

# Exhibit D

**No. 18-50994**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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DAVID STRATTA; ANTHONY FAZZINO,

Plaintiffs-Appellants

v.

JAN A. ROE, in her individual and official capacity as director of the Brazos Valley Groundwater Conservation District; BILLY L. HARRIS, in his individual and official capacity as director of the Brazos Valley Groundwater Conservation District; BRYAN F. RUSS, JR., in his individual and official capacity as director of the Brazos Valley Groundwater Conservation District; JAYSON BARFKNECHT, in his individual and official capacity as director of the Brazos Valley Groundwater Conservation District; MARK J. CARRABBA, in his individual and official capacity as director of the Brazos Valley Groundwater Conservation District; GORDON PETER BRIEN, in his official capacity as director of the Brazos Valley Groundwater Conservation District; STEPHEN C. CAST, in his individual and official capacity as director of the Brazos Valley Groundwater Conservation District; BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,

Defendants-Appellees.

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On Appeal from the United States District Court  
For the Western District of Texas, Waco Division  
Cause No. 6-18-CV-00114

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**BRIEF OF APPELLEES**  
**JAN A. ROE, BILLY L. HARRIS, BRYAN F. RUSS, JR.,**  
**JAYSON BARFKNECHT, MARK J. CARRABBA,**  
**STEPHEN C. CAST, AND BRAZOS VALLEY GROUNDWATER**  
**CONSERVATION DISTRICT**

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to 5th Cir. R. 28.2.1, 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:



Case: 18-50994 Document: 00514905424 Page: 3 Date Filed: 04/05/2019

**Appellants:** David Stratta  
Anthony Fazzino

**Represented by:** Marvin W. Jones  
C. Brantley Jones  
Sprouse Shrader Smith PLLC

**Appellees:** Jan A. Roe, Billy L. Harris, Bryan F. Russ, Jr.,  
Jayson Barfknecht, Mark J. Carrabba, Gordon  
Peter Brien,<sup>1</sup> and Stephen C. Cast, *each of whom  
is sued in his/her individual capacity and official  
capacity as Directors of the Brazos Valley  
Groundwater Conservation District, and the  
Brazos Valley Groundwater Conservation District*

**Represented by:** Jose E. de la Fuente  
Michael A. Gershon  
James F. Parker, III  
Lloyd Gosselink Rochelle & Townsend, P.C.

/s/ Jose E. de la Fuente  
Jose E. de la Fuente  
Attorney of Record for Appellees

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<sup>1</sup> Two members of the District's Board of Directors do not join in this Brief—David Stratta, who is a Plaintiff in this action, and Peter Brien, who in addition to being a fellow member of the District's Board of Directors is also Director Stratta's father-in-law. The undersigned counsel does not represent Director Brien in his individual capacity, at Director Brien's request.



### STATEMENT REGARDING ORAL ARGUMENT

Appellants' suit involves specialized questions as to the applicability of Texas oil-and-gas law on groundwater rights. As the briefing to follow demonstrates, the unsettled legal questions presented by Appellants are most appropriately addressed by the state courts, and the Court need not spend time evaluating them in depth. Accordingly, oral argument is not necessary in this appeal.



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**STATEMENT OF THE ISSUES**

Appellants asserted multiple claims against the District and its Directors, in both their official and individual capacities. To organize the claims—and hence the issues on appeal—it may be easiest to view them in graphic form, along with the district court’s bases for their dismissal:

<b>Claim:</b>	<b>Against District (and Directors in their official capacities)</b>	<b>Against Directors in their individual capacities</b>
Taking without just compensation (Fazzino only)	<ul style="list-style-type: none"> <li>• <i>Burford</i> abstention</li> <li>• Ripeness</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Burford</i> abstention</li> <li>• Ripeness</li> <li>• Qualified immunity</li> </ul>
Equal protection (Stratta & Fazzino)	Eleventh Amendment immunity	Qualified immunity
First Amendment violation (Stratta only)	Eleventh Amendment immunity	Qualified immunity

As reflected by the chart, this appeal presents four issues for the Court’s determination:

1. Whether the district court abused its discretion in deciding to abstain from adjudicating Fazzino’s takings claim under *Burford v. Sun Oil Co.* in recognition of Texas’ regulatory structure for allocating groundwater, an important resource to the state.



2. Whether the district court abused its discretion in dismissing Fazzino's unripe takings claim under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* in light of Fazzino's failure to adjudicate his claim through the state-court process.
3. Whether Appellants' assertion that they have correlative rights to groundwater is clearly established notwithstanding the Texas Supreme Court's reiteration that "[i]n *East*, we concluded that there were no correlative rights in groundwater in the absence of legislation." *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840 (Tex. 2012) (quoting *Houston & T.C. Ry. v. East*, 81 S.W. 279, 280 (Tex. 1904)) (internal quotation and other editing marks omitted).
4. Whether a Chapter 36 district, one of which has been characterized as an "arm of the state" by at least one intermediate Texas appellate court and has access to state funding under existing legislation, is entitled to Eleventh Amendment immunity as an arm of the State of Texas.



## STATEMENT OF THE CASE

To clarify the facts and procedural history of this case that are germane to the Court's determination of the issues before it, Appellees offer this supplement to Appellants' Statement of the Case.

### **A. Facts relevant to the Court's review of the issues presented.**

Appellants provide a lengthy recitation of the history of the dealings between the parties. (Appellants' Br. at 1–9.) Most of the facts set forth in Appellants' Statement of the Case are irrelevant to the issues presented to the Court. For the Court's convenience, Appellees provide the following factual statement, which contains the only facts the Court needs to consider to determine the issues before it.

#### **1. *The District is a conservation and reclamation district operating under Chapter 36 of the Texas Water Code.***

Brazos Valley Groundwater Conservation District (the "District") is a conservation and reclamation district authorized by Article XVI, Section 59 of the Texas Constitution and operating under Chapter 36 of the Texas Water Code. *See* Tex. Spec. Dist. Loc. Laws Code ch. 8835. Stratta is a Director of the District. (ROA.14.)



Pursuant to authority granted it under Chapter 36, the District has promulgated rules to govern the production of groundwater from the Simsboro formation. (ROA.15.) The District's Rules impose limits on a landowner's production of groundwater. (ROA.15.) The Rules create three categories of groundwater production wells: 1) existing wells that have a history of producing groundwater for beneficial use before the Rules' effective date; 2) existing wells that do not have a history of production; and 3) new wells. (ROA.15.)

***2. Appellants own land within the District's boundaries.***

Stratta and Fazzino separately own land within the boundaries of the District. (ROA.14–15.) Fazzino opposes the District's Rules, which “differentiate between types of wells based on the date on which they were drilled or produced.” (ROA.25.) To test the validity of those Rules, Fazzino applied for a permit to drill and operate a groundwater well. (ROA.18.)

Fazzino's application was not for purposes of using the groundwater produced. Instead, Fazzino applied to produce 3,000 gallons per minute ostensibly to “offset” a neighboring well, the permitting of which Fazzino



opposed.<sup>2</sup> (ROA.17–18.) Fazzino’s application expired without prejudice to refile when Fazzino did not provide information reflecting that he legally controlled water rights required by the District’s Rules to support the requested permit. (ROA.18.)

**3. Board member Stratta attempts to address groundwater allocation during a Board meeting’s public-comment period.**

Stratta supports Fazzino’s opposition to the District’s Rules. (ROA.19.) When Board member Stratta later attempted to address the issue of the neighboring well operated by the City of Bryan, ostensibly as a member of the public under the public-comment agenda item, the District’s Board prevented him from doing so. The District observed that while Stratta could address his remarks under the existing agenda item for Director comments, the Texas Open Meetings Act barred his comments during the public-comment period. (ROA.19–20.)

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<sup>2</sup> In the oil-and-gas context, offset wells are drilled for the specific purpose of preventing localized drainage by a neighboring landowner’s well. *See Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567 (Tex. 1981). That is necessary because oil and gas are non-renewable resources. Groundwater, in contrast, is a renewable resource. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 63–64 (Tex. 2016). For this reason, offset wells are not typically utilized in the groundwater context.



**B. Relevant procedural history.**

Fazzino filed suit against the District in state district court in Robertson County, Texas, alleging a constitutional taking under Article I, Section 17 of the Texas Constitution. *See* Pl.'s Orig. Pet. at ¶¶9–16, *Fazzino v Brazos Valley Groundwater Conserv. Dist.*, No. 17-02-20199-CV (82nd Dist. Ct., Robertson Cty, Tex. Feb. 7, 2017). Relying on Texas oil-and-gas precedent, Fazzino alleged that “the District’s regulatory scheme as applied to Plaintiff has resulted in a taking of Plaintiff’s constitutionally protected property without compensation to Plaintiff, in direct violation of the United States and Texas Constitutions.” *Id.* at ¶13.

