NO. 18-50994

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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DAVID STRATTA; ANTHONY FAZZINO,

Plaintiffs / Appellants,

v.

JAN A. ROE; BILLY L. HARRIS; BRYAN F. RUSS, JR.; JAYSON BARFKNECHT; MARK J. CARRABBA; GORDON PETER BRIEN; STEPHEN C. CAST; BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT

Defendants / Appellees.

Appealed from Cause No. 6:18-cv-00114; United States District Court
Western District of Texas, Waco Division
The Honorable, Alan D. Albright, presiding

BRIEF OF APPELLANTS DAVID STRATTA AND ANTHONY FAZZINO

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.1(a), Appellants, David Stratta and Anthony Fazzino, certify that the following is a complete list of the names and addresses of the parties and their counsel:

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Appellees, Defendants	Jan A. Roe, Billy L. Harris, Bryan F. Russ, Jr., Jayson Barfknecht, Mark J. Carrabba, Gordon Peter Brien, Stephen C. Cast, in their individual capacities and in their official capacities as directors of the Brazos Valley Groundwater Conservation District, and The Brazos Valley Groundwater Conservation District	Jose E. de la Fuente Michael A. Gershon James F. Parker, III Lauren E. Sprouse LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C. 816 Congress Avenue, Suite 1900 Austin, Texas 78701 Tel: (512) 322-5800 Fax: (512) 844-9078 jdelafuente@lglawfirm.com mgershon@lglawfirm.com jparker@lglawfirm.com lsprouse@lglawfirm.com

STATEMENT REGARDING ORAL ARGUMENT

Appellant Anthony Fazzino's ("Fazzino") claims against the Brazos Valley Groundwater Conservation District ("BVGCD") involve Fazzino's ownership interest in groundwater under his land. Specifically, Fazzino asserts a regulatory takings claim and a claim that he was not afforded equal protection under the laws in the groundwater production permitting process. In asserting these claims, Fazzino has followed the Texas Supreme Court's guidance in relying on property cases arising in the oil and gas context when those cases are appropriately analogous. BVGCD and its directors believe that oil and gas case law is inapplicable to issues of groundwater ownership. While the Texas Supreme Court has been willing to apply oil and gas concepts to groundwater disputes, and has encouraged the use of oil and gas cases in resolving property law disputes, there is nevertheless resistance to the practice among regulators and reluctance on the part of the courts to follow the example set by the Texas Supreme Court. As such, a thorough and dynamic discussion of the similarities between the two bodies of law[1] will likely assist the court in determining key aspects of this case. Oral argument would assist in facilitating such a discussion.

[1] Actually, one body of law—property law—is involved here. Texas courts have applied property law concepts in two contexts: oil and gas, and groundwater.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered on December 4, 2018 in the Western District of Texas—Waco Division by Judge Alan D. Albright. The final judgment resulted from two orders granting Motions to Dismiss entered on November 9, 2018 and December 3, 2018 respectively. The district court had federal question jurisdiction over the suit by virtue of Plaintiffs' claims brought under 42 U.S.C. § 1983. The December 4, 2018 judgment was final and appealable for the purposes of 28 U.S.C. § 1291 because it disposed of all claims and all parties. Appellants timely filed their notice of appeal of the court's final judgment on December 10, 2018.

STATEMENT OF ISSUES

I. Is BVGCD an arm of the state of Texas entitled to sovereign immunity under the Eleventh Amendment to the United States Constitution?

II. Is Fazzino's takings claim ripe for review by the federal courts?

III. Is a landowner's right to groundwater under his land sufficiently well-settled in Texas so that the exercise of Burford abstention is unwarranted in property rights cases concerning groundwater, and so that a person's rights with regard to groundwater are "clearly established?"

IV. Does Stratta have a clearly established right to address the board of directors as a member of the public during a period reserved for public comment on open agenda items?

STATEMENT OF THE CASE

This case involves the violation of constitutional rights of individuals by a political subdivision of the state of Texas. The political subdivision in question, BVGCD, is a groundwater conservation district ("GCD") created by legislative enactment passed on June 16, 2001. 2001, 77th Leg., R.S., ch. 1307, 2001 Tex. Gen. Laws (HB 1784). BVGCD's territorial boundaries are coextensive with the boundaries of Robertson and Brazos Counties. Tex. Special Dist. Loc'l Laws Code § 8835.004. Appellants Fazzino and Stratta are landowners with property within the territorial boundaries of BVGCD. ROA. 14-15. Stratta is also a member of the BVGCD board of directors representing agricultural interests in Robertson County. ROA. 14; *see* Tex. Special Dist. Loc'l Law Code § 8835.052(b)(1).

On December 2, 2004, BVGCD promulgated new rules to govern the production of groundwater from the Simsboro aquifer formation. ROA. 15. These new rules drew a distinction between Existing Wells, New Wells, and wells with Historic use. BVGCD R. 1.1(15), (20), and (28). ROA. 15. BGVCD's rules provide for the regulation of groundwater pumpage through spacing requirements and production limitations. ROA. 15. BVGCD's Rules 6.1 and 7.1 govern the spacing and production restrictions on "New Wells." Historic Use wells are generally limited to producing the amount of groundwater that had been actually beneficially used prior to the effective date of the new rules. ROA. 15. "Existing

Wells" are wells for which "drilling or significant development…commenced before the effective date of the District's rules on December 2, 2004." ROA. 15. BVGCD R. 1.1(15). The new rules contain no production limits for Existing Wells that have no historic use associated with them.

Rule 7.1 sets production limitations on New Wells based on a formula that determines allowable production based on contiguous surface acreage. BVGCD R. 19. This production limitation is aimed at the same goal as Rule 6.1's spacing requirement which is to "minimize as far as practicable the drawdown of the water table and the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality and to prevent waste." BVGCD Rule 6.1(a). Under Rule 7.1(c), production is limited by contiguous acres assigned to the well, a majority of which contiguous acreage "shall bear a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science." BVGCD R. 7.1(c). Under the formula set forth in Rule 7.1(c), a New Well producing 3,000 gallons per minute (GPM) will require 649 contiguous acres surrounding the well site, which equates to a cone of depression impact around the pumped well for approximately 3,003 feet. ROA. 16.

On December 8, 2004, the City of Bryan started actual drilling of its "Well No. 18." ROA. 16. That well was completed on October 28, 2005. Well No. 18 did

not produce any groundwater prior to December 2, 2004 and therefore had no "historic use" as that term is defined in BVGCD's rules. BVGCD R. 1.1(20). On June 8, 2006, the City of Bryan, Texas filed an application for a permit to operate Well No. 18 at 3,000 GPM. ROA. 16. The well, however, sits on a tract of just 2.7 acres. ROA. 16. If Well No. 18 were treated as a New Well, Rule 7.1(c) would allow production of only 192 GPM—not 3000 GPM. C.R. 16.

On August 8, 2006, BVGCD held a meeting of its board of directors. ROA. 17. On the agenda for that meeting was an item regarding the approval of an operating permit for a "new well" (Well No. 18) for the City of Bryan. ROA. 17. On February 20, 2007, BVGD "conditionally" granted a permit for Well No. 18 to produce 4,838 acre-feet per year of groundwater at a rate of 3,000 GPM. ROA. 17. According to the stated policy behind Rule 6.1, Well No. 18 is impacting groundwater resources in a cone of depression that is 6,000 feet across—a 3,003 foot radius in all directions from the well bore—affecting an area equal to 649 acres. ROA. 17. On April 17, 2013, BVGCD granted the City of Bryan another "conditional" permit to operate Well No. 18 at a rate of 3,000 GPM. ROA. 17. Again, under the rules in effect at the time, Well No. 18 would only be permitted to produce 192 GPM.

Because Fazzino's property is within the cone of depression effect of the City of Bryan Well No. 18, he was and is concerned about that well draining his

groundwater resources. ROA. 17. In January of 2017, Fazzino filed a complaint with BGVCD alleging that Well No. 18 was not properly permitted because it was not a Historic Use well under BVGCD's Rules and should not be exempted from the production limitations imposed on all New Wells. ROA.17. That complaint was referred to the State Office of Administrative Hearings ("SOAH") and dismissed on the basis that Fazzino could not complain about another party's permit. ROA. 17. On April 4, 2017, Fazzino filed his own application for a drilling/operating permit. ROA. 18. Fazzino's application noted that he owned or controlled an interest in 26 acres of groundwater rights and requested a permit to produce 3,000 GPM in order to offset the production from Well No 18. ROA 18.

