

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

FAZZINO INVESTMENTS, LP	§	
for itself and all others similarly	§	
situated,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	CASE NO. 6:25-cv-00001-ADA-DTG
	§	
BRAZOS VALLEY GROUNDWATER	§	
CONSERVATION DISTRICT,	§	
	§	
<i>Defendant.</i>	§	

**DEFENDANT BRAZOS VALLEY GROUNDWATER CONSERVATION
DISTRICT'S RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS
AND/OR RULE 56 MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendant Brazos Valley Groundwater Conservation District (the "District") moves under Federal Rule of Civil Procedure 12(c) for Judgment on the Pleadings and/or under Federal Rule of Civil Procedure 56 for Summary Judgment to dismiss the claims of Fazzino Investments, LP, for itself and others similarly situated ("Plaintiff"). In support thereof, the District respectfully states the following:

I.
EXECUTIVE SUMMARY

Plaintiff has filed a constitutional takings claim, and only a takings claim. Not an equal protection claim. Not an *ultra-vires* claim. Just a takings claim. And *that* claim must be dismissed for two reasons:

1. Plaintiff complains that the District's act that allegedly caused a taking without just compensation (i.e., enacting its amended Rules) violates state law. But an illegal act cannot form the basis for a takings claim; only an "entirely lawful" act can give rise to a takings claim.
2. Plaintiff has not obtained a final decision as to the District's Rule amendments, and thus its claim is not ripe. That is, because there is an available method of adjudicating the validity and applicability of the amended Rules to Plaintiff (an action for judicial review under Tex. Water Code Sec. 36.251) that has not been exhausted (and that would resolve the matter in its entirety), Plaintiff's takings claim is not ripe.

Plaintiff's decision to attack the District's amended Rules as violating Texas law (via a type of claim that does not allow for adjudication of that question), while purposefully sidestepping the exact mechanism created under Texas law to obtain a final determination of that very question, renders this case a non-starter in this Court for both reasons listed above.

Plaintiff seeks a declaration that the District's amended Rules violate the Texas Water Code, and asks the Court to issue an injunction against the District's amended Rules because they create some impermissible "differential" status among landowners, which complaint can flow only from either an (unpleaded) Equal Protection claim or a finding and declaration that the amended Rules violate Texas Water Code Section 36.101 and are thus *ultra vires* (a claim that also is not pleaded). That relief, on that basis, is not available in a takings claim because a necessary

predicate for any takings claim is that the act complained of, if properly compensated, would be “entirely lawful.” That is, an *ultra-vires* act can *never* give rise to a takings claim: the concepts of “*ultra vires*” and “taking” are mutually exclusive, as a matter of well-established law.

Additionally, the takings claim in the Complaint—even if proper—would not be ripe, because Plaintiff has not established the necessary “finality” predicate. The “takings action” here is the District’s amendment of its Rules. But that decision has not been finally adjudicated as to its legality/validity—which Plaintiff plainly contests—because Plaintiff ignored and avoided a direct mechanism for review to obtain a final decision as to the act purportedly causing the taking: a suit under Texas Water Code Section 36.251 to challenge the validity of the Rules.

In short, Plaintiff has either pleaded itself *out of* a valid takings claim, or *into* an unripe takings claim, or both. This Motion is limited to the bases stated above; only if the Court does not dismiss Plaintiff’s claim on these grounds (or if Plaintiff abandons all allegations that the District’s rule Amendments are “unlawful”) will Defendant further develop the facts and present a motion to show that Plaintiff’s takings claim absent any allegation of illegality would also fail on the merits.

The bottom line is that Plaintiff wants this Court to do something a Texas court should do, utilizing a cause of action that cannot apply in this case as pleaded. In the guise of a takings case, Plaintiff invites this Court to pass judgment on the question of whether the District’s amended Rules violate Texas law, and further ask this Court to enjoin the District from applying those amended Rules for that very reason. But

takings law unambiguously forecloses that approach. The Court should decline Plaintiff's invitation, and dismiss its claim.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. **The District was created in 2001 and passed its initial Rules in 2004.**