The District filed an answer and jurisdictional challenge, asserting that Fazzino’s claim was untimely, that he had failed to exhaust his administrative remedies, and that Texas law does not allow a takings claim predicated on governmental action primarily affecting neighboring property. *See* Def.’s 2d Am. Plea to the Jurisd. & Ans., *Fazzino*, No. 17-02-20199-CV (Mar. 19, 2018). In the face of the District’s arguments, Fazzino nonsuited his state-court claim. *See* Pl.’s Not. of Nonsuit, *Fazzino*, No. 17-02-20199-CV (April 13, 2018).



Hours later, Fazzino and Stratta filed suit in federal court under Section 1983 alleging a taking of Fazzino's property, denial of equal protection, and denial of Stratta's First Amendment rights. (ROA.20–28.) Fazzino's takings claim in this case are functionally identical to those made in the state-court case that he dismissed the same day. *Compare* ROA.25–28 with Pl.'s Orig. Pet. at ¶¶9–16, *Fazzino*, No. 17-02-20199-CV (Feb. 7, 2017).

The defendants timely filed motions to dismiss each of the plaintiffs' claims under Rules 12(b)(6) and 12(b)(1). (ROA.41–62 (Defs.' Rule 12(b)(1) Mot. to Dism.), ROA.174–92 (Defs.' Rule 12(b)(6) Mot. to Dism.)) The district court granted both motions. (ROA.369–388 (Ord. Granting Defs.' Rule 12(b)(1) Mot. to Dism.), ROA.411–27 (Ord. Granting Defs.' Rule 12(b)(6) Mot. to Dism.))

**C. Rulings presented for review.**

Appellees presume from Appellants' Brief that Appellants challenge each of the rulings made by the district court in deciding to dismiss their claims. (Appellants' Br. at 9.)



## SUMMARY OF THE ARGUMENT

In *Sierra Club v. City of San Antonio*, 112 F.3d 789, 793 (5th Cir. 1997), this Court held that a district court abused its discretion when it refused to abstain from adjudicating a Texas groundwater-regulation case. This case presents the opposite scenario—the district court dismissed Fazzino’s takings claim, which complains of the District’s application of its Rules to allocate groundwater, on the basis of *Burford* abstention. In so doing, it did not abuse its discretion.

The district court’s dismissal of Fazzino’s takings claim is doubly correct in light of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. Fazzino could adjudicate his takings claim through the state courts. He originally sought to do so, filing a nearly identical claim in state court, which he dismissed hours before filing this suit in federal court. But as set forth in *Williamson County*, a takings claim does not ripen if it can still be pursued through the state courts. In dismissing Fazzino’s takings claim as unripe, the district court did not abuse its discretion.

The district court also correctly dismissed Appellants’ claims against the Directors in their individual capacities on the basis of



qualified immunity. Qualified immunity shields government officials performing discretionary functions from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. None of the rights of which Plaintiffs claim to have been deprived, however, have been clearly established under the present circumstances.

Plaintiffs' equal-protection and due-process claims rely on the extension of Texas oil-and-gas law to govern groundwater. While the Texas Supreme Court has selectively applied some aspects of oil-and-gas law to the groundwater context, it has not adopted that body of law wholesale. Instead, Chapter 36 of the Texas Water Code sets forth the regulatory structure by which groundwater is governed, and the rights Appellants claim by analogy to oil-and-gas law are not clearly established in Chapter 36 or anywhere else in Texas law.

Likewise, Director Stratta's claim under the First Amendment would require a reversal of precedent as to the constitutionality of the Texas Open Meetings Act. Director Stratta sought to speak ostensibly as a member of the public at a District board meeting on a topic that had not been noticed under the Open Meetings Act. Such a gambit, however,



would have violated the Act, which has been held to be a constitutional time/place/manner restriction on speech. Appellants' claims against the Directors were properly dismissed on the basis of qualified immunity.

Finally, Appellants' Section 1983 claims alleging that the District denied them free speech and equal protection are barred by Eleventh Amendment immunity. Texas (including its various arms) is immune from a suit under the Eleventh Amendment. The district court properly evaluated the factors set forth in *Clark v. Tarrant County*, and observed that Texas treats the District as an arm of the State and that the State closely oversees the District's operations and policy decisions. The district court also correctly noted that the District can obtain funding from the State under existing state law, and that such state funding could be used (and could be needed) by the District to pay a judgment should Appellants prevail on their claims. Under such circumstances, the district court properly found the District to be an arm of the State, and as such, immune to suit under the Eleventh Amendment.



## ARGUMENT

The district court properly abstained from adjudicating Fazzino's takings claim under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In their brief, Appellants addressed the issue of *Burford* abstention last. (Appellants' Br. at 46–49.) However, *Burford* abstention is a “threshold issue” to be addressed before a court “need[s] to review the merits.” *Baran v. Port of Beaumont Nav. Dist. of Jefferson Cty.*, 57 F.3d 436, 439 (5th Cir. 1995).

The proper application of *Burford* abstention in this case frames the other issues before the Court, demonstrating that Texas groundwater law is not “clearly established” vis-à-vis the correlative rights that Appellants (and amicus Texas Farm Bureau) seek to create. For these reasons, Appellees address Appellants' arguments in reverse order, and address the issue of *Burford* abstention first.

**A. The district court did not abuse its discretion in applying *Burford* abstention as to Fazzino's claims.**

In applying *Burford* and deciding to abstain from adjudicating the case, the district court undertook “a careful consideration of the federal interests in retaining jurisdiction over the dispute” and determined “that the State's interest are paramount and that [the] dispute would be best



adjudicated in a state forum.” (ROA.386 (quoting *Burford*, 319 U.S. at 327.)) The district court’s decision to abstain under *Burford* is reviewed for abuse of discretion. See *Sierra Club v. City of San Antonio*, 112 F.3d 789, 793 (5th Cir. 1997) (citing *Am. Bank & Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 922 n.6 (5th Cir. 1993)).

This Court has identified five factors to be considered in deciding whether to abstain under *Burford*: (1) “whether the cause of action arises under state or federal law;” (2) “whether the case requires inquiry into unsettled issues of state law;” (3) “the importance of the state interest involved;” (4) “the state’s need for a coherent policy in the area;” and (5) “the presence of a special state forum for judicial review.” *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993). In this case, the district court carefully evaluated those factors. (ROA.386–87.)

The district court’s evaluation correctly concluded that each of the factors favored abstention. (ROA.386–87.) Indeed, under such circumstances, the district court may well have abused its discretion if it had *not* abstained under *Burford*. See *Sierra Club*, 112 F.3d at 793 (holding that the district court abused its discretion “because abstention appears so manifestly warranted under *Burford*.”)



*Sierra Club* is particularly instructive because it involves the same subject matter: Texas' regulatory system for groundwater allocation. In *Sierra Club*, the advocacy group sued San Antonio under the Endangered Species Act complaining that it was "taking" endangered species by withdrawing groundwater from the Edwards Aquifer in volumes that would endanger flows from certain springs in which the species live. *Id.* at 791–92. The City's draws from the Aquifer are controlled by the "Edwards Aquifer Act, [which] creat[ed] a regulatory scheme to control and manage the use of the aquifer." *Id.* at 792.

Shortly after the *Sierra Club* filed its federal suit, the Texas Supreme Court upheld the constitutionality of the Edwards Aquifer Act. *See id.* (citing *Barshop v. Medina Cty. Underground Water Conserv. Dist.*, 925 S.W.3d 618 (Tex. 1996)). Nonetheless, the district court denied the City's motion to dismiss on the basis of *Burford* abstention, and instead granted a preliminary injunction limiting the City's pumping from the Aquifer based on spring flows. *Sierra Club*, 112 F.3d at 792–93.

On appeal, this Court held that the district court abused its discretion in refusing to abstain under *Burford*. *See id.* at 798. In so doing, the Court noted that "*Burford* and our case are very similar." *Id.*



Whereas “[i]n *Burford*, the Court emphasized the elaborate and comprehensive nature of the state regulatory scheme” overseen by the Railroad Commission, the Edwards Aquifer Act likewise “can fairly be characterized as a comprehensive regulatory scheme” that “represents a sweeping effort by the Texas Legislature to regulate the aquifer, with due regard for all competing demands for the aquifer’s water.” *Id.* at 793–94. Moreover, as with the oil and gas at issue in *Burford*, the *Sierra Club* Court observed that “[t]he regulation of water resources is likewise a matter of great state concern.” *Id.* at 794.

The claims brought by Fazzino are similar to those at issue in both *Burford* and *Sierra Club*. Chapter 36 of the Texas Water Code provides a comprehensive regulatory scheme for the management and conservation of Texas’ groundwater resources. *See generally* Tex. Water Code ch. 36. And as recognized in *Sierra Club*, the regulation of water resources is a matter of great state concern. *Sierra Club*, 112 F.3d at 794. That is especially true of a state like Texas, which has a rapidly growing population in a region that is prone to severe drought. TEXAS WATER DEV. BD., 2017 STATE WATER PLAN at 3–17 (2016),



<http://www.twdb.texas.gov/waterplanning/swp/2017/doc/SWP17-Water-for-Texas.pdf?d=13865.794999990612>.

Thus, in applying the *Burford* factors, the district court did not abuse its discretion in deciding to abstain.