On April 13, 2017 and on June 26, 2017, BVGCD informed Fazzino that his application was administratively incomplete because he had failed to demonstrate that he owned or controlled sufficient acreage around his proposed well to support production of 3,000 GPM. ROA. 18. Fazzino responded on August 16, 2017, advising that he did not own or control 649 acres and could not provide documentation for that amount of property. ROA. 18. Fazzino's August 16, 2017 letter noted that 3,000 GPM was the minimum amount of production required to offset the drainage caused by Well No. 18 and he requested a variance from the application of BVGCD's spacing and production rules. ROA. 18. On September 6, 2017, BVGCD informed Fazzino that his application had lapsed due to failure to

provide proof that he owned or controlled 649 acres. ROA. 18. The September 6, 2017 response also advised that the district does not grant variances from its rules. ROA. 18. Nevertheless, the cities of Bryan and College Station, along with Wickson Creek Special Utility District, Brazos Valley Water Supply Company, and OSR Water Supply Corporation, each maintain wells that could not otherwise be maintained under BVGCD's Rules 6.1 and 7.1 due to inadequate tract size. ROA. 19. These municipalities and water suppliers each have close ties to BVGCD in that they are either led or owned by, or employ present or former members of the BVGCD Board of Directors. ROA. 19.

The status of No.18 has been a matter of some controversy since 2013, when the City of Bryan's well permit was up for renewal. ROA. 19. Appellant Stratta has attempted to address the District's unequal application of its rules to Well No. 18, but his efforts have been systematically and consistently thwarted by the other BVGCD directors. ROA. 19-20. On March 8, 2018, BVGCD conducted a regularly scheduled meeting of its Board of Directors. ROA. 19. Prior to the meeting, Stratta requested that the issue of whether Well No. 18 was a New Well or Existing Well be placed on the agenda. ROA. 19-20. Stratta was told by the Board President, Appellee Roe, that such a discussion might affect pending litigation, and there would be no such agenda item. ROA. 20. Stratta then called

Appellee Russ, who told Stratta he should not discuss the topic of Well No. 18. ROA. 20.

At the March 8, 2018 meeting, Stratta signed in as a member of the public and submitted a "registration form," indicating that he was a landowner in Brazos and Robertson counties and wished to make a comment on an "open" agenda item. ROA. 20. Specifically, Stratta intended to make a public comment requesting that the Board include the subject of the status of Well No. 18 on its next agenda. ROA. 21. Upon receiving Stratta's registration form, Defendant Roe consulted with the board's general counsel, who advised that she had already researched the question and that "directors" could not speak about an item that was not on the agenda, even though the agenda listed "public comment" as an item and listed "non-agenda items" as a specific type of public comment. ROA. 20. Roe then commenced the meeting without calling on Stratta for public comment and effectively denied him the right to express his view that Well No. 18 should be placed on the next meeting's agenda. ROA. 20. Stratta filed suit alleging deprivation of his First Amendment rights and seeking prospective injunctive relief prohibiting BVGCD and its directors from depriving him of his rights under the First Amendment to the U.S. Constitution. ROA. 20-22.

Fazzino, in attempting to protect his groundwater from drainage caused by the operation of Well No. 18, had launched a direct complaint regarding the permit

for Well No. 18, but that complaint was dismissed as noted above. ROA. 17. Fazzino then attempted to protect his groundwater from drainage caused by Well No. 18 by exercising his common law right to offset. ROA. 18-19. But that attempt too was thwarted when BVGCD decided that, under its Rules, Fazzino could not prove the requisite ownership or control of sufficient acreage to produce the amount he needed to offset, and denied Fazzino's requested variance from the spacing and production rules. ROA. 18-19. Having no other path to protect his property rights, Fazzino filed suit against BVGCD and its directors in their individual capacities alleging that their unequal application of BVGCD's rules violated his right to equal protection under the law and constituted a taking of his property. ROA. 22-28.

BVGCD and its directors responded by filing Motions to Dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. ROA. 41-62; ROA. 174-199. Specifically, BVGCD and its directors in their individual capacity moved for dismissal under Rule 12(b)(1) asserting that BVGCD is arm of the state and enjoys Eleventh Amendment sovereign immunity. ROA 42; ROA. 46-56. The 12(b)(1) Motion also claimed that Fazzino's takings claims were not ripe because he had not exhausted his remedies, had not sought just compensation in the state courts, and implicitly encouraged the district court to exercise *Burford* abstention

by alleging that Texas law was unsettled as to "whether Fazzino has a compensable property interest." ROA. 57-60.

The director's 12(b)(6) motion was premised on qualified immunity and claimed that Fazzino's suit presupposed the incorporation of oil and gas law to water law. ROA. 182. Therefore, the BVGCD argued Fazzino's property interest in groundwater is not "clearly established," and his claims against the directors should be barred by qualified immunity. ROA. 152-187. As to Stratta's claims, BVGCD and the directors argued that Stratta's attempt to speak at the March 8, 2018 hearing would have violated the Texas Open Meetings Act, and that the director's conduct in not permitting Stratta to speak at meeting did not violate his clearly established rights. ROA. 188-190.

The district court granted the 12(b)(1) Motion dismissing Fazzino's takings and equal protection claims as well as Stratta's claim under the First Amendment as to BVGCD. ROA. 369-381. In granting the 12(b)(1) Motion, the district court found that BVGCD is an "arm of the state" entitled to immunity under the Eleventh Amendment. ROA. 379. The district court arrived at this conclusion by reference to this Court's six-factor test as articulated in *Clark*. ROA 374-380; *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986). The district court's order noted that BVGCD's directors shared in the same immunity enjoyed by BVGCD. The district court also found that Fazzino's takings claim was not ripe

because he had not received a final decision regarding the application of the challenged regulations to his property, and because he had not sought compensation in state court. ROA. 381-383. The district court also exercised *Burford* abstention because it believed Fazzino's claims turned on novel questions of state law that impact the state's groundwater regulatory framework. ROA. 384-388. The court granted BVGCD and the directors 12(b)(6) Motion finding that Fazzino's right to groundwater was not clearly established, that he was entitled to "equal protection of the law" but not "equal outcomes," and that the directors' action in denying Stratta the opportunity to speak was not unreasonable in light of the Texas Open Meetings Act. ROA. 411-427.

The district court's granting of the 12(b)(1) and 12(b)(2) motions disposed of all claims asserted in the case as against all parties to the case. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred in finding that BVGCD is entitled to immunity under the Eleventh Amendment. This Court employs a six-factor-test to determine if a state agency is entitled to Eleventh Amendment immunity. *See Clark*, 798 F.2d at 744-745. The six factors include: (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's 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 its own name; and (6) whether it has the right to hold and use property. *Id*.

The district court's determination that BVGCD and its directors enjoy Eleventh Amendment Immunity springs from a faulty application of the *Clark* test. ROA. 374-380. In analyzing the six *Clark* factors, the district court put too much emphasis on analogizing BVGCD to other entities created under the Conservation Amendment to the Texas Constitution, misconstrued the relevant inquiry in the "state funding" arm of the test, and cast its net too broadly in determining that BVGCD is concerned primarily with statewide rather than local interests. ROA. 375-376.

Texas courts have repeatedly found that GCDs are "political subdivisions of the state" and stand on equal footing to counties. *See*

Ltd. v. High Plains Underground Water Conservation Dist. No.1, 52 S.W.3d 770, 774 (Tex. App.—Amarillo 2001, no pet.); *see also, 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.). The district court focused analogizing other conservation-oriented state agencies when it should have focused on the powers and duties of BVGCD. ROA. 375-77; *see Southwestern Bell Tel. Co. v. City of El Paso*, 243 F.3d 936,937-38 (5th Cir. 2001)(stating that comparisons between like entities cannot substitute for careful examination of the particular entity at issue).

