundary between public and private beaches, and held that officials must prove an easement exist on an area of private land under common law concepts, like prescription, before asserting one on that area. *Severance*, 370 S.W.3d at 714; *id.* at 721; *id.* at 733 (Willett, J., concurring).

Despite *Severance*, Open Beaches Act regulations enforced by the Commissioner continue to state that the LOV (not the mean high tide line) is the private/public beach boundary and that all beaches (whether private or not) lying seaward of the LOV are presumed to be a "public

beach." 31 TAC § 15.3(b)(7) ("The determination of the location of the line of vegetation by the commissioner of the General Land Office . . . constitutes prima facie evidence of the landward boundary of the area subject to the public easement[.]"); 31 TAC § 15.3(b) ("The line of vegetation is typically used to determine the landward extent of the public beach."); *id.* § 15.10(c) ("a local government shall presume that any beach fronting the Gulf of Mexico within its jurisdiction is a public beach").

B. The Owners and Their Properties





RE74, 85; *see also*, ROA.230; ROA.261.

1. Sheffield's properties

Sheffield owns three separate beachfront parcels in Surfside Beach, each developed with a single-family home. RE75-84 (Declaration); ROA.249-51. Two of his parcels, those at 109 and 111 Beach Drive, are immediately adjacent to each other. ROA.249-250. Sheffield purchased these properties together in 2019 for approximately $570,000. ROA.250 ¶ 12. In 2015, Sheffield acquired another parcel located at 814 Beach Drive, for approximately $235,000. ROA.250 ¶ 15. That lot contains a

home that was lawfully constructed in 1984. A paved two-lane road—Beach Drive—separates 814 Beach Drive from the Gulf waters. ROA.250 ¶¶ 14-18.

All of Sheffield's Beach Drive lots are located landward of the mean higher high tide line. ROA.252-55. Title to the 109 and 111 Beach Drive lots includes a dry beach area lying inland of the mean higher high water mark. ROA.255 (photo). No one has ever established a public easement on the properties. ROA.252 ¶¶ 26-29. When Sheffield purchased the properties they were not "on the public beach." *Id.* Neither Sheffield nor his predecessors has ever dedicated the land at 109, 111, and 814 Beach Drive for public use. *Id.*

While Sheffield's beach homes are often rented to families for beach vacations, he also regularly uses them for "family visits and vacations with [his] three sons and their families, which include eight grandchildren." ROA.251 ¶ 20.

2. Pedestrian Beach's property

Pedestrian Beach, LLC, owns a beachfront lot and a 2,400-square-foot "duplex" home at 1206/1207 Sargrasso Circle, Surfside Beach. RE64-73 (Declaration); ROA.211-12 ¶¶ 5-9. The Sargrasso lot was acquired by

family members in 1981. The "duplex" home was lawfully built in 1986 for approximately $79,000. ROA.212 ¶ 13.

The home on the 1206/1207 Sargrasso lot is located landward of the mean higher high tide line, and includes a dry beach area. ROA.246 (survey photo). There is no public beach easement on the Sargrasso property. Neither Pedestrian Beach, LLC, nor their predecessors have ever dedicated the property to public use and no one has ever judicially established a public easement exists on the Sargrasso parcel. ROA.214-215 ¶¶ 25-27. When Pedestrian Beach, LLC, acquired the Sargrasso property, it was not classified by state officials as "on the public beach." In the past, Pedestrian Beach has exercised its right to exclude members of the public from their property to maintain privacy. ROA.217 ¶ 43.

C. The 200-Foot Public Beach Order

1. The Order

In late summer of 2020, two tropical storms—Hurricane Laura and Tropical Storm Beta (2020 storms)—came ashore in Texas. These storms suddenly altered the topography of beaches in the Surfside area.

ROA.131. Agents of the Commissioner surveyed the beaches in Surfside Beach between October 2020 and January 2021. *Id.*

On March 29, 2021, the Commissioner issued an Order entitled, "Temporary Order Suspending Determination of the Line of Vegetation and Suspending Enforcement of Certain Encroachments on the Public Beach." ROA.131-33. The Order was promulgated pursuant to Tex. Nat. Res. Code §§ 61.0171[3] and 61.0185 (provisions of the Open Beaches Act) and is effective for two years. *Id.*

The Order begins by finding that the 2020 storms "obliterated" the LOV in Surfside Beach. It then declares that, to give the LOV time to

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[3] Section 61.0171 states, in pertinent part:

> (a) The commissioner may, by order, suspend action on conducting a line of vegetation determination for a period of up to three years from the date the order is issued if the commissioner determines that the line of vegetation was obliterated as a result of a meteorological event. For the duration of the order, the public beach shall extend to a line 200 feet inland from the line of mean low tide as established by a licensed state land surveyor.
>
> . . . .
>
> (h) The line of vegetation, as determined by the commissioner under Subsection (f), shall constitute the landward boundary of the area subject to public easement until the line of vegetation moves landward due to a subsequent meteorological event, erosion, or public use, or until a final court adjudication establishes the line in another place.