**1. *Burford* Factor 1 favors abstention: Fazzino's causes of action arise under state law.**

Fazzino's claims rely on his interpretation of state law. (ROA.22–28.) Specifically, Fazzino claims that “groundwater rights owners are entitled to a fair opportunity to produce their fair share of the groundwater beneath their property” and that denial of that right “amounts to confiscation.” (ROA.26.) In support of those propositions, Fazzino cites state-court precedent.

Whether Fazzino is correct in his characterization of state law is determinative of whether he has a valid Section 1983 claim. After all, Fazzino's claim that his property has been taken without compensation rests on the nature of his property interest. (ROA.26.) His claim that he must be treated equally as other groundwater-rights owners rests on state law. (ROA.25.) Thus, the first *Burford* factor favors abstention.



2. ***Burford Factor 2 favors abstention: Appellants' case requires inquiry into state law left unsettled by Edwards Aquifer Authority v. Day.***

With its numerous cites to state-court precedent, Fazzino's Complaint demonstrates that his claims require inquiry into state law. (ROA.26.) Fazzino's claim rests on his interpretation of *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012). (ROA.23, 26.) But as the Texas Legislature summarized, "while *Day* answered some of the most fundamental questions about groundwater ownership, it left many questions still unanswered." H. Comm. on Nat. Res., Interim Rpt., 84th Leg. at 15 (Tex. Jan 2015).<sup>3</sup> The specific state-law issues raised by Fazzino's claims are among those "many questions still unanswered."

Fazzino's claim boils down to his complaint that "[t]he District's conduct in permitting the City of Bryan to produce disproportionate amounts of groundwater from its small tract of land results in depriving Plaintiff of his fair chance to produce a fair share of the groundwater." (ROA.26–27.) Texas Farm Bureau echoes this complaint in its amicus

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<sup>3</sup> Available at <https://house.texas.gov/media/pdf/committees/reports/83interim/House-Committee-on-Natural-Resources-Interim-Report-2014.pdf>



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brief, arguing that “[t]he oil and gas principle of correlative rights” establishes “the right of a landowner to produce a fair share of groundwater.” (Tex. Farm Bureau’s Br. at 19.)

“In groundwater circles throughout the state, the term ‘correlative rights’ has been commonly used to describe a type of regulatory approach that limits groundwater production based solely on [surface] acreage ownership.” H. Comm. on Nat. Res., Interim Rpt., 86th Tex. Leg. at 56 (Tex. Dec. 2018).<sup>4</sup> Consistent with this understanding of the term “correlative rights,” Fazzino and Texas Farm Bureau contend that a landowner’s fair share of groundwater production correlates to the landowner’s surface acreage.<sup>5</sup> See ROA.219–21; Tex. Farm Bureau’s Br. at 18–20; see also *Texaco Producing, Inc. v. Fortson Oil Co.*, 798 S.W.2d 622, 625 (Tex. App.—Austin 1990, no writ) (discussing correlative rights in the oil-and-gas context).

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<sup>4</sup> Available at <https://house.texas.gov/media/pdf/committees/reports/85interim/Natural-Resources-Committee-Interim-Report-2018.pdf>.

<sup>5</sup> Texas Farm Bureau testified in 2015 before the House Natural Resources Committee “that its priority for the next session will be to ensure legislation to recognize that each property owner, regardless if there is only a one-acre lot in a subdivision, is entitled to a ‘fair share’ and compensated accordingly.” H. Comm. on Nat. Res., Interim Rpt., 84th Tex. Leg. at 31 (Tex. Jan. 2015). The Legislature did not pass the Farm Bureau’s preferred legislation. The Farm Bureau now asks this Court to create new law that the Texas Legislature has refused to pass.



But the fair share of groundwater production in Texas is not allocated by correlative rights. “In *Day*, there is no statement from the court that clearly requires or implies that groundwater regulation should limit production based solely on surface acreage over an aquifer.” H. Comm. on Nat. Res., Interim Rpt., 86th Tex. Leg. at 56 (Tex. Dec. 2018). Instead, the *Day* Court recognized that groundwater-production fair shares are allocated under the provisions of Chapter 36 of the Texas Water Code. *Day*, 369 S.W.3d at 833–36 (discussing the regulatory framework of groundwater conservation districts and noting that the Edwards Aquifer Authority is not governed by Chapter 36.)

***a) The Texas Supreme Court has adopted the principle of ownership-in-place in the groundwater context.***

Fazzino cites *Day* for the proposition that “it is just simply Texas law” to use “Texas property cases arising in the oil and gas context to resolve analogous groundwater issues.” (Appellants’ Br. at 44) (citing 369 S.W.3d at 831–32.) But that overstates the effect of *Day*, which adopted only one narrow aspect of oil-and-gas law to the groundwater context. And, with respect to the correlative rights on which Fazzino’s claims hinge, his argument misstates the holding of *Day*.



The *Day* Court addressed the Edward's Aquifer Authority's (the "EAA") denial of an application to pump groundwater from the Edwards Aquifer. *Day*, 369 S.W.3d at 821–22. The court concluded that "[g]roundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for the taking."<sup>6</sup> *Id.* at 833. To the extent the EAA deprived the landowners of their property right to groundwater under their land, the landowners could obtain just compensation under Article I, Section 17 of the Texas Constitution.<sup>7</sup> *See id.* at 838.

Thus, the Supreme Court adopted one aspect of Texas oil-and-gas law—specifically the concept that groundwater is owned in place by the owner of the surface estate—for use in the groundwater context. *See id.* at 823.

But contrary to Fazzino's assertion, *Day* did *not* adopt the whole body of Texas oil-and-gas law to groundwater regulation. And of specific

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<sup>6</sup> Whether a regulatory taking occurred is evaluated applying the same factors under both Texas and federal law. *See id.* at 839 (relying on *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

<sup>7</sup> The procedural history of *Day* and other Texas cases fatally undermines any argument that Fazzino cannot seek compensation for the alleged taking in state court. (*Cf.* ROA.27.)



importance to Fazzino's claim, *Day* rejected the application of the oil-and-gas concept of correlative rights to groundwater. The *Day* Court reiteratively observed that "[i]n *East*, we concluded that there were no correlative rights in groundwater in the absence of legislation." *Day*, 369 S.W.3d at 840 (quoting *Houston & T.C. Ry. v. East*, 81 S.W. 279, 280 (Tex. 1904)) (internal quotation and other editing marks omitted).

There has been no such legislation.

The Texas Water Code (then and now) does not "require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner." Tex. Water Code § 36.002(d)(3). The Legislature has thus expressly rejected Fazzino's (and Texas Farm Bureau's) vision of correlative rights to groundwater.

Fazzino identifies no alternative legislation. And the Texas House Committee on Natural Resources has expressed the Legislature's unwillingness to enact such legislation. H. Comm. on Nat. Res., Interim Rpt., 86th Tex. Leg. at 61–62 (Tex. Dec. 2018) ("Any statutory change to [the existing] framework [for allocating groundwater rights] at this point in time would have much more negative impacts to property rights and



the economy than whatever good could be accomplished by such a change.”); H. Comm. on Nat. Res., Interim Rpt., 84th Leg. at 30–31 (Tex. Jan 2015) (assessing correlative rights under the current regulatory structure). Fazzino’s attorneys themselves have acknowledged that there is no such legislation. Marvin W. Jones & C. Brantley Jones, *The Evolving Legacy of EAA v. Day: Toward an Effective State Water Plan*, 68:3 BAYLOR L. REV. 765, 794–95 (2016) (“The best solution is for the Legislature to recognize the importance of private property rights and the applicability of oil and gas ownership principles to groundwater,” and suggesting that “if the Legislature lacks the will to” do so, “[o]ne way to prompt legislative action . . . is through litigation.”). In the absence of such legislation, Fazzino’s argument that oil-and-gas law has been adopted *in toto* to the groundwater context must be rejected.

**b) *In the oil-and-gas context, correlative rights reconcile the law of capture with ownership-in-place.***

A landowner’s ownership of the groundwater in place underneath his land “must be considered in connection with the law of capture and is subject to police regulations.” *Day*, 369 S.W.3d at 832 (quoting *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948)). Such police



regulations allocate how much groundwater can be produced in order to ensure that all owners are permitted to produce their fair share. *See id.* In the groundwater context, such police regulations are set forth in Chapter 36 of the Texas Water Code.

Separate from groundwater, Texas has reconciled the rule of ownership-in-place with the law of capture in one context by protecting correlative rights of *oil and gas* owners. *See Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 15 (Tex. 2008). Thus, “each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil or gas therefrom by lawful operations conducted on his own land.” *Elliff*, 210 S.W.2d at 583. At the same time, the other owners of the common source of supply each have a right to prevent another owner from exercising “their privileges of taking so as to injure the common source of supply.” *Id.*

That is important because in *Day*, the Supreme Court *declined* to adopt some aspects of Texas oil-and-gas law, specifically recognizing its previous holding in *East* that there are “no correlative rights in groundwater [i]n the absence of . . . legislation.” *Day*, 369 S.W.3d at 840 (quoting *East*, 81 S.W. at 280).