BVGCD is a local regulatory body that is constrained in its territorial jurisdiction to Robertson and Brazos Counties. Tex. Special Dist. Loc'l Laws Code § 8835.004. It cannot make or enforce rules which apply outside of those boundaries. It is funded through the imposition of fees, and there is no indication that a judgment against BVGCD would paid from the state's coffers. Though the conservation of groundwater can easily be construed as a "statewide concern," the regulatory framework employed by Texas focuses on local control. *See Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 694-96 (5th Cir. 2002) . This focus on local control is emphasized by the fact that the directors of the BVGCD are selected by county and municipal governments rather than by any part of the executive or legislative

branch of the Texas government. When appropriately weighed, the *Clark* factors point away from BVGCD enjoying Eleventh Amendment immunity.

The district court's dismissal of Fazzino's equal protection and takings claims rested in large part, on its conception of those claims as involving novel issues of state law. ROA. 388-387. This rationale pervaded both the district court's *Burford* abstention analysis as well as its qualified immunity analysis. ROA. 383-387; ROA. 417-420. Essentially, the district court took the position that Fazzino did not state a violation of his clearly established rights because his property interest in groundwater ownership was unsettled. Because it found Fazzino's claims to be based on novel concepts of property ownership, the district court invoked the *Burford* abstention doctrine to decline jurisdiction. *Burford* abstention was inappropriate and dismissal based on qualified immunity was both unwarranted.

In 2012, the Texas Supreme Court handed down *Day* which affirmed that a landowner owns the groundwater under his land, in place, and that groundwater rights are subject to regulatory taking. *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 832 (Tex. 2012). Four years later, the Texas Supreme Court handed down *Coyote Lake Ranch*, which advised that oil and gas case law can be, when applicable, applied to resolve groundwater disputes. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016). It is Fazzino's acceptance of the

Texas Supreme Court's invitation to call on oil and gas cases which motivated the district court's finding that Fazzino's claims involved novel issues of state law. This is evidenced by the court's statement that "[p]laintiffs' [sic] have failed to show that the Directors' conduct was objectively unreasonable in light of clearly established rule of law because: (1) the broad discretion given to GCDs in adopting or enforcing rules; and (2) *the lack of precedent suggesting that all oil and gas law is applicable to groundwater disputes.*" ROA. 420 [emphasis added].

The district court's exercise of *Burford* abstention was unwarranted. The reason for invoking *Burford* emanates from the reluctance to rely on oil and gas case law to define property rights. However, *Burford* is not meant to act as an "easy escape" from exercise of jurisdiction by the federal courts. The district court erred in abstaining because this case presents neither novel questions of state law, nor the potential to interfere with a carefully balanced state regulatory scheme.

The district court's "novel issues" rationale breaks down entirely when applied to Fazzino's equal protection claims. Regardless of the state of groundwater property ownership principles, Fazzino has a clearly established right to be treated the same as other similarly situated landowners seeking groundwater production permits. *Lindquist v. City of Pasadena*, 669 F.3d 225, 233 (5th Cir. 2012)(setting forth two-part equal protection test). No new legal ground need be trod to arrive at that conclusion. Fazzino's pleadings state that he was intentionally

treated differently than those similarly situated and that there was no rational basis for the difference in treatment. ROA. 22-25. Fazzino should be permitted to put on evidence of his claims rather than having those claims disposed of at the 12(b)-stage.

Finally, the district court's dismissal of Stratta's claims on the basis that the directors reasonably could have believed that the Texas Open Meetings Act ("TOMA") prevents Stratta from speaking turns the rationale for the Open Meetings Act on its head. *San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991)(stating the purpose of the open meetings act is to increase transparency in governmental decision making). The district court reasoned that the other directors foreknowledge that Stratta wanted the status of Well No. 18 added to the agenda gives rise to the notice requirements of TOMA, therefore, the directors could reasonably have believed that they did not violate Stratta's First Amendment rights because they were preventing a violation of the Open Meetings Act. TOMA exists so that governmental decision making will occur in the open. It is not to be used as a shield to perpetuate the suppression of speech, and it is certainly not to be used as a shield to prevent the public from knowing the basis for governmental decisions. By dismissing Stratta's First Amendment claims, the district court effectively gave license to exercise viewpoint discrimination in

situations where government actors know ahead of time what viewpoint will be expressed. This rationale cannot and should not prevail.

ARGUMENT

I. Applicable Standards of Review

This appeal arises out of the district court's grant of a Motion to Dismiss pursuant to Rule 12(b)(1) filed on behalf of BVGCD and its directors in their official capacities, and out of the district court's grant of a Motion to Dismiss pursuant to Rule 12(b)(6) as to the directors in their individual capacities. The order granting BVGCD's Motion to Dismiss pursuant to 12(b)(1) was predicated on an assertion of Eleventh Amendment sovereign immunity and *Burford* abstention, while the Motion to Dismiss pursuant to 12(b)(6) was premised on an allegation of qualified immunity on the part of the directors of BVGCD in their individual capacities. This Court reviews dismissals under Rules 12(b)(1) and 12(b)(6) *de novo*. *Bauer v. Texas*, 341 F.3d 352, 356 (5th Cir. 2003); *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992).

In reviewing a dismissal pursuant to Rule 12(b)(1), the court takes the factual allegations of the complaint as true and resolves any ambiguities in the plaintiff's favor. *Id*. In ruling on a 12(b)(1) motion to dismiss, the Court can consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by facts plus the court's resolution of disputed facts." *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016)(internal quotation marks and citation omitted).

When deciding a Rule 12(b)(6) motion to dismiss, the court is limited to the allegations set forth in the complaint and any documents attached to the complaint. *Walker v. Webco Indus., Inc.*, 562 F. App'x 215, 216-17 (5th Cir. 2014). "[A plaintiff's] complaint therefore 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Phillips v. City of Dallas, Tex.*, 781 F.3d 772, 775-76 (5th Cir. 2015)(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is facially plausible when the pleaded factual content, "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

II. The District Court erred in concluding that the BVGCD and its directors are entitled to Eleventh Amendment Immunity.

A. The District Court misapplied the 5th Circuit's "arm-of-the-state analysis."

The Eleventh Amendment bars federal court suits against states, state officials, and state instrumentalities in appropriate circumstances, and does not extend to counties, similar municipal corporations and other political subdivisions, even though such entities enjoy a "slice of state power." *Southwestern Bell Tel. Co. v. City of El Paso*, 243 F.3d 936,937-38 (5th Cir. 2001). Immunity under the Eleventh Amendment will extend to any state agency or other political entity that is deemed the "alter ego" or an "arm of the state" such that the State itself is the

"real, substantial party in interest. *Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 688-89 (5th Cir. 2002); *Hudson v. City of New Orleans*, 174 F.3d 677, 681 (5th Cir. 1999).

There is no bright-line test for Eleventh Amendment Immunity. *See Vogt*, 294 F.3d at 689. Instead, "the matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the sovereign state." *Id*. To resolve this inquiry this circuit employs a six-factor-test. *Clark*, 798 F.2d at 744. That test considers: (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Id*. Of these six factors, the relevant authorities uniformly treat the second as the most important. *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 291 (5th Cir. 2002). This is so because a fundamental goal of the Eleventh Amendment is to protect state treasuries. *Hudson*, 174 F.3d at 682.

The district court nominally employed the *Clark* test, but its evaluation of the discrete factors was without reference to this Court's precedent which naturally led to the wrong conclusion. Proper application of the six-factor-analysis

demonstrates that BVGCD is not an alter ego of the state, and it is not entitled to immunity under the Eleventh Amendment.

i. Texas statutes and case law do not characterize GCDs as arms of the state.

The district court began its analysis by analyzing how GCDs are treated under Texas state statutes and case law. ROA. 375. Though it picked an acceptable starting place, the district court's first analytical steps were in the wrong direction. It began by noting that other "courts in the Fifth Circuit have consistently held [entities organized under Article XVI, Section 59 of the Texas Constitution] to be arms of the State of Texas." ROA. 375-376. In support of this proposition, the court cited three cases: *Cleanse Corp. v. Costal Water Auth.*, 475 F.Supp. 2d 623, 632-33 (S.D. Tex. 2007); *Pillsbury Co., Inc. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995); and *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983). ROA. 376. The court's analysis then turns directly to a comparison of the Coastal Water Authority involved in the *Cleanse Corp.* case to BVGCD on the basis that they both are creatures of Article XVI, Section 59 of the Texas Constitution (hereinafter, the "Conservation Amendment"), and concludes by citing a Texas case concluding that groundwater conservation districts are "an arm of the state created to administer the enumerated governmental powers delegated to it." ROA. 376; *See 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.).