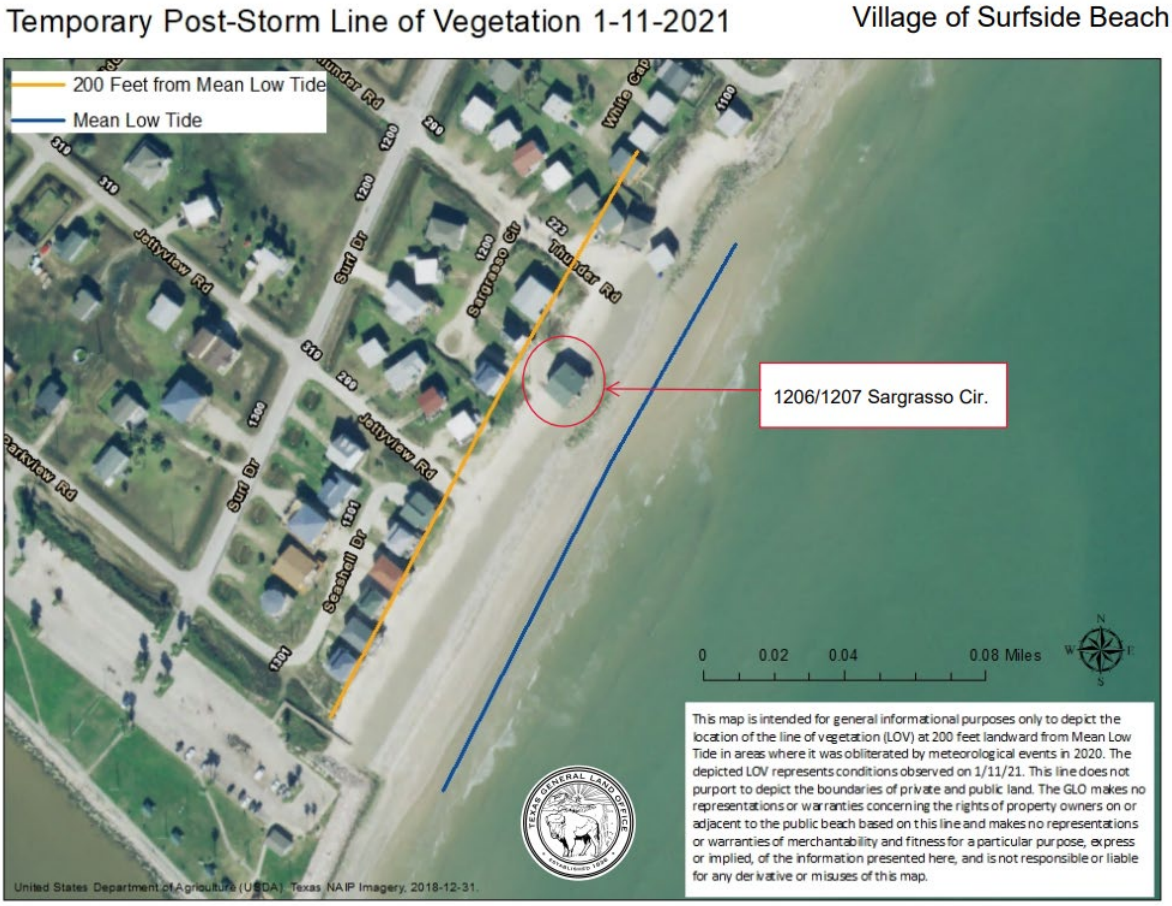
recover, (1) "[f]or the duration of the Order, the landward boundary of the public beach extends from the line of mean low tide (MLT) to a line 200 feet inland from MLT;" (2) "[f]or the duration of the order," the public beach shall extend "to a line 200 feet inland from MLT as established by a licensed state land surveyor," and that (3) "[t]he area from MLT to 200 feet landward shall be the minimum public beach easement."[4] ROA.131-32.

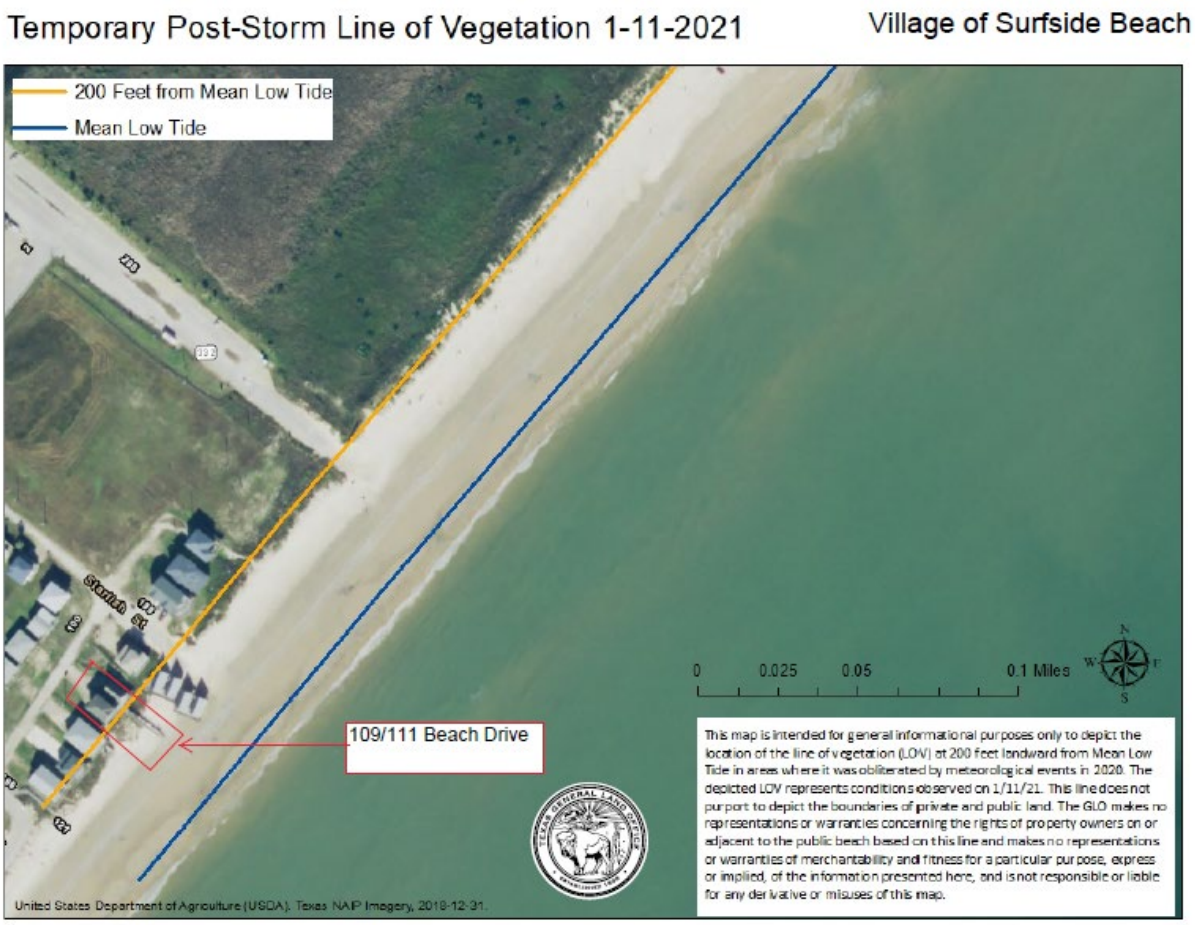
The Order also suspends state efforts to remove any "encroachments," like homes, that come to be on the "public beach" for three years. ROA.132. The Order notes it is to be "filed for record" in the "real property records of the county," as well as published online and in various governmental regulatory outlets. ROA.133. The Order was in fact recorded as a land "grant," to the public as "grantee," in the recording offices of Brazoria County, home of Surfside Beach. ROA.1292-96.