**c) *The Texas Legislature has refused to adopt correlative rights in the groundwater context, and instead allocates groundwater production by statute.***

“[C]orrelative rights are a creature of regulation rather than the common law,” and while Texas state regulation of oil-and-gas production grants correlative rights to oil and gas, there is no state regulation limiting allocation of groundwater to correlative rights alone. *Day*, 369 S.W.3d at 830. That means that a landowner’s fair share of groundwater must be determined by regulation adopted in accordance with the direct statutory guidance in Chapter 36 of the Texas Water Code. *See id.* at 841.

In response to *Day*, the Legislature has been unequivocal that the Chapter 36 statutory scheme—and not a scheme borrowed from oil-and-gas law—governs groundwater regulation. As reported by the House Natural Resources Committee,

Although the Texas Supreme Court opined a number of management strategies that it believed might be acceptable, or otherwise unacceptable, and further likened groundwater law in the state to other more highly developed areas of law in Texas, such as oil and gas regulation, the court’s decision in *Edwards Aquifer Authority v. Day* did not change the legislature’s ability to continue managing and developing groundwater resources under its own statutory implementation within the bounds of the constitution. This



includes the ability to continue creating regulations that in the future may or may not treat water resources like oil and gas, as well as create statutory provisions providing for methods of management that support historical use in the permitting of groundwater resources.

H. Comm. on Nat. Res., Interim Rpt. 84th Leg. at 15 (Tex. Jan 2015).

***d) Texas statutory law adopts a multi-factor scheme for the allocation of groundwater production, rather than correlative rights as exists in oil-and-gas regulation.***

Rather than a straight correlation to the surface acreage, Texas statutory law “requires groundwater districts to consider several factors in permitting groundwater production, among them the proposed use of water, the effect on the supply and other permittees, [and] a district’s approved management plan.” *Day*, 369 S.W.3d at 841 (citing Tex. Water Code § 36.113(d)(2)–(4)); *see also* Tex. Water Code § 36.116(a)–(e) (citing several additional factors, including “acreage or tract size” and “historic or existing use”). Fazzino disagrees with that regulatory structure. He instead intends to use this case to “prompt legislative action . . . through litigation.” Marvin W. Jones & C. Brantley Jones, *The Evolving Legacy of EAA v. Day: Toward an Effective State Water Plan*, 68:3 BAYLOR L. REV. 765, 794-95 (2016); *accord* Def.’s 2d Am. Plea to the Jurisd. & Ans.



at Attach. 3 (recounting Fazzino's characterization of his claims as a "test case").

To get this Court to take steps that the Texas Legislature has refused to take, Fazzino argues that "[t]he District's conduct in permitting the City of Bryan to produce disproportionate amounts of groundwater from its small tract of land results in depriving [him] of his fair chance to produce a fair share of the groundwater." (ROA.26–27.) In support of this proposition, Fazzino cites an oil-and-gas case—*Halbouty v. Railroad Commission*. (ROA.26–27.) *Day*, however, indicates that this rule of Texas oil-and-gas law does not apply to groundwater. Fazzino's suit therefore requests an extension of Texas law that is, at best, unsettled (and, in truth, unless and until the Legislature says otherwise, is settled against his position).

**3. *Burford* Factor 3 favors abstention: The allocation of groundwater is of critical interest to the State of Texas.**

As this Court noted in *Sierra Club*, "[t]he regulation of water resources is . . . a matter of great state concern. As the Texas Supreme Court stated in *Barshop*, '[c]onservation of water has always been a paramount concern in Texas, especially in times, like today, of



devastating drought.” *Sierra Club v. City of San Antonio*, 112 F.3d 789, 793 (5th Cir. 1997) (quoting *Barshop v. Medina Cty. Underground Water Conserv. Dist.*, 925 S.W.3d 618, 626 (Tex. 1996)).

Since *Sierra Club*, Texas’ concern over water—and specifically groundwater—has only become more acute. As observed by the Texas House Committee on Natural Resources, “[i]n recent years . . . severe drought coupled with a growing population has caused pressure to grow on groundwater resources.” H. Comm. on Nat. Res., Interim Rpt. 84th Leg. at 15 (Tex. Jan 2015). “What was once used mainly in times of emergency, is fast becoming the preferred method of water supply in this state.” *Id.*

Over the next fifty years, Texas’ population is expected to nearly double—from an estimated 29.5 million in 2020 to an expected 51 million in 2070. TEXAS WATER DEV. BD., 2017 STATE WATER PLAN at 5 (2016), <http://www.twdb.texas.gov/waterplanning/swp/2017/doc/SWP17-Water-for-Texas.pdf?d=13865.794999990612>. Those 51 million people are expected to consume 21.6 million acre-feet of water in 2070. *Id.* at 6. But over that time, the available supply of water—without construction of new sources—will decrease to 13.6 million acre-feet of water in 2070. *Id.*



Most of that decline will come as a result of the depletion of Texas' groundwater resources. *Id.* at 7.

If water supplies are not managed in such a way as to meet anticipated growth, “[e]conomic modeling indicates that Texas businesses and workers could lose approximately \$73 billion in income annually in 2020 and \$151 billion annually in 2070.” *Id.* at 11–12. But more importantly, “approximately one-third of Texas’ municipal water users would have less than half of the water supplies that they require to live and work by 2070.” *Id.* at 12. Thus, as observed by the Texas Water Development Board—a state agency that exists for the sole purpose of managing Texas’ water resources—the management and conservation of its water resources is of critical importance to the State of Texas not only to ensure its economic viability, but also to protect human life.



**4. *Burford Factor 4 favors abstention: The Texas Legislature has expressed its interest in a coherent policy in the area of groundwater regulation.***

The Texas Legislature has identified groundwater conservation districts as “the state’s preferred method of groundwater management.” Tex. Water Code § 36.0015. Chapter 36 of the Texas Water Code requires each groundwater conservation district “to develop a comprehensive management plan with stated goals, such as, promoting the most efficient use of groundwater, preventing waste and subsidence, and addressing conjunctive surface water management issues, natural resource issues, drought conditions, and conservation.” *Guitar Holding Co., L.P. v. Hudspeth Cty. Underground Water Conserv. Dist. No. 1*, 263 S.W.3d 910, 912 (Tex. 2008) (citing Tex. Water Code § 36.1071(a)(1)–(7)).

“*Day* did not change the legislature’s ability to continue managing and developing groundwater resources under its own statutory implementation within the bounds of the constitution.” H. Comm. on Nat. Res., Interim Rpt., 84th Tex. Leg. at 15 (Tex. Jan. 2015). As reflected by Chapter 36 of the Texas Water Code, the Legislature has developed a comprehensive and coherent policy to manage Texas’ groundwater resources.



5. ***Burford Factor 5 favors abstention: The Texas Legislature has expressed its desire that questions of groundwater regulation be adjudicated in state court.***

Unlike appeals of Railroad Commission decisions, which were at issue in *Burford*, the decisions of groundwater conservation districts are appealed in the count(ies) over which the district has jurisdiction. Compare Tex. Gov't Code § 2001.176(b)(1) (setting venue for appeals under the Administrative Procedure Act in Travis County) with Tex. Water Code § 36.251(c) (fixing venue for judicial review of an order made by a groundwater conservation district in any county in which the district is located). Nonetheless, in allowing and providing for judicial review in state court, the Legislature has expressed its desire that the decisions of groundwater conservation districts be adjudicated in state court. And when adjudicated in state court, "Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts." *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943).

Were the district court to wade into this unsettled, but developing area of Texas law, "[d]elay, misunderstanding of local law, and needless federal conflict with State policy, are the inevitable product of this double system of review." *Id.* Seeking to avoid such a result, the district court



here properly evaluated the factors and determined that *Burford* abstention was proper. The district court did not abuse its discretion in doing so, and its decision to abstain from deciding Fazzino's takings claim should be affirmed.

**B. The district court did not abuse its discretion in dismissing Fazzino's takings claim as unripe because he has failed to exhaust his state-law remedies.**

A federal takings claim against a State does not ripen until the plaintiff has sought "compensation through the procedures the State has provided for doing so." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 n.13 (1985) ("As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."). Fazzino did not seek compensation through the state courts. His takings claim was therefore not ripe, and the district court properly dismissed that claim.

**1. Fazzino has not sought compensation in state court.**

As reflected in Plaintiffs' Complaint, Fazzino has not sought redress in state court for the alleged taking. (ROA.27.) Fazzino



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acknowledges, however, that there is a mechanism for him to obtain just compensation from the State—Article I, Section 17 of the Texas Constitution—by citing that provision as a basis for recovery in this case before the federal court. (ROA.26.)

Fazzino consciously avoided a state-court adjudication. Fazzino initially filed suit in state court alleging that the District committed a constitutional taking of his property when it allegedly denied him the right to produce a fair share of groundwater beneath his surface property. *See* Pl.'s Orig. Pet. at ¶¶11–12, *Fazzino v. Brazos Valley Groundwater Conserv. Dist.*, No. 17-02-20199-CV (82nd Dist. Ct. Robertson Cty., Tex. Feb. 7, 2017).