These two points, an analogy between entities created under the Conservation Amendment and a single line out of single Texas case, informed the district court's conclusion that "the [BVGCD] is clearly an arm of the government that is created by the State of Texas for the purpose of effectuating enumerated powers granted by the state." ROA. 376. The analogy between BGVCD and other entities created under the Conservation Amendment is improper basis upon which to evaluate the first of the six factors. When conducting the *Clark* test "comparisons [between like entities] cannot substitute for a careful examination of the particular entity at issue." *Southwestern Bell*, 243 F.3d at 938. Instead, the inquiry must be directed at the particular entity at issue. *Id*.

A similar argument to that raised by BVGCD and relied on by the district court was rejected in *Southwestern Bell*. In that case, a water improvement district asserted immunity under the Eleventh Amendment. Like BVGCD, the water improvement district was a creature of the Conservation Amendment, and like BVGCD it insisted that precedent supported a finding that it was an arm of the state for the purposes of Eleventh Amendment immunity. *Id*. In rejecting the water improvement district's argument, this Court noted that an entity is not an arm of the state "simply because it is a creature of state law and a political subdivision of

the state" because "[s]uch a conclusion would entirely obviate the arm-of-the-state analysis" where "every entity claiming Eleventh Amendment immunity is a 'creature' of some state law." *Id* at 939.

The water improvement district in *Southwestern Bell* relied on two of the same cases cited to by district court, *Pillsbury* and *Kamani*. In rejecting the water district's arguments, this Court distinguished the cases it relied on. The *Southwestern Bell* Court noted that *Kamani* did not provide analysis for its conclusion that the Port of Houston Authority was entitled to Eleventh Amendment Immunity, and that *Pillsbury* relied on *Kamani* for the proposition that the Port of Corpus Christi Authority "was factually and legally indistinguishable" from the Port of Houston Authority. *Id*. This Court rejected the water improvement district's arguments because the cases relied on by the water district did not apply the six-factor-analysis. *Id* at 940.

The district court's reliance on analogies between agencies blinded it to the task at hand. Reviewing the status of groundwater conservation districts under Texas statutes and cases leads to the conclusion that they are considered to be squarely within the category of political subdivisions with powers akin to that of a county. The Texas Water Code 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). This definition demonstrates that the Texas legislature meant for groundwater conservation districts to be treated as akin to counties, though the inclusion of the term "state agency" admittedly muddies the waters. Any confusion caused by this definition is rectified by the body of Texas case law placing groundwater conservation district on equal footing with counties.

As noted above, the district court relied on *Lewis Cox & Son* for the proposition that a groundwater conservation district is "an arm of the state created to administer the enumerated governmental powers designated to it." ROA. 376; *See 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.). The district court omitted the very next sentence, in which the *Lewis Cox & Son* court clarified its meaning stating that, "[a]s 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*. (internal citation omitted).

The *Lewis Cox & Son* court's determination that the groundwater district stood on equal footing to a county was not an isolated holding. Several Texas courts before and after that case have reached the same conclusion. As early as 1954, the Texas Supreme Court observed that:

> Irrigation districts, navigation districts, levee and improvement districts, and like political subdivisions created under section 59a of Article XVI of the Constitution, and statutes enacted thereunder carrying out the purposes of such constitutional provision, are not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.
>
> *Bennett v. Brown County Water Imp. Dist.*, 272 S.W.2d 498, 500 (Tex. 1954).

The court's observation in *Bennett* runs directly counter to the logic employed by the district court. Groundwater conservation districts are not alter egos of the state by virtue of their genesis in the Conservation Amendment, but instead they are more uniformly to be treated as distinct subdivisions of the state and akin to counties. *Bennett* came down twenty-two years before *Lewis Cox & Sons*. A quarter century after *Lewis Cox & Sons*, the Amarillo Court of Appeals reaffirmed the central premise that groundwater conservation districts "stand upon the same footing as a county." *See South Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770, 774 (Tex.App.—Amarillo 2001, no pet.).

Notably the district court's analysis of the first factor departed from that court's own analysis of status of GCDs. For instance, in *Coates v. Hall*, the district court cited to *South Plains Lamesa* for the proposition that "[a] GCD is a political

subdivision exercising state powers and it stands upon the same legal footing as a county." 512 F.Supp.2d 770, 778 (W.D.Tex. 2007); *see also*, *Sullivan v. Chastain*, 2005 U.S. Dist. LEXIS 7417, at *24-25 (W.D. Tex. 2005)("A groundwater district is a political subdivision exercising State powers and such districts stand on the same footing as a county"). The district court in *Coates* noted that this proposition foreclosed Eleventh Amendment immunity. *See Coates*, 512 F.Supp.2d at 778, n.2 ("The Court notes that counties are not entitled to Eleventh Amendment immunity and may be sued under 42 U.S.C. § 1983). The Western District's sudden about face on this issue was not mentioned, much less explained, in the district court's order.

The district court's *Clark* analysis failed to accurately consider the treatment of groundwater conservation districts under Texas law. The body of law on the subject points toward groundwater districts being political subdivisions of the State and on equal footing with counties. The court below erred in weighing the first *Clark* factor in favor of Eleventh Amendment Immunity.

ii. The source of funds factor does not turn on hypothetical or contingent possibilities of "implicating" the State's funds.

The second *Clark* factor focuses on the source of BVGCD's funding. *Hudson*, 174 F.3d at 687. This is the most important factor because the purpose of the Eleventh Amendment is to protect state treasuries. *Cozzo*, 279 F.3d at 281). The district court found that the second factor weighed in favor of Eleventh

Amendment immunity because "…Texas law authorizes the District to receive grant funding and loans directly from the State" and therefore the "State's funds are implicated in an action against a groundwater conservation district." ROA. 377. This analysis misses the mark. The focus of the source of funding inquiry is not on whether state funds are "implicated," but instead whether the state would be liable in the event of a judgment against the defendant or whether the state is liable for the defendant's general debts and obligations. *Hudson*, 174 F.3d at 687. A review of BVGCD's funding mechanisms and the State's liability with regard to BVGCD's general debts and obligations moves the second and most weighty factor in the *Clark* test away from Eleventh Amendment immunity.

BVGCD's derives its funding through locally assessed fees as authorized by its enabling legislation. Tex. Special Dist. Loc'l Laws Code § 8835.151. BVGCD concedes that its primary funding comes from fees, but insists that this factor weighs in its favor because "Texas law authorizes the [BVGCD] to receive grant funding and loans directly from the State." ROA. 49. This conceit is not accompanied by a corresponding statement that BVGCD actually *does* receive grant funding and loans from the state. Even if it were, it would not tip the analysis toward Eleventh Amendment immunity.

Similar arguments have been raised and dismissed by this Court in the past. For instance, in *Williams v. Dallas Area Rapid Transit*, the Dallas Area Rapid

Transit ("DART") asserted a claim to Eleventh Amendment sovereign immunity in a suit brought under the Age Discrimination in Employment Act. 242 F.3d 315 (5th Cir. 2001). With regard to the funding prong of the six-factor-analysis, DART offered three arguments: (1) it was authorized to use bond and tax revenues constituting state funding; (2) the characteristics of its sales and use tax, which are administered through the state comptroller, amounted to state funding; and (3) if it were unable to pay a judgment from its own funds, it could seek additional funding from the legislature. *Williams*, 242 F.3d 320-321. The Court rejected the first argument because there was no proof that the bonds at issue were backed by the full faith and credit of the state. *Id*. As to the second argument, the Court found that it "proved too much" since taxes levied by municipalities were treated the same way and yet municipalities were clearly not arms of the state. *Id*. Notably, the Court rejected the third argument on the basis that DART had not actually shown that it received "state funding as a general matter or that a judgment against it would be satisfied by the state treasury." *Id.* at 321. Here, BVGCD has done nothing more than point to grants and loan assistance programs available to groundwater districts—it did not argue that its funds are derived in part or in whole from such sources, or that such funds would be used to satisfy a judgment against BVGCD. ROA. 49.

