

TEXAS DEPARTMENT OF AGRICULTURE

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BLAKE. A. HAWTHORNE
CLERK

TODD STAPLES
COMMISSIONER

August 9, 2013

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

Re: No. 12-0838; In the Supreme Court of Texas; Philip Boerjan, Mestena Operating, LLC (Formerly Known as Mestena Operating, Ltd.), Mestena Inc., and Mestena Uranium, LLC, Petitioners, v. J. Jesus Rodriguez and M. Carmen Negrete, Individually, as Co-Representatives of the Estates of Nicolas Landeros-Anguiano, Angelina Rodriguez-Negrete and Claudia Laura Landeros Rodriguez, and as Next Friends of A.L.R., a Minor, Respondents; On Appeal from the Fourth Court of Appeals of Texas at San Antonio, No. 04-11-00336-CV

AMICUS CURIAE LETTER BRIEF OF THE TEXAS DEPARTMENT OF AGRICULTURE

Dear Mr. Hawthorne:

To the Honorable Supreme Court of Texas:

The Texas Department of Agriculture (TDA) files this *amicus curiae* letter brief in support of Petitioners Philip Boerjan, Mestena Operating, LLC (Formerly Known as Mestena Operating, Ltd.), Mestena Inc., and Mestena Uranium, LLC (collectively referred to as “Mestena”). TDA requests that copies of this letter be circulated to the Justices of the Supreme Court as they consider Mestena’s pending Petition for Review. In accordance with Rule 11 of the Texas Rules of Appellate Procedure, the undersigned certifies that copies of this *amicus curiae* letter have been served on all parties. Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, the undersigned certifies that no fee has been paid or will be paid for preparation of this letter brief.



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I. Statement of Interest.

The Texas Legislature finds that agriculture is a critical element in the economic, cultural, and historical development of Texas.¹ The State of Texas has established policies that promote agriculture production and among other priorities recognizes that the state must consider and address the:

preservation of farmland, ranchland, timberland, and other land devoted to agricultural purposes, by encouraging the development and improvement of the land for the production of food and other agricultural products consistent with the philosophy of a private property rights state.²

The Texas Department of Agriculture is charged by statute with encouraging the “proper development and promotion of agriculture, horticulture, and other industries that grow, process, or produce products in this state”³ and “protection of property rights and the right to farm.”⁴

The 32 Texas border counties⁵ are home to over 15,000 farms and ranches covering nearly 32 million acres—almost a quarter of all of the farm and ranch land in the state.⁶ These farms and ranches account for over half of all the state’s fruit and vegetable production, approximately a third of the state’s sheep and goat numbers, and more than a third of the state’s farm and ranch income from hunting.⁷

¹TEX. AGR. CODE §2.002(1).

²TEX. AGR. CODE §2.003(a)(12).

³TEX. AGR. CODE §12.002.

⁴TEX. AGR. CODE §2.003 (a)(11).

⁵Counties within 100 kilometers of the Mexican border as designated in Article 4 of the La Paz agreement. *Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area*, U.S.-Mex., Art. 4, Aug. 14, 1984, T.I.A.S. No. 10,827.

⁶*Census of Agriculture*, Texas State & County Data, Vol. 1, Parts 43(A)-(B) (U.S.D.A. 2009), available at

http://www.agcensus.usda.gov/Publications/2007/Full_Report/Census_by_State/Texas/.

⁷*Id.*

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All together these farms along the border produce in excess of \$1.3 billion dollars in agriculture sales annually, so it is critical to the economic health of the region and the state to ensure that these farmers and ranchers can continue growing the food that feeds our communities, state, country, and world.⁸

Key to the preservation and promotion of agriculture is the protection of private property owners' rights. In order to ensure the continued viability of Texas agriculture, an essential and significant portion of the Texas economy, the Court must recognize and continue to apply established Texas law recognizing these rights. These rights ensure that Texas farmers and ranchers can control and manage their land in a manner most conducive to producing a safe and affordable food and fiber supply. Landowners must be allowed to exclude trespassers from their land without fear of potential liability to these intruders. The issues brought before the Court in this case are not unique to Petitioners; rather, private property across South Texas is being subject to use as illegal thoroughfares for drug and human trafficking—by smugglers attempting to thwart border control by bypassing checkpoints. Brooks County, where the Jones Ranch is located, is home to the Falfurrias border patrol checkpoint, and smugglers frequently cross ranches to avoid the checkpoint.⁹