Upon issuing the Order, the Commissioner also issued aerial photos showing the location of the new 200-foot (from MLT) public beach

[4] The Order notes that areas *landward* of the 200 foot (from MLT) line may also be subject to a public beach easement, depending on whether an easement is established there under state law common law principles. The Order imposes no such condition on its authorization of a public beach easement from the MLT line to the 200 foot line.

boundary line along the Surfside Beach shore. These photos show the 200-foot line on the Owners' parcels and numerous other residential properties. ROA.159, 161. *See also* https://www.glo.texas.gov/coast/coastal-management/forms/files/lov-resources/surfside-post-storm-lov.pdf (last viewed, July 10, 2022).





RE62-63.

The Commissioner also published a "Frequently Asked Questions" (FAQ) document with the Order. ROA.153-57. The FAQ states that, because of the Order, "some homes may now be on the public beach." The FAQ document further notes that those who own property within the 200-foot "public beach" area established by the Order cannot (a) "repair, replace, or construct a slab of concrete, fibercrete, or other impervious material" on their property, (b) add a room or any other additional square

footage to their houses; and (c) cannot place any material other than sand on their lots if a portion of their land falls within 200-foot public beach area. ROA.156-57.

Neither Sheffield, Pedestrian Beach, nor anyone working on their behalf received notice of the Order prior to its issuance. ROA.219 ¶ 57; ROA.253 ¶ 34. No notice of the Order was posted on their properties or received through electronic or regular mail. The Commissioner did not provide the Owners, or any Surfside Beach property owners subject to the Order, an opportunity to be heard prior to its issuance. ROA.219 ¶ 57; ROA.257 ¶ 57. The Commissioner did not judicially establish the existence of an easement between the MLT and a line 200 feet inland of that line in Surfside Beach before he decreed an easement via the Order. ROA.110 ¶ 32. The Order became immediately effective on March 29, 2021, and has encumbered the Owners' property since then.

2. Effect of the Order on the Owners' Properties

The 200-foot public beach easement created by the Order covers portions of Sheffield's properties lying between the MLT and 200 feet inland. *See* ROA.159; ROA.254-55. Indeed, the 200 feet (from MLT) public beach boundary line bisects the 109 and 111 Beach Drive

properties, just a few feet away from the homes. *Id.* The entire front (beachside) yard of the 109 and 111 Beach Drive parcels are within the 200-foot "public beach" easement area authorized by the Order. About a third of a private, beach stairway that connects the 109 and 111 Beach Drive homes to the sand is within the Order-authorized "public beach" area. ROA.254-55.

Sheffield's home at 814 Beach Drive is partially or wholly seaward of the new, 200-foot public beach boundary line, placing that home, and the land under and around the home, within the 200-foot (from MLT) "public beach" area authorized by the Order. ROA.254 ¶ 42.

Pedestrian Beach's home at 1206/1207 Sargrasso is entirely seaward of the new 200-foot public beach boundary line set by the Order. The entire parcel, including the home and curtilage, is therefore within the 200-foot "public beach" easement area established by the Order. ROA.252-53.

The imposition of a public beach easement on the Owners' lots subjects those areas to state and local laws and regulations that (1) guarantee public access to all public beaches and public beach easements, and (2) forbid property owners from lawfully excluding people

from public beach easement areas. *See* Tex. Nat. Res. Code § 61.013(a); *see also*, (Commissioner certified) Village of Surfside Beach, Dune Protection and Beach Access Plan, at 37 (as amended Sept. 2015) ("The public beach within the Village of Surfside Beach, Texas, constitutes a public recreational resource[.]"), *available at* http://www.surfsidetx.org/page/open/1014/0/Beach%20Access%20Plan.pdf; 31 TAC § 15.7(n).

The imposition of a public beach easement on the Owners' lots also triggers an array of repair and building restrictions on their parcels. Beach regulations enforced by the Commissioner categorically bar government from authorizing construction on private land subject to a "public beach." 31 TAC § 15.5(c)(1) ("[L]ocal government is prohibited from issuing a certificate authorizing any person to undertake any construction on the public beach."). While some repairs to preexisting *structures* on a public beach are permissible, 31 TAC § 15.11, all *new* construction is forbidden. ROA.156 (FAQ document notes that, under the Order, "[y]ou can't construct a room addition or increase the size of the structure's footprint or construct a new structure."). Moreover, the rules also prohibit many types of repairs even for preexisting structures that

come to be on the beach, including construction that would "increase the footprint of the house," "use [ ] impervious material, including but not limited to concrete or fibercrete," or "include the construction of an enclosed space below the base flood elevation." *See* 31 TAC § 15.11(d)(2)-(4); *see also,* ROA.156-57 (FAQ document states that, under the Order, one cannot (a) "repair, replace, or construct a slab of concrete, fibercrete, or other impervious material" on their property; (b) add a room or any other additional square footage to their houses; and (c) cannot place any material other than sand on their lots.").