On April 13, 2018, after the District sought dismissal of those claims (but before a hearing), Fazzino dismissed his suit without prejudice. *See* Pl.'s Not. of Nonsuit, *Fazzino*, No. 17-02-20199-CV (Apr. 13, 2018). ***The very same day***, Fazzino initiated this suit in federal court, which includes identical claims and identical bases for recovery. *Compare* ROA.11-31 *with* Pl.'s 1st Am. Orig. Pet., *Fazzino*, No. 17-02-20199-CV (Jan. 26, 2018).



Fazzino's repleading of his claims in federal court is forum shopping at its most naked. It's not that Fazzino couldn't pursue state-law remedies in a state-court forum. It's that he started to pursue those remedies in that forum and did not like how the proceedings were going. Faced with a likely unfavorable ruling from the state court and a fraught appellate process in which he would have to convince Texas courts to extend oil-and-gas law to the groundwater context in a way they have never done before, Fazzino opted instead to ask a federal court to do what a state court would not.

The district court was right not to accept the invitation.

***2. Texas' courts should have the first opportunity to decide whether Fazzino has a compensable property interest.***

In *Coates v. Hall*—another groundwater takings case—the Western District of Texas held that the plaintiffs' "takings claim involves several novel issues of state law" that must be resolved in state court before the federal court could adjudicate their federal takings claim. 512 F. Supp. 2d 770, 788 (W.D. Tex. 2007). Since then, the Texas Supreme Court provided some clarification in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012).



But even after *Day*, the degree to which regulation can constitute a taking of a landowner's property right to the groundwater underneath his land remains unresolved. The *Day* Court restated long-standing Texas law that there are "no correlative rights in groundwater '[i]n the absence of . . . legislation.'" *Day*, 369 S.W.3d at 840 (quoting *Houston & T. C. Ry. v. East*, 81 S.W. 279, 280 (Tex. 1904)). "[C]orrelative rights are a creature of regulation rather than the common law." *Id.* at 830. That means that a landowner's fair share of groundwater must be determined by regulation. *See id.* at 841.

If regulation determines the allocation of a landowner's fair share of groundwater, how can that same regulation result in a taking of that same fair share? Fazzino and his supporters argue that it is through correlative rights. (Appellant's Br. at 45) (arguing for the application of oil-and-gas law principles to determine a landowner's fair share to groundwater); (Tex. Farm Bureau Amicus Br. at 19) ("The oil and gas principle of correlative rights, or the right of a landowner to produce a fair share of groundwater, applies in the present case."). But that is contrary to *Day*. *See Day*, 369 S.W.3d at 840 (there are "no correlative



rights in groundwater in the absence of legislation.”) (internal quotation and editing marks omitted).

If Fazzino wishes to seek that extension of Texas law, he must do so in the Texas courts. And he can do so by bringing a claim for just compensation under Article I, Section 17 of the Texas Constitution. Until he does so, his claim under the federal Constitution is not ripe.

***3. The district court has discretion to dismiss Fazzino’s takings claim under Williamson County.***

Rather than completely depriving the district court of jurisdiction, *Williamson County* grants courts discretion in deciding whether to dismiss unripe takings claims. *See Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl Prot.*, 560 U.S. 702, 729 (2010); *Archbold-Garrett v. New Orleans City*, 893 F.3d 318, 324–25 (5th Cir. 2018). This Court has only identified an abuse of that discretion in one instance: where the plaintiff asserts a separate jurisdictional claim, and dismissal would result in duplicative litigation. *See Archbold-Garrett*, 893 F.3d at 324–25.

As discussed below, Fazzino has no other claim against the District because the District is immune to suit under the Eleventh Amendment. Nor does Fazzino have any viable claim against the Directors in their



individual capacities because the Directors are protected by the doctrine of qualified immunity.

But even if there were viable claims, the result would not be duplicative litigation. Fazzino's equal-protection claim deals with entirely different facts and involves entirely separate (and wholly federal) legal issues—i.e., whether the District treated him less favorably than other similarly situated landowners without a rational basis for doing so.<sup>8</sup> *Cf., Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 586 (5th Cir. 2016). That issue can be resolved without determining the novel questions of state law that are at issue in Fazzino's takings claim. Accordingly, the district court did not abuse its discretion, and its decision to dismiss Fazzino's takings claim should be affirmed.

**C. The district court correctly found the Directors to be protected by qualified immunity because Appellants' claims are not rooted in clearly established law.**

Qualified immunity shields government officials performing discretionary functions from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

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<sup>8</sup> The claims also seek different relief—whereas Fazzino's takings claim seeks to recover monetary damages (ROA.28), Appellants' equal-protection claim seeks only injunction. (ROA.25.)



reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The primary purpose of qualified immunity is “to ensure that ‘insubstantial claims’ against government officials [will] be resolved prior to discovery.” *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Accordingly, a Section 1983 plaintiff must meet a heightened pleading standard. *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc). The standard “requires claims of specific conduct and actions giving rise to a constitutional violation.” *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996). “Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.” *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

Appellants’ claims against the Directors did not meet the heightened pleading standard required in Section 1983 cases. Accordingly, the district court did not err in dismissing those claims.

***1. The district court properly applied the Saucier two-step analysis.***

“To defeat a defendant’s assertion of qualified immunity at the pleadings stage, the plaintiff ‘must plead that each Government-official



defendant, through the official's own individual actions, has violated the Constitution.” *Little v. Obryan*, 655 Fed. Appx. 1027, 1029 (5th Cir. 2016) (mem. op.) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). “The plaintiff must also allege facts that show that the violation was objectively unreasonable, that is, a reasonable government official, in the light of clearly established law, would not have acted so.” *Id.* (citing *Anderson*, 483 U.S. at 639).

The Supreme Court developed a “two-step scheme” to resolve claims of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 213 (2001). The first step requires the Court to determine whether the facts alleged by a plaintiff “make out a violation of a constitutional right.” *Pearson*, 555 U.S. at 232 (citing *Saucier*, 533 U.S. at 201). The second step requires the Court to decide “whether the [constitutional] right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.” *Id.* Either prong can be considered first. *See id.* at 236; *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013).



2. ***Because the District did not violate any “clearly established” law or right, the district court was correct to dismiss Appellants’ suit against the Directors.***

To survive a motion to dismiss on the basis of qualified immunity, a plaintiff must allege facts to demonstrate that “a reasonable government official, in the light of clearly established law, would not have acted so.” *Little*, 655 Fed. Appx. at 1029 (citing *Anderson*, 483 U.S. at 639); accord *Lytle v. Bexar Cty.*, 560 F.3d 404, 410 (5th Cir. 2009) (holding that a right is “clearly established” if it “would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”). Moreover, the inquiry into whether the alleged conduct violated “clearly established” rights or laws “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Saucier*, 533 U.S. at 201.

If public officials “of reasonable competence could disagree on this issue, immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (see also, *Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004)). The unlawfulness of the alleged conduct must be “readily apparent from relevant precedent in sufficiently similar situations.” *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008). Any such existing



precedent “must have placed the statutory or constitutional question *beyond debate*.” *Benes v. Puckett*, 602 Fed. Appx. 589, 592 (5th Cir. 2015) (emphasis added). Accordingly, to survive a qualified-immunity dismissal, Appellants “must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.” *Cooper v. Brown*, 844 F.3d 517, 524 (5th Cir. 2016).

**a) *The Directors did not violate clearly established Texas property law in refusing to grant Fazzino a permit.***

There is no such “robust consensus” as to Texas groundwater law, and the issues presented in this are far from “beyond debate.” Though Appellants point to numerous Texas oil-and-gas cases, the Texas Supreme Court in *Day* and *Coyote Lake Ranch* made clear that only some aspects of oil-and-gas law apply to groundwater. One aspect that has not been adopted is “correlative rights”—“counter to popular belief, the *Day* case does not mandate an acreage based regulatory approach to be used by districts to avoid takings claims.” H. Comm. on Nat. Res., Interim Rpt., 86th Tex. Legis. at 61 (Tex. Dec. 2018).



Thus, all of Appellants' alleged constitutional violations stem from their uncertain interpretations and applications of Texas state law. Appellants' claim that the Directors deprived them of equal protection and took Fazzino's property without due process is based on the application of Texas oil-and-gas law that, if applied to groundwater rights, would give them a right to produce a "fair share" of groundwater that correlates to the size of their surface estate. (ROA.25–27.)

But the Texas Supreme Court has expressly refused to adopt the totality of Texas oil-and-gas law to groundwater. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840 (Tex. 2012). And neither the Texas courts nor the Texas Legislature "requires or implies that groundwater regulation should limit production based solely on surface acreage over an aquifer." H. Comm. on Nat. Res., Interim Rpt., 86th Tex. Legis. at 56 (Tex. Dec. 2018). "To date, no other case law exists in which courts have defined a property owner's 'right to a fair share.'" *Id.*

Appellants thus failed to point to controlling authority that equates their property rights to produce the groundwater under their property to the rights Texas property owners have to produce oil and gas. The Directors' actions therefore did not violate clearly established law, and



the district court was correct to dismiss Appellants' equal-protection and due-process claims against them.