The Legislature created the District “to protect and recharge groundwater and to prevent pollution or waste of groundwater in the central Carrizo-Wilcox area [and] to control subsidence caused by withdrawal of water from the groundwater reservoirs in that area.” Act of May 26, 2001, 77th Leg., R.S., ch. 1307, § 1.02(1), 2001 Tex. Gen. Laws (H.B. 1784) (ratifying the creation of the District). Chapter 36 of the Texas Water Code governs the District. *See* Tex. Spec. Dist. Loc. Laws Code § 8835.101. The District has the plain and unambiguous authority to “make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir.” Tex. Water Code § 36.101(a). The District’s Board adopted its initial Rules at its regular meeting on December 2, 2004, consistent with public notice. BRAZOS VALLEY CONSERVATION DISTRICT, December 2, 2004 Regular Meeting and Public Hearing, <https://brazosvalleygcd.org/wp-content/uploads/2025/11/Minutes-December-2-2004.pdf> (last visited Nov. 7, 2025). The Rules included Rules 6.1 (imposing spacing requirements on New Wells), and 7.1 (providing production limits for New Wells.)¹

¹ The District’s Rules are cited in full in Plaintiff’s Complaint (Doc. 1 at p. 3, FN 1) by inclusion of a link to same at brazosvalleygcd.org. Additionally, the District’s initial adoption of its Rules were an act of a governmental entity, are

B. The District amends its Rules in September 2023.

On September 14, 2023, the District amended its Rules, including amendments to Rule 6.1 that changed well spacing requirements for wells permitted after the effective date of the amendment. (Doc. 1, ¶¶ 10, 11). On that same date, the District amended Rule 7.1, changing the production limits for wells permitted after the effective date of the amendment. (Doc. 1, ¶¶ 13, 17). Plaintiff’s Complaint complains about these respective amendments. *Id.*

C. Plaintiff files its Complaint on January 2, 2025, asserting only a constitutional takings claim.

Plaintiff’s Complaint pleads *only* a constitutional takings claim, and seeks *only* declaratory and injunctive relief. (See Doc. 1, ¶¶ 1–2.) That Complaint alleges that by “unlawfully amending Old Rules 6.1 and 7.1 to create New Rules 6.1 and 7.1” the District affected a “taking [of] Plaintiff’s and Class Members’ groundwater property rights.” (Doc. 1, ¶ 38.) That is, the thing that the District did, and that caused the alleged taking without just compensation, was the District *unlawfully* amending its Rules.

D. Additional undisputed facts in support of Defendant’s Rule 56 Motion for Summary Judgment.²

While Plaintiff pleads only a takings claim, Plaintiff does not just allege that the District’s amended Rules are “unlawful” because they effect a taking without

pleaded and necessarily implied in Plaintiff’s Complaint, and are an undisputed matter of public record, and thus the Court may take judicial notice of same.

² While Defendant believes that these facts also may be considered with respect to Defendant’s Rule 12(c) Motion for Judgment on the Pleadings, to the extent that the Court has any doubts or concerns about whether such facts may be so considered,

providing just compensation. Plaintiff's complaint that the District's amended Rules are "unlawful" includes complaints that they violate Texas law and are actually *ultra vires*:

- "Defendant's spacing and allocation rules are *ultra vires* because they are not based on the 'best available science.' Tex. Water Code Sec. 36.0015;" and
- "Defendant's spacing and allocation rules are *ultra vires* because they are not fair and impartial. Tex. Water Code Sec. 36.101."

(Plaintiff's Supplemental Responses to Defendant's First Set of Interrogatories, resp. to Interrogatory 5, items 6 and 7 at p. 6 (attached as Appendix A)).³

Likewise, with no Equal Protection claim asserted, Plaintiff's consistent complaints about differential or unequal treatment can *only* be predicated on Texas

Defendant submits these facts in support of its Rule 56 Motion for Summary Judgment in addition/in the alternative to its Rule 12(c) Motion.

³ These interrogatory answers were in response to an interrogatory asking Plaintiff to "State the general factual and/or legal bases for your contention that the district 'unlawfully' (as that term is used in paragraphs 15 and 16 of Plaintiff's Original Class Action Complaint) changed/amended District Rule 6.1(b)." (Appendix A at p. 4). Plaintiff's interrogatory answers also are consistent with its prior assertions in pleadings filed with this Court. Those pleadings contain multiple allegations that the District's amendments of its Rules are unlawful because they violate Texas law: the formula in the rules requiring circular allocation boundaries "is not authorized under Texas Water Code Chapter 36" (Responding Party's Position, August 27, 2025 Discovery Dispute Chart, p. 8); the Rule 6.1 spacing requirements were not "based on the best available science . . . and thus are not fair and impartial as required by Tex. Water Code § 36.101" (*Id.*); and the amended Rules do not treat all landowners "fairly and the same . . . which, under Texas law (*e.g.*, Tex. Water Code § 36.101(a)(2)), BVGCD is obligated to do." (Doc. 31, p. 12).

