No. 18-50994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID STRATTA AND ANTHONY FAZZINO
Plaintiffs-Appellants,

V.

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

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

AMICUS BRIEF OF TEXAS FARM BUREAU IN SUPPORT OF APPELLANTS DAVID STRATTA AND ANTHONY FAZZINO

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March 13, 2019

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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.

1. David Stratta, Plaintiff-Appellant
2. Anthony Fazzino, Plaintiff-Appellant
3. Jan A. Roe, Defendant-Appellee
4. Billy L. Harris, Defendant-Appellee
5. Bryan F. Russ Jr., Defendant-Appellee
6. Jayson Barfknecht, Defendant-Appellee
7. Mark J. Carraba, Defendant-Appellee
8. Gordon Peter Brien, Defendant-Appellee
9. Stephen C. Cast, Defendant-Appellee
10. Brazos Valley Groundwater Conservation District, Defendant-Appellee
11. Marvin W. Jones, Sprouse Shrader Smith PLLC, Counsel for Plaintiffs-Appellants
12. C. Brantley Jones, Sprouse Shrader Smith PLLC, Counsel for Plaintiffs-Appellants
13. Joe E. de la Fuente, Lloyd Gosselink Rochelle & Townsend, P.C., Counsel for Defendants-Appellees
14. Michael A. Gershon, Lloyd Gosselink Rochelle & Townsend, P.C., Counsel for Defendants-Appellees
15. James F. Parker, III, Lloyd Gosselink Rochelle & Townsend, P.C., Counsel for Defendants-Appellees
16. Lauren E. Sprouse, Lloyd Gosselink Rochelle & Townsend, P.C., Counsel for Defendants-Appellees

/s/ Joshua D. Katz
Joshua D. Katz
Counsel of Record for Amicus
Texas Farm Bureau

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I. Interest of Amicus

The Texas Farm Bureau ("TFB") is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. Founded in 1933, TFB has over has over 519,000 member families across the state and is associated with 206 organized county Farm Bureau organizations in Texas. TFB and its members – who are property owners and irrigators – believe the protection of property rights generally, and groundwater private property rights in particular, is of critical importance to the State of Texas, and to TFB's members.

TFB is keenly interested in the legal principles established in this case, as the issues of whether landowners may be allowed to produce their fair share of their groundwater from their property and the equal protection claim of a landowner whose application for a permit to produce his groundwater was treated differently than another similarly-situated landowner are of importance to TFB members. TFB submits this brief on behalf of its members and will pay all attorney's fees incurred in the preparation of the amicus brief.

II. Introduction and Summary of Argument

This case, and TFB's interest in it, centers upon clearly established property rights. The Texas Supreme Court's decision in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012) emphatically confirmed that a landowner's interest in the groundwater in place beneath his or her property is a vested property right that is subject to constitutional protection. *Id*. at 833. Moreover, a landowner (such as Appellants in this proceeding) is "regarded as having absolute title in severalty to" the water "in place beneath his land." *Id*. at 832. Owners of groundwater have vested rights that afford them the opportunity to remove their fair share of the recoverable groundwater that lies in a common reservoir under their property. *Id.* at 830. By failing to afford owners the reasonable opportunity to produce their fair share of the groundwater beneath their property, and failing to protect Fazzino from uncompensated drainage, Brazos Valley Groundwater Conservation District ("BVGCD" or the "District") has committed a taking of property and violation of his equal protection rights.

However, the trial court never properly considered this important question of property rights, instead ruling that Appellant's state law takings claim was not ripe because Fazzino did not first seek compensation in state court. This holding, however, is based on a prudential – and not jurisdictional – doctrine that a state law takings claim should first be brought in state court before it may be asserted in

federal court. Furthermore, it is appropriate for a federal court to exercise supplemental jurisdiction over state law claims that arise out of the same facts and involving the same parties when there are also federal claims pending before it.

The trial court also incorrectly granted the District's 12(b)(1) motion to dismiss the Appellants' other claims on the basis of 11th Amendment immunity, finding that a groundwater conservation district is an "arm of the state" and thus enjoys the state's immunity from suit. However, the trial court ignored the local, independent nature of groundwater districts under Texas law and thus misapplied the immunity protection of the 11th Amendment. A groundwater district is not an arm of the state, but rather a political subdivision, established under the Texas Constitution as a local conservation district, with the independent authority to adopt its own rules, management conditions, and permitting schemes to carry out its goals based on local conditions. Districts receive their funding not from the state, but rather from permitting fees and taxes paid by their own local permit holders and property owners.

BVGCD adopted rules in 2004 that distinguish between existing wells, new wells, and wells for which the landowner can demonstrate historic use. The City of Bryan drilled a new well on a 2.7 acre parcel adjacent to Appellant Fazzino which, under these rules, was permitted by the District to produce groundwater at 3,000 gpm and produce 4,838 acre-feet of groundwater per year. Bryan's well is

within 3,000 feet of the property owned by Fazzino. In contrast, when Fazzino applied for an application to drill a new well on his own 26 acres of land, and to also produce at a rate of 3,000 gpm, the District applied its rules to restrict his ability to pump at a commensurate rate, and his access to a fair share of his groundwater was severely limited.