II. The Unlawful Acts Rule

Texas courts have applied the unlawful acts rule for more than a century¹⁰ to bar a plaintiff from recovering damages arising out of plaintiff's involvement in an

⁸*Id.*

⁹U.S. Army Generals (ret.) Barry R. McCaffrey & Robert H. Scales, *Texas Border Security: A Strategic Military Assessment*, 25 (2011), available at <http://protectyourtexasborder.com/Portals/6/Documents/Final%20Report-Texas%20Border%20Security.pdf>.

¹⁰“It may be assumed as undisputed doctrine that no action will lie to recover a claim for damages if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party... In those cases where it is shown that, at the time of the injury, the plaintiff was engaged in the denounced or illegal act, the rule is, if the illegal act contributed to the injury he cannot

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illegal act.¹¹ Courts have interpreted the unlawful acts rule to mean that a plaintiff cannot recover damages if the plaintiff's illegal act is "inextricably intertwined" with the claim and the alleged damages would not have occurred but for the illegal act.¹²

In the case at issue, Jose Maciel was illegally transporting decedents Nicholas Landeros-Anguiano, Angelina Rodriguez-Negrete and Claudia Laura Landeros Rodriguez, along with another passenger, Oscar Vasquez-Lara, around immigration checkpoints and through private property, in violation of 8 U.S.C. § 1325(a)(1) and (2).¹³ If Mr. Maciel and decedents had been observing the law, they would not have been trespassing on private property. Similarly, if Mr. Maciel and decedents had been observing the law, Mr. Maciel almost unquestionably would not have been driving at such a dangerous speed after Ray Dubose, an employee of Mestena Operating, LLC, noticed their presence on the ranch.¹⁴ Moreover, had the decedents not been entering the country illegally, they almost certainly would not have been crouched in the floorboard of a truck where they are exponentially more at risk to suffer fatal injuries in a motor vehicle accident.

Federal courts in Texas have found that the unlawful acts rule bars a plaintiff from recovering damages for injury that occurs while illegally entering the United

recover..." *The Gulf, Colorado & Santa Fe Railway Co. v. Johnson*, 9 S.W. 602, 602-603 (Tex. 1888).

¹¹ See *Sharpe v. Turley*, 191 S.W.3d 362, 366 (Tex. App.—Dallas 2006, pet. denied); *Saks v. Sawtelle, Good, Davidson & Troilo*, 880 S.W.2d 466, 467 (Tex. App.—San Antonio 1994, writ denied); *Rodriquez v. Love*, 860 S.W.2d 541, 544 (Tex. App.—El Paso 1993, no pet.); *Dover v. Baker, Brown, Sharman & Parker*, 859 S.W.2d 441, 450 (Tex. App.—Houston [1st Dist.] 1993, no writ).

¹² See *Sharpe*, 191 S.W.3d at 366; *Ward v. Emmett*, 37 S.W.3d 500, 503 (Tex. App.—San Antonio 2001, no pet.).

¹³ See 8 U.S.C. § 1325(a)(1) and (2) (2013) (criminalizing the acts of entering the country at undesignated points and avoiding examination and inspection by immigration officers); *Sharpe*, 191 S.W.3d at 366; *Ward*, 37 S.W.3d at 503.

¹⁴ Petitioners' Joint Brief on the Merits, p. 3.

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States.¹⁵ In *Fuentes v. Alecio*, the plaintiff was an illegal immigrant who hired a smuggler to transport him into the United States and died of heat exhaustion on the trip.¹⁶ The federal district court held as follows:

This case falls squarely within the Texas unlawful acts rule.... In this case, the decedent was engaged in an illegal act at the time of his death, namely attempting to enter the United States illegally in violation of 8 U.S.C. § 1325(a). The decedent's act clearly contributed to his injury, because he would not have been alone in Brooks County, exposed to the sun and without water, had he not illegally entered the United States.¹⁷

Here, like in *Fuentes*, decedents would not have been in the situation for their injuries to occur had they not been attempting to enter the United States in violation of 8 U.S.C. § 1325(a).