Water Code Section 36.101’s reference to regulations being “fair and impartial,” and Plaintiff has stated as much. (Doc. 31, p. 12)⁴

III. STANDARD OF REVIEW

A. Rule 12(c) Motion for Judgment on the Pleadings.

Rule 12(c) provides that “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Rule 12(c). “The standard for Rule 12(c) motions for judgment on the pleadings is identical to the standard for Rule 12(b)(6) motions to dismiss for failure to state a claim.” *Waller v. Hanlon*, 922 F.3d 590, 599 (5th Cir. 2019). To survive a motion to dismiss under Rule 12(b)(6) (and thus Rule 12(c)), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In considering such motion, the Court may consider the Complaint and its attachments, documents incorporated into the Complaint by reference, and

⁴ Additional examples of such complaints by Plaintiff of differential or unequal treatment include:

- “Defendant has handcuffed Plaintiff as compared to people with pre-change permits. All landowners within the BVGCD *are not treated equally*.” (Responding Party’s Position, August 27, 2025 Discovery Dispute Chart, p. 3 (emphasis added));
- “Plaintiff does not break new ground by referring to this undisputed *differential treatment* as wrongful (i.e., unlawful).” (Doc. 49, p. 3 (emphasis added)); and
- “Here, BVGCD has the authority under its legislation and the Texas Water Code to reduce groundwater production allocations—applied equally across the District. *But it does not have the authority to establish two different production allocations* based solely on an arbitrary calendar date with no underlying rationale predicated on “the peculiar formation of the underground structure or some unusual circumstances.”” (Doc. 49, p. 4 (emphasis added)).

matters of which a court may take judicial notice. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008).

B. Rule 56 Motion for Summary Judgment.

Summary judgment shall be granted if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Court need not determine that there is no factual dispute, only that there are no material facts in dispute. A factual dispute is “material” if it “might affect the outcome of the suit under the governing law.” *Smith v. Harris Cnty.*, 956 F.3d 311, 316 (5th Cir. 2020). A dispute about a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 255.

**IV.
ARGUMENT AND AUTHORITIES**

First, a 42 U.S.C. § 1983 takings claim based on the government action of a Texas groundwater district passing allegedly “unlawful” rules is not a thing; it is neither a recognizable takings claim nor a ripe claim. All relevant authority is consistent: an *ultra-vires* act cannot give rise to a takings claim. *See, e.g., Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 543 (2005). Plaintiff’s attempt to plead a “takings” claim that isn’t a takings claim means “that is the end of the inquiry.” *Id.* Instead, a challenge to the validity of the rulemaking action of a groundwater district in Texas must proceed under a mechanism for review and relief created by the Texas legislature for the express

purpose of answering that very question: a suit for judicial review under Texas Water Code Section 36.251.

Plaintiff attempts to infuse its takings claim with an Equal-Protection or *ultra-vires* flavor. But not only are those separate causes of action with separate elements that must be met, they are mutually exclusive here.⁵ Plaintiff pleads *only* a constitutional takings claim, and seeks *only* declaratory and injunctive relief. (See Doc. 1, ¶¶ 1–2.) The problem is that the “takings” case pleaded in the Complaint is neither fish nor fowl.