In support of its findings that state funds could be implicated in a suit against BVGCD, the district court cited to sections 36.158-161 and 36.3705-374 of the Texas Water Code. ROA. 377. A review of the referenced statutes does not support the notion that a judgment against BVGCD would be paid from state funds. Section 36.158 allows a district to make or accept grants, gratuities, advances, or loans "…in any form to or from any source approved by the board, including any governmental entity…" Tex. Water Code § 36.158. This provision merely permits the acceptance of grants, and in no way obligates the state to fund BVGCD through grants or loans.

Section 36.159 permits the Texas Water Development Board to allocate funds from the water assistance fund to the district to: (1) conduct initial data collections under chapter 36; (2) develop and implement a long-term management plan under Section 36.1071; and (3) participate in regional water plans. Tex. Water Code § 36.159. Again, this provision does not indicate that state monies will be used to pay a judgment against BVGCD. In fact, section 36.159 earmarks the funds at issue for specific uses, which cuts against the very proposition for which that statute was cited. *See Vogt*, 294 F.3d at 694 (because state funds were already earmarked for other purposes those monies would not be used to satisfy a judgment and the state funding factor weighed against Eleventh Amendment Immunity). Similarly, section 36.160 provides that certain state agencies can allocate funds to

carry out objectives of the Water Code and provides a non-exclusive list of objectives toward which funds may be allocated. Section 36.161 simply sets forth the eligibility requirements for funding allocations.

Sections 36.3705-374 of the Water Code concern the Groundwater Conservation District Loan Assistance Fund which applies to newly confirmed districts legislatively created districts that do not require a confirmation election to pay for their creation and initial operations. Tex. Water Code §§36.3705, 36.372(a), 36.372(b) authorizes the Texas Water Development Board to establish rules for the use and administration of loan funds. Tex. Water Code § 36.372(b) . The rule promulgated by the Texas Water Development Board with regard to the use of the Groundwater Conservation District Loan Assistance funds provides that: "Loan funds may be used to fund or reimburse an applicant's initial expenses, including start-up and operating costs…" 10 Tex. Admin Code § 363.805 (Tex. Water Dev. Bd., Groundwater District Loan Program).

Assuming BVGCD qualified for assistance under the Loan Program, the use of those loan funds was limited to certain enumerated *initial* expenses incurred in starting up a new groundwater conservation district. None of the statutes cited to by the district court tend to demonstrate that the state is obligated to pay the general debts and obligations incurred by a district or that the state would be obligated to pay a judgment. *See Vogt*, 294 F.3d at 694 ("Of greatest significance is

that nothing in Louisiana law, or in recent practice, suggests that the State has any obligation with respect to judgments against the levee district."). Here, there is no indication that any state funds are actually implicated in suits against BVGCD. Focusing on the possibility that a groundwater district may receive state grants and loans is a misapplication of the six-factor-test. The mere contingent or hypothetical prospect of state funds being used to satisfy a judgment is not sufficient to weigh the second factor in favor of Eleventh Amendment Immunity. Accordingly, the district court erred by weighing the second factor in favor of immunity where the law and facts indicate that state funds will not be called upon to satisfy a judgment against BVGCD.

iii. TWDB oversight of a groundwater district's management plan does not rob BVGCD of local autonomy.

The third factor in the *Clark* test looks to the degree of local autonomy exercised by the entity in question. *Clark*, 798 F.2d at 744. The 5th Circuit's application of this part of the test looks to the extent of the entity's independent management authority as well as the independence of the individuals who govern the entity. *Vogt*, 294 F.3d at 684 *citing Jacintoport Corp. v. Greater Baton Rouge Port. Com.*, 762 F.2d 435, 442 (5th Cir. 1985).

Here, BVGCD's board is composed of directors who are appointed by the Robertson County and Brazos County commissioner's courts, the governing body of the city of Bryan, and the governing body the city of College Station. Tex.

Special Dist. Loc'l Laws Code § 8835.051(a)-(d). Thus, the day-to-day operations of BVGCD fall under purely local control. *See Williams*, 242 F.3d at 321 (finding DART maintained local autonomy because it's management operation and control was vested to a committee whose members were appointed by the municipalities served by DART). In *Cleanse Corp.*, the Southern District of Texas, weighed the local autonomy factor in favor of Eleventh Amendment Immunity because the Coastal Water Authority ("CWA") was governed by a board of seven directors, three of whom are appointed by the governor with the advice and consent of the senate. *Cleanse Corp.*, 475 F.Supp.2d at 634. That court contrasted the autonomy of the CWA, which it found was under a "moderate" degree of state control, with the Levee Board in *McDonald*, which was found to be autonomous because the commissioners of that board were drawn from the counties within the levee district. *Id*. Employing the same metric used by the Southern District in *Cleanse Corp.* and this court in *Williams* results in finding that the local autonomy factor militates against finding of Eleventh Amendment Immunity for BVGCD. The district court took a different approach and reached an incorrect conclusion. ROA 377-378.

The district court found that BVGCD's local autonomy was hampered by the technical assistance and oversight provided by the Texas Commission on Environmental Quality ("TCEQ") and the Texas Water Development Board

("TWDB"). ROA. 377-378. Specifically, the district court homed in on the fact that the TWDB is required to ensure that a district's groundwater management plan contains certain detailed information. ROA. 377-378. This, the court determined, amounted to a "substantial amount of state supervision." ROA. 377-378. The court's focus on this one aspect of oversight overlooks the substantial autonomy groundwater conservation districts have to implement and enforce rules within their territorial boundaries.

Under Chapter 36 of the Texas Water Code, groundwater conservation districts have the authority to: make their own rules, including rules limiting groundwater production (Tex. Water Code § 36.101); enforce their rules through a variety of mechanisms including injunctions and the imposition of civil penalties of up to $10,000 per day (Tex. Water Code § 36.102); acquire property, erect dams, drain lakes, and make other improvements and installations to further its statutory prerogatives (Tex. Water Code § 36.103); purchase, sell, and distribute surface water or groundwater (Tex. Water Code § 36.104); carry out research projects deemed necessary by the board (Tex. Water Code § 36.107); and to issue bonds and notes (Tex. Water Code § 36.171). While the TWDB and TCEQ undoubtedly exercise oversight over a district's groundwater management plan, the development of that plan and the enactment of rules related to that plan are left to the district. Tex. Water Code § 36.1071(e). The oversight function exercised by the

TWDB is limited to ensuring that a District's management plan contains all of the items required by statue. The TWDB's role in this process is passive and does not bear on the day-to-day operations of a groundwater conservation district. The district court should not have allowed this oversight function to outweigh the undeniably broad local powers groundwater conservation districts maintain.

In weighing the local autonomy factor, the district court also looked to the Water Code's authorization of a state auditor to audit a district's operations with the technical assistance of the TWDB, Texas Parks and Wildlife Department, and TCEQ. ROA. 378 *citing* Tex. Water Code §§ 36.061, 36.302. According the district court, the fact that the state auditor can deem the District "non-operational" demonstrates that the District "does not act independently." ROA. 378. A similar line of reasoning was rejected by this Court in *Williams*. There, DART argued that the local autonomy factor weighed in its favor because it was subject to fiscal audits every year and performance audits every fourth year. *Williams*, 242 F.3d at 321; *see* Tex. Transp. Code Ann. §§ 452.451, 452.454 . The Court in *Williams* determined that, while such audits reflect a degree of state oversight, they were not dispositive of the issue of local control. Unlike DART's audits, the Water Code provides for only one mandatory audit which occurs on the first year after the approval of the groundwater management plan, and recurring at least every seven years thereafter. Tex. Water Code § 36.302. Texas Water Code section 36.061

merely gives the state auditor authority to audit the records of the district if the state auditor determines the audit is necessary. Tex. Water Code § 36.061(b) . This Court did not give substantial weight to the DART audits in *Williams* even though those audits were mandated to occur more frequently and with less discretion than the audits called for by the Water Code. The district court afforded too much weight to the Water Code audits, and ought to have focused on the expansive powers groundwater districts have to carry out their day-to-day operations.

iv. Groundwater Conservation Districts are confined to their territorial jurisdiction.