As part of its preliminary injunction motion, Pedestrian Beach testified that it "would like to continue making repairs and improvements to the Property, as needed, including placement of fill material and other repairs to make the Property able to withstand future storms," ROA.219 ¶ 52, but that it will not do so now because the Order puts the Sargrasso property within the repair-restricted "public beach." Sheffield testified that he would like to put a "no trespassing" sign on his 109/111 Beach Drive beach stairway, but must refrain from doing so because the stairway is now on a "public beach" area where he no longer has the right to exclude. ROA.256 ¶ 51; *see* 31 TAC § 15.7(n) ("A local government shall

not cause any person to display or cause to be displayed on or adjacent to any public beach any sign . . . which states that the public beach is private property or represent in any other manner that the public does not have the right of access to and from the public beach[.]").

Finally, the Owners have alleged and testified that the Order "limits the homes' privacy, safety and raises serious liability concerns," ROA.255 ¶ 45, and "reduces the value of the Property and may render the Property unsalable." ROA.219 ¶ 55.

D. District Court Procedure

On May 24, 2021, Plaintiffs filed a complaint against the Commissioner and one other, now dismissed, Texas Official,[5] in their official capacities. On June 18, 2021, Plaintiffs filed a First Amended Complaint (FAC), the operative complaint. ROA.102-28. The FAC alleges that the Order violates the Constitution on its face and as-applied to Plaintiffs' properties, to the extent it establishes a "public beach" on their private land lying between MLT and 200 feet inland. The complaint specifically asserts that the Order violates the Takings Clause, the

[5] The FAC originally included a claim against the Texas Attorney General, in his official capacity, but the Owners voluntarily dismissed that defendant during proceedings in the district court.

Fourth Amendment, and the Fourteenth Amendment's Due Process Clause.[6] The claims seek prospective equitable relief only under *Ex parte Young*, 209 U.S. 123 (1908).

On July 24, 2021, the Owners filed a motion for a preliminary injunction. ROA.171-208. On August 9, 2021, the Commissioner filed a motion to dismiss the complaint. The court held a hearing on both motions on October 25, 2021. On May 24, 2022, the court issued a published opinion and order denying the Commissioner's motion to dismiss with respect to three out of four of the Owners' claims, while also denying the Owners' motion for preliminary injunction. ROA.1309-52. The Owners timely appealed the denial of the motion for preliminary injunction on June 1, 2022. ROA.1353.

Standard of Review

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *Moore v. Brown*, 868 F.3d 398, 402 (5th Cir. 2017). "Factual findings are reviewed for clear error, while legal conclusions are

[6] The FAC also originally raised a state law claim for declaratory relief under Tex. Nat. Res. Code § 61.019, but the Owners voluntarily abandoned that state law declaratory relief claim during proceedings in the district court.

reviewed de novo." *Id.* at 403. When a lower court's denial of an injunction turns on a mixed question of law and fact, the Court reviews the denial *de novo*. *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006). The denial in this case involves mixed issues of fact and law; it is therefore reviewed under a *de novo* standard. A party is entitled to a preliminary injunction when there is:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that irreparable injury will result if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985) (quoting *Canal Auth. of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

Summary of Argument

The Owners satisfy all factors required for the grant of a preliminary injunction. The Owners have a right to seek an injunction to halt the ongoing violation of their constitutionally protected property rights by state officials. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996, 1005 (5th Cir. 1996) (holding, in a takings case, that "the Eleventh Amendment does not protect the state from

federal suits seeking injunctive relief"); *Arnett v. Myers*, 281 F.3d 552, 568 (6th Cir. 2002). In authorizing a public beach on their lots, without due process, just compensation, or compliance with settled state law predicates for establishing public easements on private land, the Commissioner is appropriating the Owners' property interests for public use, in violation of the Constitution. The district court denied the Commissioner's motion to dismiss the Owners' claims for good reason: they are substantial and strong.

First, the Owners are likely to prevail on their claim that the Order violates their rights under the Takings Clause of the Fifth Amendment by authorizing an uncompensated "public beach" easement on the Owners' lots. Because the Order imposes a "public beach" area on their lots, the Owners' property is now subject to public access and use. Tex. Nat. Res. Code § 61.013(a); *Gulf Holding Corp.*, 497 S.W.2d at 618; 31 TAC § 15.2(6); 31 TAC § 15.3(c). The Order gives members of the public a right to invade the Owners' land for "public beach" use, while divesting the Owners of the right to exclude unwanted strangers from their residential property. Tex. Nat. Res. Code § 61.013(a); 31 TAC § 15.7(n).

Second, the Owners assert a meritorious claim that the Order violates the Due Process Clause because the Commissioner issued and recorded the Order without providing prior notice or an opportunity for the Owners to be heard. They had no pre-deprivation opportunity to object to the Commissioner's authorization of a public beach easement to the 200-foot (inland of MLT) line or to the mistaken and unconstitutional factual and legal premises underlying that determination.

Third, and finally, the Owners are likely to prevail on their claim that the Order effects an unreasonable seizure of the Owners' real property interests. The Order authorizes a public beach easement on private land by administrative fiat, without any pre-issuance attempt on the part of state officials to establish the existence of the easement under mandatory state law easement principles, such as prescription or dedication. This Court has previously held that such action gives rise to a valid unreasonable seizure claim. *Severance v. Patterson*, 682 F.3d 360 (5th Cir. 2012).