That is, if the District acted *unlawfully*, then that act of the District cannot be the basis for a takings claim, because takings claims can only be brought for failure to compensate a plaintiff for harm caused by an “otherwise proper interference” with

⁵ Plaintiff is trying to have its cake and eat it too: Plaintiff has steadfastly *avoided* pleading an Equal Protection claim or an *ultra vires* claim, yet it certainly seems like Plaintiff calls on this Court to adjudicate either or both such unpleaded claims. There’s a good reason that Plaintiff hasn’t pleaded an Equal Protection claim complaining about rules that have always applied equally to everyone in the District at any given point in time: it would lose on that claim. See Order at 5, *Fazzino v. Roe*, No. 6:18-CV-00114-JCM (Aug. 23, 2021) (finding that a similar “temporal break” between comparators defeated an allegation of unequal treatment) (Order attached as Appendix B). There’s also a good reason that Plaintiff hasn’t pleaded an *ultra vires* claim: it doesn’t belong here, and if it were raised, it would lose. See Tex. Water Code §§ 36.251–.254 (attached as Appendix C); *BLF Land, LLC v. North Plains Groundwater Conservation Dist.*, 2024 U.S. Dist. Lexis 205913, at *24–34 (N.D. Tex. 2024) (considering and dismissing an *ultra-vires* claim against a groundwater conservation district similar to the unpleaded claim here). Instead, Plaintiff is trying to use its takings claim as a trojan horse to sneak in some relief as to Equal Protection or a declaration as to the scope of the District’s statutory authority in a takings adjudication. In any case, adjudicating unpleaded claims is something this Court cannot do. *Cutrera v. Bd. of Supervisors*, 429 F.3d 108, 113 (5th Cir. 2005) (“A claim which is not raised in the complaint . . . is not properly before the court.”). Thus, this Motion speaks only to the sole claim pleaded: a takings claim. (See Doc. 1, ¶¶ 1–2.)

its property rights. *Id.* Alternatively, as Plaintiff's takings claim is predicated on the alleged invalidity of the District's amended Rules, that claim is not ripe because Plaintiff has not availed itself of the specific state-law mechanism of review necessary to answer and establish that predicate so as to render the District's action final: a challenge to the validity of the amended Rules under Texas Water Code Section 36.251.

The logic behind both applicable rules is similar, and leads to the same necessary outcome: dismissal of Plaintiff's takings claim.

A. An “unlawful” act cannot be the basis of a takings claim.

Plaintiff's Complaint alleges that by “unlawfully amending Old Rules 6.1 and 7.1 to create New Rules 6.1 and 7.1” the District affected a “taking [of] Plaintiff's and Class Members' groundwater property rights.” (Doc. 1, ¶ 38.) That is, the thing that the District did, and that caused the alleged taking without just compensation, was the District *unlawfully* amending its Rules. That is exactly the matter that Plaintiff asks this Court to decide, or perhaps even assume: that the District's amendment of its Rules was “wrongful.” (*See* Doc. 1, ¶ 25(i).) It is undisputed that Plaintiff contends that at least some of the things that make such amendments “unlawful” are alleged violations of a Texas statute: Chapter 36 of the Water Code (see Section II. D. above).⁶

⁶ This is yet another issue where Plaintiff seems to want it both ways. Plaintiff has asserted unambiguously in both pleadings to this Court (*see, e.g.*, Responding Party's Position, August 27, 2025 Discovery Dispute Chart, p. 8; Doc. 31 at p. 12) and an interrogatory answer (*see* Appendix A) that the District acted illegally and *ultra vires* in violation of several provisions of Chapter 36 of the Texas Water Code. Yet Plaintiff simultaneously argues that when it alleges that the District's amendment of its Rules was “unlawful,” it really only means that the amendments were

The Plaintiff asks the Court for relief in relation to and predicated on its claim that the District's amended Rules are unlawful because they violate Chapter 36 of the Water Code; for example, Plaintiff asks the Court to issue a specific declaration that "BVGCD owed (and continues to owe) a legal duty to all landowners in the District, including Plaintiff and Class Members, *to fairly and equitably* safeguard and protect their groundwater property rights, and allow them to produce groundwater underneath their land, in a uniform and consistent manner across the District . . ." (Doc. 1 ¶ 43 (emphasis added)).

But an unlawful act by the government *cannot form the basis of a takings claim*; only a legal act by the government can do so. *Lingle*, 544 U.S. at 543 (An inquiry into a "regulation's underlying validity . . . is logically prior to and distinct from the question whether a regulation effects a taking . . ." because the Takings Clause "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounted to a taking.") (quoting *First Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482

"unlawful" because they affected a taking without providing just compensation: "As used in Plaintiff's Complaint, the word simply means 'improper, unauthorized, contrary to law, or wrongful.' A Rule change effecting a taking is wrongful even if the rule is globally within BVGCD's statutory umbrella." (Doc. 49 at p. 3, FN 3). Thus, on one hand, Plaintiff has filed multiple pleadings and submitted discovery responses that the District has acted *outside and contrary to* its "statutory umbrella," but on the other hand, perhaps the Plaintiff is only complaining about actions that are *within* the District's "statutory umbrella." *Id.* So . . . which is it? Unless and until Plaintiff formally and irrevocably abandons its repeated assertions that the District's rule Amendments violate Chapter 36 of the Texas Water Code or any other state law, this Motion stands and should be granted.