***b) The absence of a clearly established correlative right to groundwater likewise undermines Appellants' equal-protection claim.***

Appellants claim that “[u]nequal application of the District’s permitting rules has resulted in a scenario where certain landowners like Fazzino are deprived of their groundwater because it is being drained by wells such as the City of Bryan Well No. 18.” (ROA.216.) Fazzino has not been deprived of his groundwater.

Appellants are only entitled to produce their “fair share” of water in the common, subsurface reservoir. *Day*, 369 S.W.3d at 840–41. Appellants’—and other landowners’—fair share is determined by regulation, i.e., the District’s Rules and Chapter 36 of the Texas Water Code. As set forth in *Day*, regulation that affords an owner a fair share of subsurface water “must take into account factors other than surface area.” *Id.* at 841.

Consistent with Chapter 36 of the Texas Water Code, the District’s Rules take into account a variety of factors in determining a landowner’s fair share of groundwater production. The consideration of such factors



(as the District's Rules do) is expressly called for in the Texas Water Code and unreservedly endorsed by the Texas Supreme Court in *Day*. *Id.*

Appellants' suit thus is not a challenge to any action taken by the Directors. It is a challenge to the District's Rules and, ultimately, a challenge to the constitutionality of Chapter 36 of the Texas Water Code itself. But the (alleged) unconstitutionality of Chapter 36 has never been clearly established by any Texas or federal court.

Thus, for the same reason that it was correct to dismiss Fazzino's takings claim—i.e., it rests on an extension of Texas law that is not clearly established—the district court was correct to dismiss Appellants' equal-protection claim.

***c) Clearly established First Amendment law does not allow Stratta to violate the Texas Open Meetings Act.***

Stratta is a member of the District's board of directors. (ROA.14.) As such, Stratta (like all of the District's directors) is subject to the Texas Open Meetings Act ("TOMA"). *See* Tex. Gov't Code § 551.001(3)(H).

The TOMA requires that the District notify the public of the agenda of each meeting of the District's board of directors at least 72 hours before the scheduled time of the meeting. *See* Tex. Gov't Code §§ 551.041,



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551.043(a). Any action taken at a meeting of the District's board of directors that is not properly noticed is voidable. *See* Tex. Gov't Code § 551.141. In addition, the District may be sued for violating the TOMA, enjoined from committing future violations, and required to pay attorneys' fees for past violations. *See* Tex. Gov't Code § 551.142.

The topic on which Stratta wished to speak—i.e., the City of Bryan's Well No. 18—was not posted as an agenda item for the District's board meeting. (ROA.225.) Nonetheless, Stratta attempted to speak on the subject, ostensibly as a member of the public during the public-comment period. (ROA.21, 225.)

But a director is not a member of the "public" for TOMA purposes, and cannot use a "public-comment" period to circumvent the notice requirements of the TOMA. *See Hays Cty. Water Planning P'ship v. Hays Cty.*, 41 S.W.3d 174, 180 (Tex. App.—Austin 2001, pet. denied) (holding that the detailed presentation of a county commissioner regarding infrastructure planning during the general "proclamations and presentations" portion of the meeting was not properly noticed under the TOMA); Op. Tex. Att'y Gen. No. JC-0169 (2000) ("We caution that the use of 'public comment' or similar term will not provide adequate notice if the



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governmental body is, prior to the meeting aware, or reasonably should have been aware, of specific topics to be raised.”). Stratta’s attempt to speak about an unnoticed subject during the District’s public-comment period would therefore have violated the TOMA had the District permitted him to proceed.

Stratta’s post-hoc justification that he intended only to inquire about placing the issue of Well No. 18 on a future agenda is disingenuous. Stratta acknowledged to the district court that his attempt to speak as a “member of the public” was the result of his “frustrat[ion]” at the board’s refusal to place the issue on the agenda. (ROA.225.) But if Stratta only wanted to inquire about placing the issue on a future agenda, he could have done so as a member of the board—a fact of which he was informed by the District’s legal counsel. *See* Tex. Gov’t Code § 551.042(a). He had no need to use the “public-comment” period. Stratta’s attempt to speak as a supposed member of the public reveals his true intention to speak beyond what the TOMA permits.

Stratta acknowledged to the district court that his purpose in seeking to “speak during the public comment period” was to avoid the restrictions imposed by the TOMA because “his fellow board members



refus[ed] to place Well No. 18 on the board's agenda." (ROA.225.) But the right to circumvent the TOMA is not clearly established.

Stratta's public comments, had they been permitted, would have violated the TOMA—also a fact of which he was informed by the District's legal counsel. The operation of the TOMA to bar Stratta's comments does not violate the First Amendment. *See Asgeirsson v. Abbott*, 696 F.3d 454, 467 (5th Cir. 2012).

Stratta points to no applicable precedent that would have alerted the Directors that the TOMA did not bar a director's attempt to speak as a putative member of the public. On the contrary, the whole of the precedent of this Court reflects that the TOMA is a reasonable time/place/manner restriction, and the Directors reasonably believed that Stratta's proposed comments would violate the law. In the absence of existing precedent placing the question beyond debate, the Directors did not infringe on a clearly established right. The district court therefore did not err in dismissing Stratta's First Amendment claim.



**D. The District is an arm of the State of Texas, and as such is immune to Appellants' suit under the Eleventh Amendment.**

The Eleventh Amendment bars federal suits against a State unless the State has specifically waived its immunity or unless Congress has exercised its power under the Fourteenth Amendment to override that immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (citing *Welch v. Tex. Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 472–73 (1987) (plurality opinion)). In enacting Section 1983, Congress did not waive the states' Eleventh Amendment immunity. *Id.*

As an appropriate first step, therefore, the Court must determine whether the District is to be treated as “an arm of the State partaking of the State's Eleventh Amendment immunity.” *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). This Court has set out six factors to be considered in determining whether an entity shares the State's Eleventh Amendment immunity: 1) whether the State statutes and case law view the agency as an arm of the State; 2) the source of the entity's funding; 3) the degree of local autonomy; 4) whether the entity is concerned primarily with local, as opposed to statewide problems; 5) whether the entity has the authority to sue and be sued in



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its own name; 6) whether the entity has the right to hold and use property. *Clark v. Tarrant Cty.*, 798 F.2d 736, 744 (5th Cir. 1986). No one factor is dispositive, but the “second *Clark* factor—the source of the entity’s funding—is the weightiest factor.” *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004).

Applying the *Clark* factors to different entities responsible for water and organized under Article XVI, Section 59 of the Texas Constitution, courts within this circuit have consistently held such entities to be arms of the State of Texas. *See Pillsbury Co., Inc. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995); *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983); *Celanese Corp. v. Coastal Water Auth.*, 475 F. Supp. 2d 623, 632–33 (S.D. Tex. 2007). The *Celanese* Court’s application of the *Clark* factors is particularly instructive in this case, as the underlying facts are similar. Acknowledging that some factors weighed to the contrary, the *Celanese* Court concluded that “those facts do not outweigh the other factors, which give the overwhelming impression that the state intended CWA to share the state’s immunity.” *Celanese Corp.*, 475 F. Supp. 2d at 634.



In this case, application of the *Clark* factors even more strongly favors the conclusion that the District is an arm of the State:

**1. *Whether the state statutes and case law view the agency as an arm of the State:***

Like Coastal Water Authority, the District is established under Article XVI, Section 59 of the Texas Constitution, which states that “the conservation and development of [the State’s] . . . water . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties.” Tex. Const. art XVI, § 59(a); Tex. Spec. Dist. Loc. Laws Code § 8835.002. To carry out these public duties, the Texas Constitution authorizes the creation of “conservation and reclamation districts . . . , which districts shall be governmental agencies and bodies politic and corporate with such powers of government . . . as may be conferred by law.” Tex. Const. art XVI, § 59(b).



At least one Texas state court has concluded that an underground water conservation district<sup>9</sup> organized under Article XVI, Section 59 of the Texas Constitution is “an arm of the state created to administer the enumerated governmental powers delegated to it.” *Lewis Cox & Son, Inc. v. High Plains Underground Water Conserv. Dist. No. 1*, 538 S.W.2d 659, 662 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.); *disapproved of on other grounds by Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 940–41 (Tex. 1993). The state court’s clear pronouncement in *Lewis Cox* pushes this factor strongly in favor of immunity.

Appellants argue that groundwater conservation districts “stand upon the same footing as a county.” (Appellants’ Br. at 23) (quoting *S. Plains Lamesa R.R. v. High Plains Underground Water Conserv. Dist. No. 1*, 52 S.W.3d 770, 774 (Tex. App.—Amarillo 2001, no pet.)) Applying the transitive property, Appellants conclude that the District is not an

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<sup>9</sup> Underground water conservation districts were formerly governed under Chapter 52 of the Texas Water Code. In 1995, the Texas Legislature repealed virtually all of Chapter 52, and such districts are now governed by the same provisions of the Water Code—i.e., Chapter 36—as groundwater conservation districts. See Act of June 16, 1995, ch. 933, § 9, 1995 Tex. Gen. Laws 4701 (providing for the repeal of Ch. 52 Texas Water Code and subsuming regulation of underground water conservation districts in Ch. 36 Texas Water Code).



arm of the State because counties are not arms of the State for Eleventh Amendment purposes. (Appellants' Br. at 22–23.)