The fourth *Clark* factor looks at whether the entity claiming Eleventh Amendment Immunity is concerned with state-wide rather than local concerns. *Clark*, 798 F.2d at 745. The proper focus at this stage of the inquiry is whether the entity in question acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants. *Vogt*, 294 F.3d at 695. The district court concluded this factor weighed in BVGCD's favor because "[w]ater conservation and supply appears…to necessarily be one of both statewide and local concern." ROA. 378.

In evaluating this factor, the district court again gave undue weight to irrelevant facts because its attention was drawn to the analogy between a groundwater district and the Coastal Water Authority involved in the *Cleanse Corp.* case. ROA. 378 *citing Cleanse Corp.*, 475 F.Supp. 2d at 634). The district

court determined that, like the CWA, BVGCD is "primarily concerned with protecting the water supply within its district…" as "part of a larger statewide concern." *Id*. Instead of looking to whether the problem to be addressed by the entity was of a statewide or local concern, the district court ought to have asked whether BVGCD was authorized to exercise its powers outside of its territorial boundaries. Most entities that are entitled to Eleventh Amendment Immunity have statewide jurisdiction. *Vogt*, 294 at 695. Moreover, many entities that do not have Eleventh Amendment Immunity can be said to address "statewide" concerns. In *Vogt*, for instance, the levee district asserted that it was concerned with the statewide problem of flooding, which "outweigh[ed] the narrow geographic boundaries of the levy district." *Vogt*, 294 F.3d at 695. Nevertheless, the Court found that the levee district's powers were confined to its territorial jurisdiction and, as such, the fourth factor weighed against Eleventh Amendment Immunity. Similarly, in *Cozzo*, this Court found that, even though enforcing state laws and "performing sundry duties for Louisiana's benefit, sheriffs are concerned with local problems because those 'duties are generally performed only within a given parish.'" *Cozzo*, 279 F.3d at 282.

While many regional entities can be said to be local solutions to statewide problems, the essential test under this element is whether the entity in question is confined to a particular geographic or geopolitical territory in the exercise of its

powers. *See Hudson*, 174 F.3d at 690-91 (explaining that looking to the geographic reach of the entities powers is highly useful to examine the fourth factor); *see also, Vogt*, 294 F.3d at 695; *Williams*, 242 F.3d at 321-22. BVGCD's enabling legislation provides that the district's boundaries are coextensive with the boundaries of Robertson and Brazos Counties unless modified by Chapter 36 or other law. Tex. Special Dist. Loc'l Laws Code § 8835.004. Groundwater conservation districts like BVGCD are not permitted to enact rules or enforce rules outside of their territorial boundaries. By contrast, the CWA, to which the district court analogized GCDs, is authorized to operate outside of its territorial boundaries. *See Cleanse Corp.*, 475 F.3d at 634.

The district court properly analyzed the fifth factor, whether the entity may sue or be sued, and did not address the sixth factor. However, it did not analyze the other four factors in accordance with this court's precedent and, as a result, incorrectly determined that BVGCD was entitled to Eleventh Amendment Immunity. It is not. Accordingly, the district court's order granting BVGCD's Motion to Dismiss on the basis of Eleventh Amendment Immunity should be reversed.

B. BVGCD's Directors are not entitled to 11th Amendment Immunity

The Directors in their official capacities derived their claim of Eleventh Amendment Immunity from the supposed immunity of BVGCD. Just as the

District itself is not entitled to Eleventh Amendment Immunity, the Directors are likewise not availed of Eleventh Amendment Immunity. *See Crane v. Texas*, 759 F.2d 412, 427 (5th Cir. 1985)("State officials partake of the Eleventh Amendment immunity of the states they serve.").

III. Fazzino's takings claim is ripe.

The district court found that Fazzino's takings claim was not ripe and dismissed it for want of subject matter jurisdiction. ROA. 381. This ruling was based on the district court's determination that Fazzino had not obtained a final adjudication on the merits, and had not sought compensation through procedures provided by state law. ROA. 383. BVGCD's application of its rules to Fazzino effectively prevented his submission of an application that BVGCD would consider "administratively complete." ROA. 17-18. Fazzino sought a variance, but BVGCD claimed it did not grant variances from its rules. ROA. 18.

The principle flaw in the district court's ripeness determination is that it presupposes that Fazzino went directly from a denial of his application by BVGCD straight into the district court. ROA. 383. The district court appears to be operating under the impression that Fazzino both failed to obtain a final determination on his application and failed to pursue state court remedies. ROA. 383. In fact, Fazzino did obtain a final determination, sought a variance from BVGCD's application of

its rules, and was precluded from seeking an adequate remedy in state court. ROA. 17-18.

In January of 2017, Fazzino attempted to protect his groundwater from the drainage caused by the City of Bryan Well No. 18 by filing a complaint with BVGCD asserting that Well No. 18 was not properly permitted and that it should not be exempted from the operation of the District's rules. ROA. 17. The contest ultimately went before an administrative law judge at the SOAH who determined that Fazzino was not authorized to assert a complaint relating to a well owned by a third party. ROA. 17.

Finding himself without an ability to directly prevent the drainage caused by Well No. 18, Fazzino was left to pursue the only avenue available to protect his property interest—that is exercising his right to offset under the rule of capture. *See Houston & T.C. Railway v. East*, 81 S.W. 279, 280-82 (Tex. 1904) (adopting the rule of capture in the context of a complaint of groundwater drainage caused by neighboring well owner). On April 4, 2017, Fazzino filed an application for a production permit which stated that he owned or controlled an interest in 26 acres of groundwater rights and requested a permit to produce 3,000 gallons per-minute, the amount of water required to offset the production from Well No. 18. ROA. 18. BVGCD advised Fazzino on April 13, 2017 and June 26, 2017 that his application was administratively incomplete in that he failed to demonstrate that he owned

enough surface acreage around the proposed well to support the production of 3,000 gallons-per-minute under BVGCD's Rule 7.1. ROA. 18. Under that Rule, Fazzino would have been required to own 649 acres compared to the 26 he actually owned. Meanwhile, the City of Bryan well was pumping 3,000 gallons-per-minute off of a 2.7 acre tract. ROA. 16-18. On August 16, 2017 Fazzino responded to BVGCD's July 26 letter explaining that he did not own or control 649 acres. Fazzino explained that 3,000 GPM was the minimum amount of production he required to offset the drainage caused by the City of Bryan well, and requested a variance from the application of the District's spacing and production rules. On September 6, 2017 BVGCD's general manager advised Fazzino that his application had lapsed due to his failure to provide the requested information regarding his ownership of sufficient surface acreage to support the production of 3,000 GPM. In that same communication, BVGCD advised Fazzino that it did not grant variances from its rules. ROA. 18. BVGCD's Rules provide no mechanism to get an administratively incomplete application before the board for a decision. ROA. 18.

BVGCD's application of Rule 7.1 rendered Fazzino's application administratively incomplete. *See* BVGCD Dist. R. 8.4(b)(3)(requiring evidence of legal authority to produce groundwater as required by 7.1(c)). In order to comply with Rule 7.1, Fazzino would be required to own more land than he did and, in the

absence of a variance from the application of that rule, Fazzino was unable to submit an administratively complete application. Without an administratively complete application, BVGCD would never make a ruling on the application. Therefore, BVGCD's statement that it did not grant variances thrust Fazzino into an administrative limbo. To obtain a final determination on the application by BVGCD's board, Fazzino would be required to submit an application seeking an amount of production that is insufficient to protect his property interests, thereby effectively acquiescing to the loss of his property. Instead, Fazzino brought this lawsuit.

The Supreme Court adopted a two-prong test to assess whether a takings claim is ripe. *Williamson Co. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-91, 194-197. (1985). Under that test, a takings claim is not ripe until: (1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner; and (2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the state provides. *Id*.