U.S.304, 315 (1987) (emphasis added).⁷ Conversely, if the government’s action is impermissible or illegal, “that is the end of the inquiry.” *Id.* The Fifth Circuit recently followed that rule by dismissing a takings claim predicated on an allegedly illegal act, observing that a “key feature of takings is that, when properly compensated, they are entirely lawful.” *Lafaye v. City of New Orleans*, 35 F.4th 940, 943 (5th Cir. 2022) (citing *First Evangelical Lutheran Church*, 482 U.S. at 314, and

⁷ That Plaintiff seeks only injunctive relief—which is not typically available for a takings claim and is improper here—presents its own problem. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–28 (1985) (“[I]n general, ‘[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.’”) (cleaned up). After all, taking property is not unconstitutional; only taking it without paying just compensation is. *First Evangelical Lutheran Church*, 482 U.S. at 314. But the task of considering Plaintiff takings claim is further complicated by Plaintiff *again* taking a “have it both ways” approach, this time regarding what *kind* of takings claim it asserts. Plaintiff has told Defendant and this Court at various times that (1) it is only asserting a *per se*/physical invasion taking such that there is no need for a *Penn Central* regulatory taking analysis (Responding Party’s Position, August 27, 2025 Discovery Dispute Chart, p. 8); (2) but then Plaintiff says it is asserting *both* “a *per se* and a regulatory taking” (Doc. 31, p. 9), but then (3) well really, Plaintiff is just presenting a regulatory takings claim (and apparently *not* a *per se*/physical invasion claim): “There is only one injury that each putative class member landowner has uniformly suffered: after the September 14, 2023, BVGCD Rules changes, it takes 400% more land to drill the same producing groundwater well than what was required prior to September 14, 2023.” (Doc. 49, p. 1). Plaintiff presents a constantly moving target. That Plaintiff would now shift to arguing that the unifying factor among all purported class members is that they have suffered a *regulatory* taking—a claim that requires the sort of individualized, fact-specific inquiry that cannot take place in a class action—is dispositive of and should end Plaintiff’s quest for class certification. But most relevant to this Motion, what remains constant is that embedded within that moving target is a bullseye of allegations predicated on “unlawful” acts of the District that allegedly violate state law. For that reason, inquiry into what *kind* of takings claim is not necessary at this point, because that allegation of illegality means that Plaintiff alleges no takings claim at all.

further acknowledging the *Lingle* rule that in a takings case, “illegality” ends the inquiry.) (cleaned up).

That is, a takings claim can only be predicated on an “otherwise proper interference” with property rights. Conversely, if a plaintiff pleads that the act of the government was improper in some way, then that act cannot effect a taking, and the claim should be dismissed. *See, e.g., Doe 1 v. Harris Cnty.*, 2022 U.S. Dist. LEXIS 234337, at *16 (S.D. Tex. 2022) (dismissing a takings claim based on the court’s finding that plaintiffs’ pleadings “belie a takings claim because they allege that Defendants’ actions are not legal. This ends the inquiry regarding Plaintiffs’ takings claim.”) (cleaned up).

If the act was unlawful, then it may be addressed and remedied by some other mechanism or cause of action, but *not* by a takings claim. However, a 42 U.S.C. § 1983 takings claim (1) is the sole cause of action brought here, and (2) is consistently predicated on an assertion that the District’s actions were unlawful and thus *not* an “otherwise proper interference” with Plaintiff’s property rights. As the Supreme Court has directed, thus ends the inquiry regarding Plaintiff’s takings claim, and it must be dismissed.

B. Because Plaintiff has ignored an available means of review, the action complained of is not final, rendering Plaintiff’s claim unripe.