But *South Plains Lamesa Railroad* does not stand for the proposition that groundwater conservation districts are not arms of the State. *S. Plains Lamesa R.R.*, 52 S.W.3d at 774. The statement that “districts stand upon the same footing as a county” is provided to illustrate the nature of the district as a political subdivision. *Id.*

In support of that statement, the *South Plains Lamesa Railroad* Court relied on *Lewis Cox*, which presented the question of a district's authority to close an irrigation well. *Lewis Cox & Son*, 538 S.W.2d at 660. The *Lewis Cox* Court ***did not hold*** that the district was akin solely to a county, but rather that it was akin to all other political subdivisions of the state:

The answer to the question, then, lies in the character or nature of the water district. The sources which generated and sanctioned the water district constituted it a political subdivision of the State of Texas performing governmental functions. ***It is, in other words, an arm of the state*** created to administer the enumerated governmental powers delegated to it. As constituted, the water district exists and functions as a governmental agency, a body politic and corporate, ***and stands upon the same footing as counties and other political subdivisions of the state.***

*Id.* at 662 (emphasis added and internal citations omitted).



The operative statute is consistent with that reasoning; the Texas Water Code does not treat districts the same as counties. Instead, it defines “Political subdivision” as “a county, municipality, or other body politic or corporate of the state, including a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a state agency or a nonprofit water supply corporation created under Chapter 67.” Tex. Water Code § 36.001(15). Thus, “state agenc[ies]”—which are unquestionably arms of the State—are included in the definition of “political subdivision,” indicating that the term “political subdivision” includes both arms of the State and non-arms.

While all counties are political subdivisions, not all political subdivisions are counties. And the fact that one type of political subdivision—i.e., counties—is not an arm of the State does not mean that all other political subdivisions—including state agencies and Article XVI, Section 59 districts—are also not arms of the State.

Counties, moreover, are very different from groundwater conservation districts. While counties operate under Article IX of the Texas Constitution, the District was created under Article XVI, Section 59 of the Constitution. *Compare* Tex. Const. art. IX *with* Tex. Const. art.



XVI, § 59(a). The entities have different purposes and powers, with groundwater conservation districts only having authority over “the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of ground water reservoirs or their subdivisions . . . .” Tex. Water Code § 36.0015(b).

The different powers and purposes are critical in an Eleventh Amendment analysis. While it is clear that counties are not arms of the State, this Court’s decisions evaluating conservation and reclamation districts have found them to be arms of the State. *See Pillsbury Co., Inc. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995); *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983); *Celanese Corp. v. Coastal Water Auth.*, 475 F. Supp. 2d 623, 632–33 (S.D. Tex. 2007).

Citing to an isolated footnote from the Western District of Texas’ previous decision in *Coates v. Hall*, Appellants discuss only counties, ignoring both the statutory definition and the analysis in *Lewis Cox*. (Appellants’ Br. at 24) (citing 512 F. Supp. 2d 770, 778 n.2 (W.D. Tex. 2007). In that footnote, “[t]he Court note[d] that counties are not entitled to Eleventh Amendment Immunity and may be sued under 42 U.S.C. § 1983.” *Coates*, 512 F. Supp. 2d at 778 n.2. But that footnoted



observation is dicta—the plaintiffs’ claims in that case were dismissed on the basis of ripeness and for failure to state a claim<sup>10</sup>—and not part of an analysis of the *Clark* factors. *See id.* at 772. *Coates* therefore provides little support for Appellants’ position.

Nor does this Court’s decision in *Southwestern Bell Telephone Co. v. City of El Paso* support Appellant’s assessment of the first *Clark* factor. *Southwestern Bell* stands for the well-established and non-controversial proposition that a district court must apply the *Clark* analysis in determining whether an entity is an arm of the state. *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 940 (5th Cir. 2001). But in *Southwestern Bell*, the district court applied the *Clark* factors, and “because [the El Paso County Water Improvement District No. 1 did] not challenge the district court’s application of the individual factors of the arm-of-the-state analysis, [this Court did] not address such application.” *Id.*

*Southwestern Bell* thus provides no guidance as to how the *Clark* factors should be applied with respect to an Article XVI, Section 59 district. Such guidance, however, is not necessary—the factors speak for

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<sup>10</sup> Eleventh Amendment immunity was not cited as a basis for dismissal in Defendants’ Motion to Dismiss. *See* Defs’ Mot. to Dism., *Coates v. Hall*, 512 F. Supp. 2d 770 (W.D. Tex. Oct. 23, 2006) (No. SA-06-CV-0773-XR), ECF Doc. No. 6.



themselves. And in this case, the district court thoughtfully and correctly applied the *Clark* factors to determine that Texas law treats the District as one of its arms.

**2. *The source of the entity's funding:***

Though the District's funding is derived from fees, *see* Tex. Spec. Dist. Loc. Laws Code § 8835.151; Tex. Water Code § 36.0171, Texas law specifically contemplates and authorizes the District to receive grant funding and loans directly from the State. Tex. Water Code §§ 36.158–161 (authorizing state grants to groundwater conservation districts), Tex. Water Code §§ 36.3705–374 (establishing a loan assistance fund for groundwater conservation districts)

In particular, the Texas Water Code provides that state funds may be allocated to “carry out the objectives of this chapter,” Tex. Water Code § 36.160, which include “balanc[ing] the conservation and development of groundwater to meet the needs of this state.” Tex. Water Code § 36.0015(b). Because the application of the District's Rules is part of the District's obligation to balance the conservation and development of groundwater, it can obtain State funding in connection therewith under Section 36.160. Thus, the State's funds are implicated in this action.



Appellants assert that the use of state funds to pay a judgment in this case is “mere[ly] contingent or hypothetical.” (Appellants’ Br. at 29.) Appellants’ assertion is undermined by the financial realities of groundwater conservation districts. The District has an annual budget of \$675,840.69 for 2019. Brazos Valley Groundwater Conserv. Dist., FY 2019 Approved Operating Budget (Dec. 13, 2018), <https://brazosvalleygcd.org/wp-content/uploads/2019/01/Approved-2019-District-Operating-Budget.pdf>. It is difficult to imagine that the District would be able to pay the \$100,000 judgment Fazzino seeks without obtaining state funding. (ROA.28.) That is especially true when such state funding is available to the District under existing law. *See* Tex. Water Code § 36.160. The effects of such a judgment, moreover, would not be limited to Fazzino; other landowners would have similar takings claims worth millions of dollars—an amount the District (and other districts like it) would be unable to pay without state funding.

The Texas Water Code provides the mechanism for the District to obtain such funding. Section 36.160 authorizes “The Texas Water Development Board, the [Texas Commission on Environmental Quality], the Parks and Wildlife Department, the Texas Agricultural Extension



Service, and institutions of higher education” to “allocate funds to carry out the objectives of this chapter.”<sup>11</sup> Tex. Water Code § 36.160(a); *see also* Tex. Water Code § 36.0015 (setting forth the purpose of Chapter 36 as the creation of groundwater conservation districts “to protect property rights, balance the conservation and development of groundwater to meet the needs of this state, and use the best available science in the conservation and development of groundwater through rules developed, adopted, and promulgated by a district.”).

Under existing legislation, therefore, State funds can be used by groundwater conservation districts to facilitate their regulation of groundwater. The Legislature’s concern about the liability of groundwater conservation districts to takings claims such as Fazzino’s implicitly acknowledges the impact of such suits on the State’s treasury. *See* H. Comm. on Nat. Res., Interim Rpt., 86th Leg. at 60–61 (Tex. Dec. 2018). Far from being “contingent and hypothetical,” therefore, the

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<sup>11</sup> Because funds granted under Section 36.160 are not earmarked for any specific project, the Court’s decision in *Vogt v. Bd. of Comm’rs of Orleans Levee Dist.* is inapposite. *See* 294 F.3d 684, 694 (5th Cir. 2002) (“The Orleans Levee District is almost entirely self-supporting, and the funds provided by the State are earmarked for special projects.”). With no state-mandated earmark, the funding is fungible.



impact of Appellants' claims on the State treasury are so likely as to have gained the attention of the Texas Legislature.

The fact that there is an existing funding mechanism that would likely be used by the District to pay an adverse judgment distinguishes this case from *Williams v. Dallas Area Rapid Transit*, on which Appellants rely. (Appellants' Br. at 25–26.)

In *Williams*, “DART argue[d] that, if it were unable to pay a judgment from its own funds, it could seek additional funding from the legislature.” *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 321 (5th Cir. 2001). But here, the District would not have to seek “funding from the legislature” via a new legislative act; the Legislature has already created a mechanism for the District to obtain such funding. And the Legislature itself has expressed its concern about such liability.

Were the Court to restructure Texas groundwater regulation in the way Appellants seek, the District—and other groundwater conservation districts across Texas—would have no option but to obtain State funding from existing available sources. The State treasury is therefore impacted by Appellants' suit, and the second *Clark* factor thus favors finding the District to be an arm of the State.