The District's treatment of Fazzino, in contrast to its permitting treatment of the City of Bryan's Well No. 18, presents both equal protection and takings of property issues. The unequal application of the District's regulatory program has prevented Fazzino's effort to produce his fair share of the groundwater under his property, which is a vested property right. Groundwater is a valuable and fundamental attribute of private property ownership in the State of Texas, and a groundwater district is precluded from depriving or divesting a landowner of the ownership of that real property. The District's disparate treatment of the City of Bryan's well and Fazzino's well is arbitrary, deprived Fazzino of equal protection, and constitutes a taking of property without compensation.

III. Argument

A. A Texas groundwater district is not immune from suit under the 11th Amendment.

The trial court determined that the District is an "arm of the State" of Texas and therefore is immune from Appellants' non-takings claims pursuant to the 11th Amendment. CR.374. The court analyzed the six factors set out by this Court in

Clark v. Tarrant County, 798 F.2d 736, 744 (5th Cir. 1986), and concluded that the District is immune from suit. TFB respectfully suggests that the trial court incorrectly applied these factors, and therefore improperly concluded that the District is an alter ego of the State.

The *Coates* decision that Appellees and the trial court rely upon for the proposition that the Appellant's takings claim is not ripe also indicated that a groundwater conservation district is *not* entitled to 11th Amendment immunity. *See Coates v. Hall*, 512 F.Supp. 2d 770, 778 (W.D. Tex. 2007), finding that a groundwater district that, like the District, was organized under Section 59, Article XVI of the Texas Constitution "is a political subdivision exercising state powers and it stands on the same legal footing as a county," citing *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.). Counties are *not* entitled to 11th Amendment immunity and therefore may be sued, for example, under 42 U.S.C. § 1983. *Crane v. State of Tex.*, 759 F.2d 412, 415 (5th Cir. 1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124 n. 34 (1984) (The Supreme Court "has consistently refused to construe the [Eleventh] Amendment to afford protections to political subdivisions such as counties . . . even though such entities exercise a 'slice of state power.'"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (local governments are not entitled to sovereign immunity under 42 U.S.C. § 1983); *Monell*

v. Dep't of Soc. Servs., 436 U.S. 658, 633 (1978) (no 11th Amendment immunity for counties and municipalities under § 1983). As explained further below, Texas cases and statutes treat groundwater conservation districts like counties – political subdivisions that the Supreme Court has held do not enjoy 11th Amendment immunity.

Moreover, the trial court incorrectly applied the six *Clark* factors in determining that 11th Amendment immunity applies to the District. These factors are:

1. Whether state law views the District as an arm of the state.

The district court principally relies upon dicta in one case that referred to an underground water conservation district as "an arm of the state created to administer the enumerated governmental powers delegated to it." CR.376, citing *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.). However, that case went on to describe underground water conservation districts as being equivalent to "counties and other political subdivisions of the state" which, as discussed above, do not enjoy 11th Amendment immunity. An analysis of state case law and statutes illustrates that groundwater districts are independent political subdivisions rather than "arms" of the state government.

The Texas Water Code states that a groundwater district is a political subdivision akin to a county or city, rather than an arm of state government. Groundwater conservation districts are created pursuant to the conservation amendment of the Texas Constitution, Article XVI, Section 59, which states that the Legislature shall pass all laws as may be appropriate to water conservation and development. A district may have the authority, rights, privileges, and functions as may be conferred by the Legislature. The Legislature set out this authority in Chapter 36 of the Water Code and local enabling legislation of individual groundwater conservation districts. Section 36.0015 states that a groundwater conservation district is a local regulatory agency created to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater. Notably, as stated in *Coates* and *South Plains*, the Texas Water Code also provides that a groundwater district is a political subdivision of the state like a county or municipality. Texas Water Code § 36.001(15).

Further, not all groundwater conservation districts are created by an action of the Texas Legislature. Groundwater districts may also be created by landowner petition to the Texas Commission on Environmental Quality ("TCEQ"). Texas Water Code §§ 36.013-.019. Additionally, such districts may be created by TCEQ itself through the priority groundwater management area process. *See, generally*, Texas Water Code Chapter 35.

In *EAA v. Day*, the Texas Supreme Court examined the evolution of groundwater district regulation. 369 S.W.3d at 833-834. The Court noted that efforts to pass a comprehensive, statewide groundwater management scheme had repeatedly failed and the Groundwater Conservation District Act of 1949 was the first legislation providing for the conservation and development of groundwater. *Id*. It did so by allowing landowners to petition either the county commissioner's court or the State Board of Water Engineers for creation of a district and requiring the approval of local voters to confirm that creation, with management by a locally elected board of directors. The Court concluded that, after many changes of the Act (now incorporated in Water Code Chapter 36), Texas groundwater conservation districts remain under the local electorate's supervision and have little supervision beyond the local level. *Id.* Neither the Water Code nor the Texas Supreme Court consider groundwater conservation districts to be "arms of the state."