Plaintiff’s decision not to seek a determination that the District’s Rule Amendments were “unlawful” by some other cause of action or mechanism was no accident; Plaintiff is trying to avoid the established form of review of the validity of District Rules: a Texas Water Code Section 36.251 challenge to the validity of a

District rule. Avoiding that pathway, which is available and could provide functionally the exact relief sought here (the amended Rules—if found to be unlawful—would no longer apply) necessarily renders Plaintiff’s claim unripe.

To be actionable, a takings decision by a government entity must be final. *Urban Devs. v. City of Jackson*, 486 F.3d 281, 292–93 (5th Cir. 2006) (citing *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)).⁸ Specifically, “whenever the property owner has ignored or abandoned some relevant form of review or relief, such that the takings decision cannot be said to be final, the takings claim should be dismissed as unripe.” *Id.* at 293. Failure to follow an applicable process of appeal is just such an “abandonment” of a form of review that means the decision at issue cannot be said to be final. *Hidden Oaks v. City of Austin*, 138 F.3d 1036, 1041 (5th Cir. 1998) (holding that a specifically provided route of appeal “offers a relevant form of review,” and failure to follow that “formal process of appeal” mandated dismissal of plaintiff’s takings claim per *Williamson County*).

Further, when a regulation is challenged as being unlawful because it violates state law, there is necessarily an open question as to how/whether it applies to the

⁸ *Williamson County* imposed two predicates to ripeness of a takings claim: (1) finality of the government’s decision, and (2) the plaintiff has sought compensation for the taking through any procedures the state provides. *Williamson Cnty.*, 473 U.S. at 186. Importantly, while the Supreme Court’s decision in *Knick v. Twp. of Scott* overruled the second predicate (plaintiff must seek compensation), it left the first predicate (finality of the decision) undisturbed. 588 U.S. 180, 188 (2019). To be clear, Plaintiff’s claim here is unripe because it fails to clear the finality hurdle; that jurisdictional failing has nothing to do with any failure to seek compensation or the availability of any compensation remedy, and that former ripeness predicate is not at issue in this Motion.

Plaintiff's property. That is, a lawful regulation applies, but an unlawful regulation does not apply. The existence of that as-yet unresolved question, raised by the Plaintiff itself, means that Plaintiff's takings claim is not ripe. *Beach v. City of Galveston*, 2022 U.S. App. LEXIS 9005, at *6 (5th Cir. 2022) ("Under the finality requirement, 'a plaintiff must show that "there [is] no question . . . about how the 'regulations at issue apply to the particular [property] in question.'")" (citing *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 478 (2021) (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739, (1997))).

Plaintiff here has purposefully ignored and avoided a specific mechanism "of review or relief" created by the Texas Legislature to answer the exact question of rule validity Plaintiff asks this Court to answer: a rule challenge or an equally available administrative appeal under Texas Water Code Section 36.251. Subchapter H of Chapter 36 of the Texas Water Code provides for judicial review of any act of a district. Tex. Water Code §§ 36.251–.254 (Appendix C). Any entity "affected by and dissatisfied with any rule or order made by a district" is entitled to file suit "to challenge the validity of the . . . rule or order." Tex. Water Code § 36.251(a).

Plaintiff's failure to take *any* of the administrative path provided by Section 36.251 to seek review of the allegedly unlawful nature of the District's rules necessarily renders Plaintiff's claim unripe. That is, by ignoring and purposefully avoiding that path of review—in this case, a clearly and purposefully provided administrative procedure that expressly applies to rules enacted by the District—the requisite finality cannot be established. *Beach*, 2022 U.S. App. LEXIS, at *6 ("[A]

plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision.” (cleaned up)). Here, a straightforward Section 36.251(a) rule challenge (as an example of a potential path) is just such an administrative procedure that could completely change the District's decision to apply its amended Rules, if in fact they are unlawful.

To the extent that Plaintiff might argue that the “futility exception” to the finality requirement might apply to such suit for review, and/or that seeking a “variance” from the application of the District's Rules might be futile, the existence of an established administrative process via Section 36.251 for challenging the District's Rules and its application of same—which would determine the applicability of the amended Rules to Plaintiff's property—negates that argument. *Abdelhak v. City of San Antonio*, 2011 U.S. Dist. LEXIS 161339, at *28 (W.D. Tex. December 6, 2011) (The “variance” requirement is “not definitive or talismanic;’ it encompasses ‘other types of permits or actions [that] are available and could provide relief.” (cleaned up)).