The district court did not disagree with the foregoing arguments, but declined to grant a preliminary injunction because it believed the Owners have not satisfied the "irreparable harm" prong of the

preliminary injunction test. This was error. The Owners have no adequate remedy at law for the ongoing, unconstitutional imposition of a public easement on their lots because sovereign immunity bars monetary damages against the Commissioner. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). The Owners can obtain only prospective, equitable relief against the Commissioner. *Id.* A sovereign immunity barrier to damages justifies a finding of irreparable harm. *Odebrecht Const., Inc. v. Sec'y, Florida Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."); *see also Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

Even if one could theoretically seek damages from the Commissioner, they would not adequately remedy the injuries in this case. Real property is unique, and this is nowhere more true than in the context of private beach land. The Order's destruction of the Owners' ability to use, enjoy, and control the dry beach portions of their property

(their backyard) qualifies as "irreparable harm." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 297 (5th Cir. 2012) ("The deprivation of an interest in real property constitutes irreparable harm.") (citation omitted); *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (finding irreparable harm in part because the challenged regulatory action "intrudes on one of the most fundamental elements of property ownership—the right to exclude") (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

The imposition of a public beach easement on the Owners' lots not only irreparably damages their property interests in the encumbered areas, it also harms their privacy in the adjacent homes. The Order burdens portions of the Owners' land immediately next to their homes with a public beach easement *See* ROA.159; ROA.254-55. It consequently gives the public a right to occupy these sensitive, formerly-private areas, providing a full view of the homes' windows, doors, and other areas. ROA.217 ¶ 44. The damage to the Owners' privacy, and the privacy of their guests, is substantial and qualifies as "irreparable harm." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)

(when "the constitutional right of privacy [is] 'either threatened or in fact being impaired,'" irreparable injury exists); *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 280 n.15 (5th Cir. 2012) ("the district court properly explained that [a loss of privacy] *could* form the basis of a claim of 'irreparable injury'") (citing *Deerfield*, 661 F.2d at 338).

The balance of equities also favors a preliminary injunction. The public will suffer no harm if the Commissioner is enjoined from enforcing a public beach on the Owners' properties while a court resolves the issue of constitutionality. After all, no public beach or public easement was previously established on the Owners' lots. An injunction forbidding the Commissioner from enforcing a public beach easement on the Owners' private lots will not change the status quo with respect to public/private beaches or their boundaries. It will preserve it by halting the sudden and unconstitutional extension of the public beach from the mean high tide boundary line to the more-inland 200-foot (from MLT) beach boundary line.

Argument

I.

The Owners Are Likely to Prevail on the Merits

The Owners raise meritorious takings, due process, and unreasonable seizure claims against the Order's authorization of a "public beach" easement on land they own between MLT and 200 feet inland from the MLT. While the Order uses the phrases "public beach" and "public beach easement" interchangeably to describe its effect on land within the 200 feet-from-MLT area, the Order is properly understood to establish or authorize a public "easement" because private owners retain title to the affected private land.

The Order's easement decree gives members of the public a right, under state law, to access and occupy the Owners' lots, stripping their private titles of the fundamental right to exclude non-owners from the land around their homes. *Gulf Holding Corp.*, 497 S.W.2d at 618. It also triggers severe building restrictions on the affected land. The Order imposed these burdens without any prior notice or hearing opportunity for the Owners, and without any attempt on the part of the Commissioner to properly establish the existence of a public easement under state

common law precepts, like prescription or dedication, before he superimposed one on the Owner's private land. The result is an ongoing taking, seizure, and deprivation of core private property interests in violation of the Constitution.

A. The Owners Will Prevail on Their Takings Claims

1. Takings standards

The Takings Clause of the Fifth Amendment prohibits uncompensated takings of private property. U.S. Const. amend. V. A "taking" occurs when government occupies real property or authorizes its invasion by third parties. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Such a "physical taking" of property is unconstitutional regardless of the public purpose for the taking, its size, or its duration. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

The most obvious example of a *per se*, "physical" taking occurs when the government takes possession of property for its own use. *Id.* at 2071. But direct, invasive action is not always necessary. Regulations and laws that authorize a physical invasion by others are also treated as *per se* physical takings. *Id.* at 2072. It is just as much a taking when regulations grant third parties, such as members of the public, a right to access

private land, as when government itself physically enters land. *Id.* ("The access *regulation appropriates a right to invade* the growers' property and therefore constitutes a *per se* physical taking.") (emphasis added); *Nollan*, 483 U.S. at 833.

The governmental grant of a public right to invade property is typically described as the appropriation of an "easement," *Cedar Point*, 141 S. Ct. at 2072-73 ("The Court has . . . often described the property interest taken as a servitude or an easement."), and the Supreme Court has repeatedly made clear that the uncompensated taking of an easement on private land is automatically unconstitutional. *Cedar Point*, 141 S. Ct. at 2073 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.") (quoting *Kaiser-Aetna v. United States*, 444 U.S. 164, 180 (1979)); *see also Nollan*, 483 U.S. at 834 ("requiring uncompensated conveyance of the [access] easement outright would violate the Fourteenth Amendment"). That is, a Takings Clause violation arises as soon as the government gives people a *right* to invade private land; i.e., an easement. *Cedar Point*, 141 S. Ct. at 2073 ("the appropriation of an easement constitutes a physical taking"); *id.* at 2075 ("What matters is . . . that the government

had taken a right to physically invade the Nollans' land. And when the government physically takes an interest in property, it must pay for the right to do so.").

Courts so readily consider the governmental authorization of a public easement as a taking because such action deprives property owners of the "right to exclude" non-owners from their property. *Nollan*, 483 U.S. at 831-32. This right is a "'fundamental element of the property right,' that cannot be balanced away." *Cedar Point*, 141 S. Ct. at 2077 (quoting *Kaiser Aetna*, 444 U.S. at 179-80); *Nollan*, 483 U.S. 831-32; *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991). The right to exclude enjoys such strict judicial protection, at least in part, because private property ownership loses its "private" character as soon as an owner cannot lawfully exclude strangers. Jace C. Gatewood, *The Evolution of the Right to Exclude—More Than a Property Right, a Privacy Right*, 32 Miss. C. L. Rev. 447 (2014).