Fazzino satisfied the first prong of this test by seeking a production permit sufficient to offset drainage caused by Well No. 18, being denied due to the application of BVGCD's spacing rules, then seeking a variance from those rules. *See Urban Developers, LLC v. City of Jackson*, 468 F.3d 281, 293 (5th Cir. 2006) ("…even if a plan is initially disapproved by the government, property owners

must then seek variances or waivers, when potentially available, before a court will hear their takings claim."). BVGCD claimed it does not grant such variances. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992)(noting that request for variance would have been pointless because council previously indicated no permits would be issued). The denial of Fazzino's requested variance left no question about how the "regulations at issue" apply to his land. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 740 (1997)(noting that the finality requirement is satisfied when there is no question about how the regulations at issue will apply to the particular land in question.")

The district court found that Fazzino could not satisfy the second prong of the *Williamson County* test because he had not sought compensation through the state court system. As an initial matter, inverse condemnation claims in Texas have the same finality requirement applied to takings claims under federal law. *See generally*, *Mayhew v. Town of Sunnyvale*, 954 S.W.2d 922 (Tex. 1998)(explaining the finality requirement in context of takings claim under Texas law by reference to federal precedent). Having been denied the ability to go forward with his application before BVGCD, a takings claim filed by Fazzino in state district court would be based on the same theory as he advanced before the federal district court. ROA. 382-383. Applying a blanket requirement that Fazzino exhaust state remedies before pursuing identical federal remedies would be to merely slavishly

adhere to the *Williamson County* test for its own sake. Such adherence leads to inequitable results and has been harshly criticized by members of the U.S. Supreme Court. *See Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1409-11 (2016)(Thomas, J., dissenting)(Thomas joined by Kennedy dissenting from denial of petition for certiorari calling for reconsideration of *Williamson County* and describing the state litigation rule as ahistorical, atextual, and anomalous). Strict adherence to *Williamson County*'s state-litigation requirement should be rejected or ignored in cases where the state court and federal court remedies are the same in all respects save the forum in which those remedies are sought. The requirements imposed by *Williamson County* are, after all, prudential and can be waived or forfeited. *See Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 89 (5th Cir. 2011); *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envt'l. Prot.*, 560 U.S. 702 (2010).

The question of whether "prudential ripeness" requirements should be enforced requires courts to consider "fairness and judicial economy," as well as the "fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration." *MDG-RIO V Ltd. v. City of Seguin*, No. SA-18-cv-00882-OLG, 2018 U.S. Dist. LEXIS 209730, at *13 (W.D. Tex. 2018) *citing Archbold-Garret v. New Orleans*, 893 F.3d 318, 325 (5th Cir. 2018) *and Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In *Archbold-Garret*, this Court held

that the district court should have disregarded the *Williamson County* ripeness doctrine where the plaintiff had other ripe claims properly before the district court and a strict application of *Williamson County* would create piecemeal litigation and increased hardship on the parties. *Archbold-Garrett*, 893 F.3d at 325. Here, the non-takings-based causes of action appellants asserted are ripe. The takings claim would also be ripe but-for the second prong of the *Williamson County* test. A strict adherence to *Williamson County* would force Fazzino to try the same takings claim twice and risk the perils of issue and claim preclusion in so doing. The interests of fairness and judicial economy weigh heavily in favor of disregarding the second *Williamson County* requirement.

IV. Fazzino's property interest in his groundwater is sufficiently well-settled to warrant review by the federal courts of his equal protection and takings claims.

The district court's dismissal of Fazzino's takings and equal protection claims rested in large part on its discomfort with the notion of applying oil and gas case law to groundwater. This same line of reasoning bled over into the district court's grant of the Director's 12(b)(6) Motion to Dismiss on qualified immunity grounds. ROA. 383-387. By these rulings, the district court essentially adopted BVGCD's contention that Fazzino's claims turned on a novel application of Texas law. ROA. 57-60; ROA. 386-387. As to the equal protection claims, the district court found that "[Fazzino] failed to show that the director's conduct was

objectively unreasonable in light of clearly established law because of: (1) the broad discretion given to GCDs in adopting or enforcing rule; (2) *the lack of precedent suggesting that all oil and gas law is applicable to all groundwater disputes*." ROA 386-387. There is nothing novel about the property interest Fazzino asserts. The court's exercise of *Burford* abstention was not warranted, and the dismissal of Fazzino's claims against the individual directors was inappropriate because he alleged the violation of a clearly established right.

A. Texas law regarding the ownership of groundwater is sufficiently well-settled

BVGCD successfully convinced the district court that resolving Fazzino's claims would require extending oil and gas law principles to groundwater in a way that is novel or otherwise untested. ROA. 420. This argument doubtless derives some appeal from the fact that other Texas federal district courts had abstained from deciding groundwater cases on the basis that the nature of the rights involved were unsettled. *See* ROA. 385; *see, e.g., Williamson v. Guadalupe County Groundwater Conservation Dist.*, 343 F.Supp. 2d 580 (W.D. Tex. 2004). However, those cases were decided without the benefit of the Texas Supreme Court's decision affirming landowner's right to absolute ownership of groundwater in place. *See Day*¸ 369 S.W.3d at 831-832 ("We decide in this case whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of

the Texas Constitution. We hold that it does.") *compare Coates v. Hall*, 512 F.Supp. 2d 770, 788 ("The Court believes that Plaintiff's takings claim involves several novel issues of state law…the Texas Supreme Court has not addressed the scope of a landowner's cognizable property interest in groundwater beneath their land."). In light of the Supreme Court's opinion in *Day*, it is not reasonable for groundwater conservation districts to claim ignorance of the contours of a property owner's right to the groundwater beneath her land.

Fazzino calls upon oil and gas law cases in asserting his rights in his groundwater because groundwater and oil and gas share several characteristics that render the body of oil and gas case law particularly instructive. As explained by the Texas Supreme Court when deciding whether the accommodation doctrine applied to groundwater estates: "[c]ommon law rules governing mineral and groundwater estates are not merely similar; they are drawn from each other or from the same source." *See Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex.2016). In light of *Day* and *Coyote Lake Ranch*, using Texas property cases arising in the oil and gas context to resolve analogous groundwater issues is not an extension of Texas law; it is just simply Texas law. There is nothing particularly novel about this approach.

The persuasive force behind BVGCD's argument is derived mostly from a comparative dissimilarity between hydrocarbons and water. The distinctions

between the two substances with regard to their composition and utility to society are important, but not controlling. These distinctions do not form a sufficient basis for treating the core ownership principles of oil and gas differently from the ownership principles applicable to groundwater. *See Day*, 369 S.W.3d 814, 831 (Tex. 2012). As the Texas Supreme Court explained in *Day*, "…the issue is not whether there are important differences between groundwater and hydrocarbons; there certainly are…[b]ut we see no basis in these differences to conclude that the common law allows ownership of oil and gas in place but not groundwater."

It is the characteristic of ownership of groundwater, absolute and in place, which gives rise to Fazzino's reliance on oil and gas case law to support his claims. "Oil and gas law" is, after all, just a phrase used to describe a body of property law that developed around a particular industry. Insofar as oil and gas cases are resolved by reference to a landowner's absolute ownership of minerals in place, those cases should apply to groundwater disputes raising similar issues. *See Coyote Lake*, 498 S.W.3d at 63-64. Seven years ago, the Texas Supreme Court confirmed, in absolute terms, that groundwater rights owners are entitled to fair opportunity to produce their fair share of groundwater beneath their property, and that government action that deprives a property owner of their chance to produce their fair share of groundwater constitutes a taking. *Day*, 369 S.W.3d at 831. The district court's concern that there is a "lack of precedent suggesting that all oil and gas law

is applicable to all groundwater disputes" requires too much in both the takings and equal protection contexts. There is no reason to require the piecemeal adoption of each oil and gas case to groundwater before we accept the principles of ownership over groundwater to be clearly established. If the property concepts underlying a particular oil and gas decision are applicable in an analogous groundwater case, there is no reasoned basis for not applying those concepts.

B. *Burford* abstention was unwarranted.

The district court's invocation of *Burford* abstention was unwarranted. The fundamental concern in *Burford* abstention is to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed to expert administrative resolution. *Adrian Energy Assocs. v. Michigan Pub. Serv. Comm'n*, 481 F.3d 414, 423 (6th Cir.). In determining whether to exercise *Burford* abstention, the Fifth Circuit has employed a five-part test which weighs: (1) whether the cause of action arises under federal or state 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 that area; and (5) the presence of a special state forum for judicial review. *Jefferson Cnty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 623 (5th Cir. 2017).