### ***3. The degree of local autonomy:***

The state exerts significant direct control over the District. The Texas Water Development Board and Texas Commission on Environmental Quality provide technical assistance in the formulation of the District's groundwater management plan, and the Water Development Board must approve this plan before it can be enacted or modified. *See* Tex. Water Code § 36.1072(a). That review is no perfunctory affair—it requires the Water Development Board to ensure that the District's management plan contains detailed information, including estimates of modeled available groundwater and annual recharge and an assessment of the amount of groundwater used annually. Tex. Water Code §§ 36.1071(e), 36.1072(b).

State supervision is ongoing. Chapter 36 of the Water Code authorizes the state auditor and the Legislature to audit the District's operations with the technical assistance of the Texas Water Development Board, Texas Parks and Wildlife Department and Texas Commission on Environment Quality. Tex. Water Code §§ 36.061, 36.302.

The State's supervision has teeth. If the state auditor determines that the District is not appropriately managing groundwater within its



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boundaries, it can deem the District non-operational and the Texas Commission on Environmental Quality must then assert jurisdiction and undertake one or more measures it deems necessary to ensure the accomplishment of comprehensive management in the District. Tex. Water Code §§ 36.302(f), 36.303; *cf. Guitar Holding Co., L.P. v. Hudspeth Cty. Underground Water Conserv. Dist. No. 1*, 263 S.W.3d 910, 913 (Tex. 2008) (recounting case in which the state auditor deemed a district to be non-operational under Chapter 36).

The ability of the State to shut down the District distinguishes this situation from the one before the Court in *Williams*. In that case, DART was subject to regular fiscal and performance audits. *See Williams*, 242 F.3d at 321. But unlike with the District, DART's enabling authority creates no mechanism for the Texas Department of Transportation (or any other state agency) to shut DART down in the event of a negative audit. *See generally* Tex. Transp. Code ch. 452. The District's audit, in contrast, can have significant consequences in terms of State action and control.

Thus, to an extent not present with other entities, the State takes a direct hand in the management and oversight of the District with



respect to both fiscal and operational matters. The third factor therefore weighs in favor of Eleventh Amendment immunity.

**4. Whether the entity is concerned primarily with local, as opposed to statewide problems:**

Water conservation and supply “is undeniably a statewide concern,” and even though the District may be “primarily concerned with protecting the water supply within its district, this is part of a larger statewide concern.” *Celanese Corp.*, 475 F. Supp. 2d at 634; accord Tex. Const. art. XVI, § 59(b) (authorizing the Legislature to divide the state into “such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment.”).

The District is part of the State’s comprehensive statewide management of groundwater that has developed over the past century. As part of that management, groundwater conservation districts are required to work together in close coordination with, and relying upon the technical assistance of, the Texas Water Development Board. See Tex. Water Code § 36.108; accord *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 834–35 (Tex. 2012) (describing the State’s management of groundwater resources through groundwater management areas and



groundwater conservation districts). The District's management plans must be approved by the Water Development Board (a statewide agency) and those plans may be reviewed by the state auditor. See Tex. Water Code §§ 36.1072(a), 36.302(c).

In its Interim Report in 2015, the Texas House Natural Resources Committee summarized the Legislature's statewide supervision over groundwater regulation:

Although the Texas Supreme Court opined a number of management strategies that it believed might be acceptable, or otherwise unacceptable, and further likened groundwater law in the state to other more highly developed areas of law in Texas, such as oil and gas regulation, the court's decision in *Edwards Aquifer Authority v. Day* did not change **the legislature's ability to continue managing and developing groundwater resources** under its own statutory implementation within the bounds of the constitution. This includes the ability to continue creating regulations that in the future may or may not treat water resources like oil and gas, as well as create statutory provisions providing for methods of management that support historical use in the permitting of groundwater resources. Likewise, the legislature could restructure groundwater management altogether.

H. Comm. on Nat. Res., Interim Rpt., 84th Leg. at 15 (Tex. Jan. 2015)

(footnotes omitted and emphasis added).



The overarching state supervision and management of groundwater pushes the “statewide problems” factor heavily in favor of Eleventh Amendment immunity.

**5. *Whether the entity has the authority to sue and be sued in its own name:***

The District has authority to sue and be sued in its own name. Tex. Water Code § 36.066(a). This relatively insignificant factor thus argues against Eleventh Amendment immunity.

**6. *Whether the entity has the right to hold and use property:***

The District has the right to hold and use property. Tex. Water Code §§ 36.103–36.105. But as with the fifth factor, this factor is not significant in light of other factors.

Applying the *Clark* factors, therefore, it is clear that the District is an arm of the State of Texas. As set forth in the Texas Constitution, the Legislature is authorized to create groundwater conservation districts, which “shall be governmental agencies and bodies politic and corporate with such powers and government . . . as may be conferred by law.” Tex. Const. art. XVI, § 59(b). Other courts that have considered the role of similar districts under the Texas Constitution found the



district/authority at issue to be an “arm of the State” of Texas for purposes of Eleventh Amendment immunity.

Consistent with those cases, “the overwhelming impression” is that the District is immune from suit under the Eleventh Amendment. *Cf. Celanese Corp.*, 475 F. Supp. 2d at 634. The district court therefore correctly dismissed Appellants’ claims against the District, and its decision should be affirmed.

**E. The Directors in their official capacities are likewise immune under the Eleventh Amendment.**

Eleventh Amendment immunity extends to state officials acting in their official capacities “when the state is the real, substantial party in interest.” *Hughes v. Savell*, 902 F.2d 376, 377 (5th Cir. 1990); (quoting *Ford Motor Co., v. Dep’t of Transp.*, 323 U.S. 459, 464 (1945)); accord *Anderton v. Tex. Parks & Wildlife Dep’t*, 605 Fed. Appx. 339, 349 (5th Cir. 2015). The state is the “real party in interest” if the decision rendered in this case would “operate against the sovereign, expending itself on the public treasury, interfering with public administration, or compelling the state to act or to refrain from acting.” *Anderton*, 605 Fed. Appx. at 349 (quoting *Hughes*, 902 F.2d at 378).



The Court in *Hughes* summarized this reasoning by holding “a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State.” *Hughes*, 902 F.2d at 378 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984)). Relying on the Supreme Court’s analysis in *Pennhurst*, the *Hughes* Court reasoned:

A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

*Id.* (quoting *Pennhurst*, 465 U.S. at 106). Importantly, this Court has construed the term “state law” to include both statutory enactments and state common law. *Id.*

Appellants’ suit against the Directors in their official capacities runs directly afoul of the Eleventh Amendment, as interpreted by the Supreme Court and this Court. The fundamental question posed by Appellants’ suit—i.e., whether the principles of Texas oil-and-gas law apply in their entirety to groundwater rights—is an issue solely of state law. See, e.g., *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 829 n.70,



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831–32 (Tex. 2012); *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 63 (Tex. 2016).

Believing the answer should be in their favor, Appellants asked the district court to award them “compensatory” and “punitive damages” to be paid by the Directors in their official capacity, which is to say from the District’s (and, ultimately, the State’s) public funds. ROA.29; *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000). But the District, as an arm of the State of Texas, is immune to suit under the Eleventh Amendment. Likewise, the Directors in their official capacities, as officials of the State of Texas, are also immune from suit under the Eleventh Amendment. The district court therefore correctly dismissed Appellants’ suit against them.

### CONCLUSION

Applying the *Clark* factors to this case, it is apparent that the District is an arm of the State of Texas and, as such, is (along with its Directors in their official capacities) immune to suit under the Eleventh Amendment. Thus, the district court correctly dismissed Appellants’ Section 1983 claims against the District.



Likewise, the district court correctly dismissed Appellants' Section 1983 claims against the Directors in their individual capacities pursuant to the doctrine of qualified immunity. Neither Appellants' interpretation of TOMA nor their vision of Texas groundwater regulation is clearly established. Instead, were the Court to accept Appellants' legal arguments, it would extend Texas law.

In the absence of other viable claims against the District or its Directors, the district court properly dismissed Fazzino's takings claim against the District as unripe. Fazzino has a viable path to recovery in state court, as evidenced by the state-court suit against the District that he voluntarily dismissed hours before filing this suit in federal court. Until the state courts rule, Fazzino's federal claim is not ripe, and the district court properly exercised its discretion to dismiss it.

Finally, Fazzino's takings claim involves unsettled issues of state law that involve critical state interests and in which Texas continues to develop its regulatory structure. The district court therefore properly exercised its discretion to abstain under *Burford v. Sun Oil Co.*, and its decision should be upheld.



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For all these reasons, the decision of the district court should be affirmed in all respects.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of April, 2019, I electronically filed the foregoing document with the clerk of court for the Fifth Circuit, using the electronic case filing system of the court. The electronic case filing system will send a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept service of this document by electronic means, or if the email address of the party or attorney is not on file with the electronic filing manager, the service shall be accomplished pursuant to FED. R. APP. P. 25 and 5<sup>th</sup> CIR. R. 25.

/s/ Jose E. de la Fuente  
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April 5, 2019