Under the Supreme Court's recent decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), property owners may raise federal takings claims in federal court without regard for potential remedies in state court. *Id.* at 2172-73. Put another way, property owners need not exhaust

potential state court compensation remedies or actions before asserting a violation of the Takings Clause in federal court. *Id.* ("The 'general rule' is that plaintiffs may bring constitutional claims under § 1983 'without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.' This is as true for takings claims as for any other claim grounded in the Bill of Rights.") (citations omitted). Further, in the context of suits against state officials under *Ex parte Young*, an injunction is the proper remedy for a violation of the Takings Clause. *Severance*, 566 F.3d at 495; *Washington Legal Found.*, 94 F.3d at 1005; *Arnett v. Myers*, 281 F.3d at 568.

2. By decreeing a public beach easement on land owned by the Owners, the Order violates the Takings Clause

It is undisputed that much of the Owners' residential land is located between MLT and 200 feet inland of that line, and thus, within the "public beach" easement area established by the Order. ROA.252-255 (Sept. 22, 2021, surveys). Moreover, the Owners uncontroverted testimony and allegations are that the Owners' lots have been wholly private since the time of purchase and the state has never established a

public beach easement on the Owners' lots, or in Surfside Beach in general. ROA.214-15 ¶¶ 25-28; *id.* 252 ¶¶ 26-29.

The Order eviscerates the Owners' property rights by authorizing a new public beach easement on their land. ROA.132 ("[T]he public beach shall extend to a line 200 feet inland from the line of mean low tide (MLT)" and "[t]he area from MLT to 200 feet landward shall be the minimum public beach easement."). Indeed, because "the public has vested property rights in Texas' public beaches, and free use of and access to and from the beaches are guaranteed," 31 TAC § 15.1(7); Tex. Nat. Res. Code § 61.013(a), the Owners cannot lawfully exclude people from "public beach" area that is now on their land. *See* 31 TAC § 15.7(n) ("A local government shall not cause any person to display or cause to be displayed on or adjacent to any public beach any sign, marker, or warning, *or make or allow to be made any written or oral communication which states that the public beach is private property or represent in any other manner that the public does not have the right of access to and from the public beach* or the right to use the public beach[.]") (emphasis added); 31 TAC § 15.16(b) (prohibited physical interference with public beach access "includes any circumstance that hampers, hinders, infringes, disturbs, or

creates, additional burden or cost on the exercise of the right of the public to *enter or leave the public beach or traverse any part of the public beach*") (emphasis added).

Therefore, by imposing a public beach easement on portions of the Owners' lots, the Order authorizes members of the public to invade and access the subject land, while stripping the Owners of their right to exclude strangers from the burdened portions of their lots. *See* 31 TAC § 15.7(n); *Gulf Holding Corp.*, 497 S.W.2d at 618. Whether one characterizes this as the taking of an easement, the grant of a right in the public to physically invade, or a denial of the right to exclude (and it is all of those), the result is an unconstitutional taking. *Cedar Point*, 141 S. Ct. at 2072 (a regulation caused "a *per se* physical taking" because it "appropriates for the enjoyment of third parties the owners' right to exclude"); *Nollan*, 483 U.S. at 832 (a physical taking occurs "where individuals are given a permanent and continuous right to pass to and fro" on private beach land); *Kaiser Aetna*, 444 U.S. at 180; *see also*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (plurality opinion) ("States effect a taking if they

recharacterize as public property what was previously private property.").[7]

The Commissioner is likely to argue that evidence of actual trespassing on the Owners' land is needed before a taking can arise from the institution of a public easement. Not so. A taking arises as soon as officials grant the public the easement, *Cedar Point*, 141 S. Ct. at 2073; *id.* at 2075. Whether or not people choose to use the easement on the Owners' lots frequently or infrequently is immaterial to the taking's existence. As soon as the Commissioner made the "easement across [the Owners'] beachfront [lot] *available* to the public," a taking arose. *Nollan*, 483 U.S. at 831 (emphasis added); *Cedar Point*, 141 S. Ct. at 2075.

B. The Owners Will Prevail on their Procedural Due Process Claim

The Due Process Clause of the Fourteenth Amendment includes procedural guarantees "meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The basic due process requirements are

[7] *See also Severance*, 370 S.W.3d at 726 (observing that recognition of a public easement on private land based on nothing but the landward movement of the vegetation line would be a taking due to interference with the owner's right to exclude).

(1) notice prior to a decision depriving a person of property, *Jones v. Flowers*, 547 U.S. 220 (2006), and (2) an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also*, *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993).

While due process protections overlap in some instances with the property protections afforded by the Takings Clause, a due process deprivation and a takings claim are not co-extensive. The injuries addressed by due process and takings actions are distinct and independently actionable. *See Archbold-Garrett v. New Orleans City*, 893 F.3d 318, 322 (5th Cir. 2018) (stating, in a property rights case, "[a] procedural due process violation is actionable and compensable without regard to any other injury" including a Takings Clause violation). Indeed,

> "there are many intangible rights that merit the protection of procedural due process although their infringement falls short of an exercise of the power of eminent domain for which just compensation is required . . . ." Even if a court were to decide that the [the government] did not violate the Takings Clause . . . they still violated her right to procedural due process.

Bowlby v. City of Aberdeen, 681 F.3d 215, 226 (5th Cir. 2012) (citations omitted). Consequently, a property owner can raise both a due process and takings claim, and each claim is analyzed independently. *James Daniel Good Real Prop.*, 510 U.S. at 49 ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.").

Due process standards, such as the requirement of pre-deprivation notice and hearing, come into play whenever government interferes with a protected liberty or property interest. "The deprivation of real or personal property involves substantial due process interests." *Serrano v. Customs & Border Patrol, U.S. Customs & Border Prot.*, 975 F.3d 488, 497 (5th Cir. 2020) (quoting *Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.)). In particular, the "right to exclude others" from private property is a constitutionally protected interest. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("[t]he hallmark of a protected property interest") But, as the district court properly held, other private interests in real property, including the right to use, rent, and repair property, are also subject to due process protections. *See Hidden Oaks Ltd. v. City of Austin*, 138 F.3d

1036, 1046-47 (5th Cir. 1998) (recognizing utility services and the right to rent property as protected interests); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property . . . includes the right to acquire, use, and dispose[.]"); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest.").