As discussed above, this case does not require inquiry into unsettled law. BVGCD treated Fazzino differently than it treated other similarly situated groundwater rights owners. The City of Bryan was permitted to drill what is effectively a new well to produce 3,000 GPM from a 2.7 acre tract in derogation of BVGCD's rules, meanwhile Fazzino was denied an application for the same amount of production because he owned only a 26 acre tract. The BVGCD rules do not distinguish between municipalities and other landowners. Treating municipalities as exempt from the application of BVGCD's rules, while rigorously enforcing those rules against similarly situated landowners like Fazzino, constitutes a violation of Fazzino's right to equal protection under the laws. This fact can be ascertained without tilling any new ground in Texas or federal jurisprudence.

The state law under which Fazzino claims an ownership interest in groundwater has been settled for several years. The district court came to the wrong conclusion regarding this second element and then gave it too much weight. In weighing the second and third factors, the district court stated that "[t]he Texas legislature, by providing for groundwater conservation districts, has set the stage for a court case to decide the permissibility of pumping limits." ROA 387. This is an answer to a question that was never asked. The validity of pumping limits *per se* is not at issue. A district may set pumping limits as authorized by the Texas Water

Code. But it should go without saying that in enacting and enforcing those pumping limits, a groundwater district may not violate a person's rights under the United States or Texas Constitutions.

The state's interest and its need for coherent policy in groundwater law is not threatened by requiring a groundwater conservation district to comply with the law. The decentralized regulatory framework represented by Texas' 98 groundwater conservation districts, each promulgating and enforcing different rules, gives rise to a presumption that invalidating the application of one district's application of its rules to a particular litigant would not significantly disrupt the state's overall groundwater conservation scheme. It is telling in this regard that the district court never explained why it thought Fazzino's suit would disrupt the Texas regulatory framework.

Finally, application of *Burford* abstention here does not comport with the purpose of the doctrine in preventing the federal courts from bypassing the state's administrative scheme and resolving issues of state law and policy that are committed to expert administrative resolution. Fazzino's claims in this case do not threaten state policy and they do not broach issues committed to expert administrative resolution. Neither BVGCD nor the district court explained what coherent policy or matter of public concern would be disrupted by the exercise of federal review. *Cf. BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir.

1977)(reversing dismissal on *Burford* abstention grounds because "[a]lthough the challenged statutes [we]re part of a large and perhaps complex regulatory scheme[,] *i.e.*, the Florida Banking Code[,] appellants focus[ed] their attack upon a single statute whose possible invalidation could scarcely be expected to disrupt Florida's entire system of banking regulation"(footnote omitted)). Nor did the district explain what difficult question of state law exists in the case beyond its concern that oil and gas law had not been adopted wholesale into groundwater law. There is no dispute that there is no special state forum for Fazzino to bring his claim in. Under these circumstances, the district court erred in exercising *Burford* abstention.

C. Fazzino alleged the violation of a clearly established right.

Whatever expansive discretion GCDs may be imbued with, that discretion cannot extend to violating a person's constitutional rights. And the mere fact that one area of law is less developed than its closest analog cannot excuse BVGCD's conduct in treating similarly situated property owners differently without a rational basis. Nor should BVGCD be permitted to appropriate private property without compensation based solely on the fact the case fixing the property rights in question is merely 7 years old. Ultimately, the right to equal protection under the law is well established, and determining whether or not equal protection was afforded to Fazzino can be done without reference to oil and gas law or water law.

See Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (an equal protection claim is properly plead where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment); *Mikeska v. City of Galveston*, 451 F.3d 376, 381-82 (5th Cir. 2006).

The district court erred in dismissing Fazzino's takings and equal protection claims based on *Burford* abstention, and erred in dismissing Fazzino's claims against the individual directors where he had plead their violation of his clearly established rights.

III. Stratta's First Amendment Claim

Stratta, as a member of BVGCD's Board of Directors representing agricultural interests in Robertson County, was concerned about the disparate and unequal application of its rules to Well No. 18. Prior to the March 8, 2018 meeting of the BVGCD board of directors, Stratta requested that the Board put an item on the agenda to discuss whether Well No. 18 was an Existing Well or a New Well. ROA. 20. The Board prevented Stratta from making the request on the basis that they feared it would violate TOMA's notice requirements.

Section 551.042(a) of TOMA provides that "[i]f at a meeting of a governmental body, a member…of the governmental body inquires about a subject for which notice was not given as required by this subchapter, the notice

provisions…do not apply to: (1) a statement of specific factual information given in response to the inquiry; or (2) a recitation of existing policy in response to the inquiry." Tex. Gov't Code § 551.042(a). Subsection (b) of that statute provides that any deliberation about the subject of the inquiry would be limited to a proposal to place the subject on the agenda for a subsequent meeting. Tex. Gov't Code § 551.042(b). Accordingly, Stratta's raising an inquiry regarding the status of Well No. 18 would fall within an exception to the notice requirement. There's no indication that a proposal to put issues related to Well No. 18 on the agenda would have violated TOMA, regardless of who made the request.

The district court dismissed Stratta's First Amendment claims on the basis of qualified immunity. ROA. 420-426. The court's rationale was that, since Stratta had previously attempted to put issues regarding Well No. 18 on the board's agenda, the board was aware of what Stratta would say during the public comment period, and therefore the notice requirements of TOMA required that Stratta be prevented from speaking. ROA. 423-425. Because TOMA's notice requirements applied, the court reasoned that the directors could reasonably have believed that allowing Stratta to speak would violate TOMA and therefore it was permissible to prevent him from speaking. ROA. 425. The district court rejected the notion that the provisions of Section 551.042 rendered Stratta's request for an agenda item benign for TOMA purposes. In doing so, the court explained that the "agenda"

exception under 55.042 did not apply because Stratta was the one making the inquiry rather than receiving the inquiry. ROA. 425-436. The district court's construction of the Texas Open Meetings Act is flawed.

The purpose of the Texas Open Meetings Act is opening governmental decision making to the public. *San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991). Stratta, as a landowner subject to BVGCD's regulations and as a member of BVGCD's board, maintains legitimate concerns regarding BVGCD's unequal treatment of the City of Bryan Well No. 18. Moreover, the mere fact that he is a member of the BVGCD board does not deprive him of his constitutional right to be heard before that board as a member of the public. His concerns are, to a large degree, supported by the fact that the City of Bryan is authorized by statute to select one of BVGCD's board members. Tex. Special Dist. Loc'l Law Code § 8835.051(c). BVGCD's persistent efforts to block public discussion of the status of City of Bryan Well No. 18 demonstrates an animus against Stratta's viewpoint—that the City of Bryan Well No. 18 is incorrectly categorized as an "existing" rather than "new" well. The district court reasoned that, because Stratta attempted to get discussion of Well No. 18 placed on the agenda prior to the March 8, 2018 meeting, the board had foreknowledge of the topic he wished to discuss thereby activating notice requirements. It follows, according to the district court, that BVGCD acted reasonably in preventing Stratta

from speaking. Under this rationale viewpoint discrimination is permissible when the government has prior warning of the occasion to exercise that discrimination, so long as they can connect the speech to a possible violation of TOMA. Qualified immunity and the Texas Open Meetings Act should not be wielded to suppress First Amendment rights or to close off governmental decision making from the public. Stratta should be permitted to vindicate his rights through a trial on the merits.

PRAYER

The district court erred in granting BVGCD's Motion to Dismiss pursuant to 12(b)(1) and the directors Motion to Dismiss pursuant to 12(b)(6). BVGCD is not entitled to Eleventh Amendment Immunity, and the exercise of *Burford* abstention regarding Fazzino's claims is not warranted. Moreover, both Stratta and Fazzino have colorable claims plead against the directors. Accordingly, Appellants pray that this Court reverse the district court's final judgment dismissing Appellants' lawsuit, and remand this case for proceedings on the merits.

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 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 5th CIR. R. 25.

s/ Marvin W. Jones
Marvin W. Jones

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