III. Section 75.002(a) of the Texas Civil Practice and Remedies Code

Landowner liability for incidents such as the one at issue, arising from illegal smuggling or trafficking across privately owned property, is limited by Texas Civil Practice and Remedies Code Section 75.002(a), which outlines the extent of landowner liability of agricultural land as follows:

- (a) *An owner, lessee, or occupant of agricultural land:*
(1) *does not owe a duty of care to a trespasser on the land; and*

¹⁵*Fuentes v. Alecio*, No. C-06-425, 2006 U.S. Dist. LEXIS 93013, at *8-10 (S.D. Tex. Dec. 26, 2006) (holding unlawful acts rule barred claims based on the death of an illegal immigrant); *Rico v. Flores*, 405 F. Supp.2d 746, 757 (S.D. Tex. 2005), *rev'd on other grounds*, 481 234 (5th Cir. 2007) (applying unlawful acts rule to bar similar claims of illegal immigrants).

¹⁶ *Fuentes*, 2006 U.S. Dist. LEXIS 93013, at *11-12.

¹⁷*Id.* at *12; *see also Rico*, 405 F. Supp. 2d at 757.

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*(2) is not liable for any injury to a trespasser on the land, except for willful or wanton acts or gross negligence by the owner, lessee, or other occupant of agricultural land.*¹⁸

The Jones Ranch clearly fits the definition of agricultural land; thus, Respondents must establish willful or wanton conduct by Petitioners, or gross negligence, in order to prevail.¹⁹ The Court of Appeals imposed a duty beyond that required by statute in reversing the summary judgment in favor of the Petitioners on Respondents' claims other than gross negligence.²⁰

IV. Private Property Rights

Beyond the fact issues between the parties to the case, important questions for agriculture interests should be considered by the Texas Supreme Court upon its review of this case. These interests include:

i. Impact on private property rights.

The State of Texas has long recognized private property rights. The state legislature acknowledges the importance of protecting private real property interests.²¹ The Texas Supreme Court has characterized the preservation of

¹⁸TEX. CIV. PRAC. & REM. CODE § 75.002(a).

¹⁹(1) "Agricultural land" means land that is located in this state and that is suitable for:

(A) use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed;

(B) forestry and the growing of trees for the purpose of rendering those trees into lumber, fiber, or other items used for industrial, commercial, or personal consumption; or

(C) domestic or native farm or ranch animals kept for use or profit.

Id. § 75.001(1).

²⁰See *id.* § 75.002(a)(2).

²¹See, e.g., TEX. GOV'T CODE §§ 2007.001-.045 ("Private Real Property Rights Preservation Act").

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property rights as “one of the most important purposes of government”²² and has reiterated that “[Texas’s] Constitution and laws enshrine landownership as a keystone right.”²³ Property rights are particularly important to farmers and ranchers whose entire lives revolve around the land: that is how they make their living and where they raise their families.

Texas’ protection of private property owners’ rights extends beyond agricultural producers and has a broad application across our state. Approximately 95 percent of Texas’ land mass is privately owned.²⁴ Additionally, since 2005, the protection of private property owners’ rights has been a priority for lawmakers and voters.²⁵ For example, in November 2009 an overwhelming majority of Texans voted for Proposition 11 and strengthened the Constitutional protections of privately-owned land.²⁶ Even more recently, in 2011, comprehensive property rights legislation was passed in Senate Bill 18.²⁷ The 82nd Texas Legislature also passed Senate Bill 1160, which protects landowners from liability of harm incurred by trespassers.²⁸ Lawmakers continue to seek ways to prevent abuse of property owners’ rights by common carriers and other entities.

This commitment to private property owners’ rights should continue to be affirmed and enforced by this Court. The Court of Appeal’s judgment, if upheld, slices away key sections of the bundle of rights that make up the property rights that

²²*Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (quoting *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977)) (internal quotations omitted).