In this case, the Order interferes with a multiplicity of protected interests. First, it deprives the Owners of their protected right to exclude non-owners by placing a public beach on their private land lying between the MLT and 200 feet inland, thereby opening the land to public access. Further, the public beach imposition deprives the Owners of the ability to obtain permits to repair and build on their land, as needed. Prior to the Order, they could seek to build new structures on their lots, and to repair their existing structures, in almost any way they desired. *See* 31 TAC § 15.5(a). But once the Order put a public beach area on the lots, they were immediately barred from lawfully engaging in new building on their land, and restricted in repairing their homes. 31 TAC § 15.5(c)(1). Finally, the Owners have alleged, based on their experience in the vacation home business, that the Order's authorization of a public beach

easement reduces property values and interferes with their ability to market or sell their properties. ROA.217 ¶ 44; ROA.219 ¶ 55. At the most general level, the Order deprives them of the use and enjoyment of their properties. It accordingly deprives them of real property interests several times over.

Therefore, the central issue is whether the Commissioner's issuance of the Order violates the Owners' right to notice and an opportunity to be heard. The answer is "yes." The Officials do not dispute that they provided no specific or individualized notice to Surfside beachfront property owners before extending the public beach to 200 feet inland from the MLT, across private parcels. ROA.216 ¶ 33. While the Order was published on a few on-line outlets and recorded in the real property records of Brazoria County (where Surfside Beach is located), these steps did not occur prior to issuance of the Order, but only contemporaneously or afterward.

The Commissioner also failed to provide the Owners with any pre-deprivation opportunity to contest the Order, and the "findings of fact" and "rulings of law" upon which it purports to rest, before covering their lots with a "public beach" easement. ROA.219 ¶ 57. This is entirely

inconsistent with long-standing due process understandings about the need for proper procedure and fairness in the regulation of traditional property interests, such as the right to use, enjoy, and maintain real property. The Owners are accordingly likely to prevail on the merits of their procedural due process claim.

C. The Owners Will Prevail on Their Unreasonable Seizure Claim

The Owners are also likely to prevail on their Fourth Amendment "unreasonable seizure" claim. The Constitution protects property from unreasonable seizure in the civil, as well as criminal, context. *See Soldal v. Cook County*, 506 U.S. 56, 66-67 (1992).

To establish an unreasonable seizure, one must show (1) a protected interest; (2) a "seizure," *id.* at 61; and (3) unreasonableness. *Severance*, 566 F.3d at 502; *Freeman v. City of Dallas*, 242 F.3d 642, 649 (5th Cir. 2001) (en banc). This Court has already held that the Fourth Amendment applies to small, residentially developed beachfront lots, like those here. *See Severance*, 566 F.3d at 502. This Court's jurisprudence also makes clear that the imposition of an easement on previously unencumbered private land is "meaningful interference" with property. *Id.* at 501 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Thus, here,

the Order's authorization of a public beach easement on the portions of the Owners' lots lying between the MLT and the 200-foot line interferes with, and "seizes," their real property interests.

As to "reasonableness," the Order's imposition of a public beach easement on the Owners' lots is unreasonable because it is being imposed by administrative fiat, without any attempt by the Commissioner to establish an easement under traditional and mandatory state law easement rules. *Severance*, 370 S.W.3d at 714-15. Texas law forbids officials from presuming that private beach land is impressed with a public easement, and instead requires state officials to *prove* the existence of an easement on a particular area of private land under common law principles, before they may place a public beach easement on private land. *Severance*, 370 S.W.3d at 715; *id.* at 719; *id.* at 733 (Willett, J., concurring).

The Order ignores these required predicates for establishment of a public easement on private land, and simply decrees that a public beach easement exists on land to the 200 feet (from MLT) line at Surfside Beach. It is true that the 200-foot beach boundary set by the Order is intended as a proxy for the line of vegetation destroyed in Surfside Beach

by the 2020 storms. But this does not make the Order "reasonable" because the LOV has never been the public beach boundary at Surfside Beach; the mean higher high tide line holds that status. *Severance*, 370 S.W.3d at 714; *id.* at 726.

The vegetation line becomes a legitimate public easement boundary/marker only if and when (and after) state officials judicially establish (under traditional state law doctrines like prescription) that a public easement exists over an area demarcated by the LOV. But state officials have never established an easement to the vegetation on the Owners' lots or anywhere at Surfside Beach. ROA.110 ¶ 32. Consequently, under settled state law, the mean high tide line was the public/private beach boundary prior to the Order. The Order's declaration that a public beach extends beyond the mean high tide line, to a line 200 feet inland of the MLT, is utterly divorced from legitimate public/private beach boundaries (like the mean high tide line) and background property principles (like judicial proof of easement). It is therefore unreasonable. *Severance*, 682 F.3d 360.

II.

The Owners Have Established Irreparable Harm and the Equities Support a Preliminary Injunction

The Owners have not only shown a likelihood of prevailing; the evidence shows that they will suffer irreparable harm without a preliminary injunction. "Irreparable harm" generally exists "where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). The Owners are not required to show that irreparable harm is certain, but only that "irreparable injury is *likely* in the absence of an injunction." *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Here, the Owners will experience "irreparable harm" without an injunction because monetary damages are not available to remedy the Commissioner's violation of their real property and privacy interests. Moreover, even if some monetary remedy existed against the Commissioner, it would not adequately redress their injuries.