All such suits must be filed in state court in the county in which the district is located. Tex. Water Code § 36.251(c). In such suits, the plaintiff has the burden of proof, the challenged law is deemed prima facia valid, and the matter is reviewed under the “substantial evidence rule” (a difficult bar to clear). Tex. Water Code § 36.253; Tex. Gov't Code § 2001.174 (attached as Appendix D). Additionally, should

the district prevail in such suit, it is entitled to recover its attorney's fees. Tex. Water Code § 36.066 (attached as Appendix E).

It thus is understandable why Plaintiff might want to avoid the mechanism of review created by the Legislature to adjudicate its claim that the District's amendment of its rules was "unlawful"—it will lose, and will have to pay the District's attorney's fees—but takings law does not allow such an end-around. *Urban Devs.*, 486 F.3d at 293. This *Williamson County* "finality" requirement also is consistent with the principle that the question of a regulation's validity must be answered first. *Lingle*, 544 U.S. at 543 (An inquiry into a "regulation's underlying validity . . . is logically prior to and distinct from the question whether a regulation effects a taking . . ." (citing *First Evangelical Lutheran Church*, 482 U.S. at 315)).

The "finality" ripeness predicate is particularly important here, where a final decision on the applicability of the District's amended Rules via the requisite Section 36.251 suit would be entirely dispositive of the dispute. Either (1) the District's amended Rules will be found to be invalid, in which case they will no longer stand and neither the Plaintiff nor anyone else will have to operate under those rules, or (2) the amended Rules will be found valid, and any further claim by Plaintiff that it has been harmed by an "unlawful" act will be barred by *res judicata*.

The prudence of both the *Lingle* rule that validity of a regulation must be decided prior to bringing a takings claim and the *Williamson County* finality requirement (that is, the decision and nature of the governmental act must be determined and finalized before any takings claim can ripen) is borne out by that

decision tree. If Plaintiff wishes to adjudicate whether the District's amendment of its Rules violated state law (and its repeated statements that the District's amendments were unlawful because they violated state law indicates that is exactly Plaintiff's wish), then it must do so by another claim, by another statutory mechanism, and in another courthouse altogether.

**V.
CONCLUSION AND PRAYER**

Plaintiff tries to sneak an unpleaded *ultra-vires* and/or Equal Protection claim into the Court under the cover of a takings claim. But those complaints—predicated on and inseparable from assertions that the District has acted contrary to the law—mean that the Court must dismiss the only claim that was actually pleaded: a constitutional takings claim. A takings claim predicated on an unlawful act is, by definition, *not* a takings claim and thus cannot be adjudicated as such by the Court. On top of that, when the key question of the alleged illegality of the act purportedly causing the taking can be addressed and remedied by an available means of review that a Plaintiff purposefully sidesteps, that takings claim—even if it could be viable—is not ripe.

Defendant Brazos Valley Conservation District therefore prays that this Court dismiss Plaintiff's takings claim against it under Rule 12(c) and/or grant final summary judgment under Rule 56 that Plaintiff take nothing by its claim, grant the District costs of Court, and award the District any additional relief to which it may be justly entitled.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800 Phone
(512) 472-0532 Facsimile

By: /s/ Jose E. de la Fuente
JOSE E. de la FUENTE
State Bar No. 00793605
jdela Fuente@lglawfirm.com
JAMES F. PARKER
State Bar No. 24027591
jparker@lglawfirm.com
GABRIELLE C. SMITH
State Bar No. 24093172
gsmith@lglawfirm.com

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2025, I caused a true and correct copy of the foregoing to be transmitted by the Court's electronic filing system to the parties listed below:

Marvin W. Jones
marty.jones@sprouselaw.com
C. Brantley Jones
brantley.jones@sprouselaw.com
Sprouse Shrader Smith PLLC
701 S. Taylor, Suite 500
Amarillo, Texas 79105

Richard L. Coffman
rcoffman@coffmanlawfirm.com
The Coffman Law Firm
3355 West Alabama, Suite 240
Houston, Texas 77098

ATTORNEYS FOR PLAINTIFFS

/s/ Jose E. de la Fuente

JOSE E. de la FUENTE