²³ *Id.*

²⁴ Greg Abbott, *Understanding Eminent Domain: Texas Landowner's Bill of Rights*, (2008), available at www.oag.state.tx.us/agency/weeklyag/2008/0308eminentdomain.pdf (noting that 95-percent of land in Texas is privately owned).

²⁵ See S.B. 7, 79th Leg., 2d Spec. Sess. (Tex. 2005).

²⁶ H.R.J. Res. 14, 81st Leg., Reg. Sess. (Tex. 2009) (passed with 82-percent of votes).

²⁷ S.B. 18, 82nd Leg., Reg. Sess. (Tex. 2011).

²⁸ S.B. 1160, 82nd Leg., Reg. Sess. (Tex. 2011).

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landowners enjoy. Among the property rights weakened by the Court of Appeals' opinion are the right to exclude²⁹ and the right to peaceful enjoyment.³⁰

The right to exclude has long been deemed to be one of the most essential property rights.³¹ The Court of Appeal's judgment effectively enervates landowners by creating potential claims against the landowner if the landowner invokes the right to exclude and the intruder or representatives allege injury. If allowed to stand, the opinion by the Court of Appeals will give landowners pause before engaging in the simple actions of inspecting their property and keeping watch over their land, dismissing trespassers and telling them to get off of their property, or walking someone out of the premises, for fear that the trespasser will be injured in the process and the landowner will be held liable.

A landowner's right to private enjoyment will be infringed if the duty created by the Court of Appeals is upheld. It is difficult to imagine how a landowner may peacefully enjoy property when drug and human smugglers consistently use that property as a highway for criminal activity.

The use of private land for drug and human smuggling is an ever-present and unresolved dilemma of paramount importance to the State of Texas and South Texas landowners. Many landowners fear for their safety and the safety of their families. The Court of Appeals' opinion is based on faulty legal analysis and is contrary to efforts to ensure property owners have the right to protect their property from trespassers.

Furthermore, it seems counterintuitive for Texas law to allow landowners to use force where necessary to eject trespassers from their property but make a

²⁹ *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (holding that the government cannot "take" the right to exclude without compensation).

³⁰ *Biggs v. Commissioner of Internal Revenue*, 632 F.2d 1171, 1177 (5th Cir. 1980) (quoting from *Starker v. United States*, 602 F.2d 1341, 1355 (9th Cir. 1979)) (noting that title to real property includes right to bring suit for interference with quiet enjoyment).

³¹ *Kaiser*, 444 U.S. at 176 ("one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others").

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landowner liable for injuries that might occur to a trespasser while the landowner is simply watching and overseeing the trespasser leave the property.³²

- ii. The law should protect the interests of private landowners above those of participants in illegal drug trafficking, human smuggling, or any other illegal activity.

Rather than creating more protection for participants in illegal drug trafficking, human smuggling, and other illegal activity, the State of Texas must protect its law-abiding citizens from the illegal and criminal actions of others. While the State does not encourage landowners to willfully or wantonly harm trespassers, or to engage in conduct that constitutes gross negligence, our policy must enable landowners to eject trespassers and stop illegal activity on their land, and the interpretation of our laws must preserve and reflect these priorities. The opinion by the Court of Appeals goes in the opposite direction; it inhibits landowners from taking affirmative action to stop trespassers for fear of liability.

³²See TEX. PEN. CODE § 9.41(a).

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Prayer

In consideration of the interests and statutory protections for private landowners discussed in this brief, the Texas Department of Agriculture asks the court to grant the relief requested by Petitioners in this case.

Respectfully submitted,

/s/ Dolores Alvarado Hibbs

By: Dolores Alvarado Hibbs, General Counsel

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Certificate of Compliance

In accordance with Rule 9.4 of the Texas Rules of Appellate Procedure, I certify that the word count of the Texas Department of Agriculture's *amicus curiae* letter brief is 2,410.

/s/ Dolores Alvarado Hibbs

Dolores Alvarado Hibbs, General Counsel

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Certificate of Service

I certify that a true and correct copy of the *amicus curiae* letter brief of the Texas Department of Agriculture has been served upon the following counsel, parties of record, and/or amici on the 9th day of August, 2013, by email and/or certified mail, return receipt requested, as follows:

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