A. Monetary Relief Is Not Available Against State Officials; An Injunction Is the Only Remedy

For purposes of remedial analysis, the critical feature of this case is that it arises against state officials who enjoy sovereign immunity from

monetary damages claims. *Kentucky*, 473 U.S. at 169. An exception to such immunity exists under *Ex parte Young*—but only for claims that seek prospective equitable relief from a violation of federal law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984); *Green Valley Special Utility Dist. v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020). Indeed, the *Ex parte Young* avenue for obtaining injunctive relief against state officials exists precisely because damages claims are unavailable, leaving the Constitution's supremacy in doubt unless officials are subject to an equitable remedy. *Green v. Mansour*, 474 U.S. 64, 68 (1985).

The Owners have a right to sue state officials in federal court, including for violations of their constitutionally protected property rights, *Washington Legal Found.*, 94 F.3d at 1005; *Hirtz v. Texas*, 974 F.2d 663, 665 (5th Cir. 1992) (stating in a beach property rights case that sovereign immunity "does not bar suits for injunctive relief against state officials"), but they *cannot* seek monetary damages for such violations. *Green*, 474 U.S. at 68. This alone demonstrates that the Owners will experience irreparable harm if the Commissioner is not enjoined from enforcing the Order's public beach easement on the Owners' lots.

Odebrecht Const., 715 F.3d at 1289; *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 650 (M.D. La. 2015) ("that the Eleventh Amendment forbids PPGC from ever collecting monetary damages, even if Defendant's conduct is later found illegal, also militates in favor of deeming its likely harm to be irreparable").

B. The Loss of Real Property and Privacy in the Owners' Homes Is Irreparable Harm

Even if damages were available as a remedy for the Commissioner's authorization of a public beach on the Owners' lots (and they are not), that remedy would be inadequate to redress the harm to their real property and privacy interests, confirming the existence of "irreparable harm." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489.

Real property is unique, and private beachfront land is particularly different than other types of land. It is highly prized by people like the Owners because it provides the unique opportunity to live and recreate at the water's edge. This case does not just challenge a public easement, it challenges creation of a public area in the Owners' yard, in the shadow of their beach homes. Even if the Owners could theoretically seek compensation from the Commissioner for placing an easement on their land, the existence of public access will forever change the nature and

character of the Owners' private lots. The Owners' private backyard is now effectively a public park, which severely limits the Owners' enjoyment of their entire property. By giving the public a right to enter and use the Owners' beach-front land as a public beach, the Order interferes with every right the Owners would normally have in the area, including the right to exclude, control, use and enjoy the area. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489; *Loretto*, 458 U.S. at 423. Such a "deprivation of an interest in real property constitutes 'irreparable harm.'" *Opulent Life Church*, 697 F.3d at 297; *see also*, *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *16 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting) ("harms to real property, every plot of which is unique, often call for equitable remedies"); *Carpenter Technology Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (the taking of plaintiff's real property constitutes irreparable injury).

The Commissioner's imposition of a public beach easement not only harms the Owners' right to control and enjoy the now-encumbered land immediately next to their homes, it also damages their privacy in the homes themselves. The Owners and other families using the homes must now expect to encounter strangers near decks, windows, and other

private parts of their homes because the Order creates a publicly accessible beach in those areas. ROA.217 ¶ 44. The Order diminishes the Owners' and their families' privacy, and the privacy of their guests, and will force them to change their behavior in and around the homes and take new precautions for privacy and safety reasons. This Court has previously held that harm to privacy amounts to irreparable harm, and it should apply that rule here. *City of Deerfield Beach*, 661 F.2d at 338 ("[T]he right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief."). The Owners have thus shown that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22; *see Garcia-Rubiera v. Flores-Galarza*, 516 F. Supp. 2d 180, 197 (D.P.R. 2007) (finding irreparable harm where "[t]he Commonwealth provides no administrative procedure through which Plaintiffs may recover the taken interest. Moreover, the Eleventh Amendment prohibits a money damages award against the Commonwealth[.]").

C. The Equities and Public Interest Support an Injunction

The final two factors in preliminary injunction analysis—consideration of the balance of equities and public interest—"merge"

when, as here, "the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The balance of equities favors an injunction. On the one hand, the Owners have shown a substantial likelihood of ongoing harm to their constitutionally protected real property and privacy interests unless an injunction issues against enforcement of the Order and the public beach it places on their residential land.

On the other hand, a preliminary injunction will not harm the public. Prior to the issuance of the Order, the public did not have a public beach easement on the Owners' land or any right to lawfully access their land. ROA.214-15 ¶¶ 25-29. Indeed, the public has never established a public beach easement on any area of private dry sand beach within Surfside Beach. A preliminary injunction halting enforcement of the Order's sudden and new expansion of the public beach to 200 feet (from MLT) line will take no vested rights from the public. It will simply return public and private beaches at Surfside Beach to the status quo ante.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights," *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012), *cited with approval in Jackson Women's Health Org. v.*

Currier, 760 F.3d 448, 458 n.9 (5th Cir. 2014). The Court should therefore remand for issuance of a preliminary injunction that halts the Commissioner's violation of the Owners' property rights.

Conclusion

The Court should reverse and remand for entry of an order granting a preliminary injunction.

DATED: July 12, 2022.

Respectfully submitted,

s/ J. David Breemer
J. DAVID BREEMER

Attorney for Plaintiffs – Appellants

Certificate of Service

I hereby certify that on July 12, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ J. David Breemer
J. DAVID BREEMER

Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It is printed in Century Schoolbook, a proportionately spaced font, and includes 9,736 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2. I relied on my word processor, Microsoft Word, to obtain the count.

/s/ J. David Breemer
J. DAVID BREEMER

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United States Court of Appeals for the Fifth Circuit

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Document(s): Document(s)

Docket Text:
APPELLANT'S BRIEF FILED by Pedestrian Beach, L.L.C. and Mr. Charles Sheffield. Date of service: 07/12/2022 via email - Attorney for Appellees: Abrams, Ahmed, Doggett; Attorney for Appellant: Breemer [22-40350] (J. David Breemer)

Notice will be electronically mailed to:

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The following document(s) are associated with this transaction:
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