2. The source of groundwater districts' funding.

The trial court found that, while no one *Clark* factor is dispositive, the second factor – the source of the entity's funding – is the "weightiest factor." CR.377. Here, the trial court concluded that, because Texas law "authorizes the District to receive grant funding and loans directly from the State," state funds are "implicated in an

action against a groundwater con servation district." *Id*.[1] The trial court mentions but proceeds to downplay the crucial fact that groundwater districts, including the District, are principally funded by fees from their own permit holders or a combination of fees and local property taxes, not state funding. Texas Special District Local Laws Code § 8835.151. The District concedes that it is funded by fees rather than the State. ROA.49. The important question for this Court to consider is whether a judgment against the District would be paid from state funds. *McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901, 907 (5th Cir. 1987). In the *Bragg* case, the Edwards Aquifer Authority ("EAA") unsuccessfully argued that the State (and not a groundwater district) should be liable for any taking that might result from its regulation of groundwater because its actions were mandated by the State legislature. *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118, 126-27 (Tex. App.—San Antonio 2013, pet. denied). [2]

Moreover, although programs exist authorizing groundwater districts, in theory, to receive grant or loan funding from TCEQ or TWDB, the District does not

[1] Texas Water Development Board ("TWDB") funding does not make groundwater districts "arms of the state." Such funding is available to cities, counties, and even rural water supply corporations. *See, e.g.*, Texas Water Development Fund, available at https://www.twdb.texas.gov/financial/programs/TWDF/index.asp (last viewed 3/13/19).

[2] Interestingly, in *Day*, the State of Texas argued that the groundwater district involved – the EAA – was an "independent political subdivision" that should be liable on Day's takings claim, and not the State. *See Day*, 369 S.W.3d at 821, n. 24. The Court did not reach that issue because it was not properly developed on appeal.

state that it has ever received such funds. ROA.49; 377. The trial court inappropriately concluded that state funds "are implicated" in an action against the District based on a hypothetical possibility that state grants or loans *could* be implicated by a judgment against it, while the District acknowledges it actually receives its funding directly from local permit fees pursuant to its enabling statute.

3. The degree of local autonomy exercised by the District.

Under the third *Clark* factor, courts examine the "degree of local autonomy" exercised by the entity. Paradoxically, the trial court recognized that the District "is governed by the Board of Directors, the members of which are appointed by the local governmental entities within the District" – not the State of Texas – yet concludes that there "is a substantial amount of State supervision" of the District, and thus that this factor weighs in favor of finding 11th Amendment immunity. ROA.377.

The purpose of this factor is to "measure[] the closeness of the entity's connection to the state" and is intended to "protect[] a state's public policy and internal affairs from federal interference." *McDonald,* 832 F.2d at 907. The trial court concluded that the District receives "substantial" State supervision because, while the District's Board is entirely comprised of local officials, the TCEQ and TWDB may provide technical assistance when the District adopts its groundwater management plan, and the TWDB must approve said plan. ROA.377.

Groundwater conservation districts in Texas are created to conserve, preserve, protect, recharge, and prevent waste of groundwater within their defined, local jurisdiction. Texas Water Code § 36.0015(b). Districts are each granted authority to develop and enforce their own, independent rules regarding matters such as well spacing, production, drilling, and completion. Texas Water Code § 36.101. Part of each district's local authority is to develop desired future conditions for the waters within its jurisdiction based on hydrological conditions, aquifer uses, and other factors specific to that district. *Id*. at § 36.108(d). These conditions are set by each local district – not the State.

Local groundwater districts are the state's "preferred method of groundwater management." *Id*.; see also *Sipriano v. Great Spring Waters of America, Inc*., 1 S.W.3d 75, 81 (Tex. 1999) (*concurring op*.). As the Texas Supreme Court has noted, groundwater conservation districts "remain under the local electorate's supervision" and "have little supervision beyond the local level." *Day*, 369 S.W.3d at 834. The Court reached that conclusion despite noting that the district in *Day*, like BVGCD, must develop a groundwater management plan every five years and submit it for approval by the TWDB, and implementation of this plan is subject to review by the State Auditor's Office. *Id*. The highest court of Texas thus found that groundwater districts, despite requiring the same state agency approvals of groundwater

management plans cited by the trial court as evidence that such districts receive substantial State supervision, are in fact local entities with local control.

The District appears to agree. Its website describes it as "a not-for-profit local government that is required, by law, to protect and conserve the groundwater resources of Robertson and Brazos counties **through local management**." *Our Mission*, https://brazosvalleygcd.org/our-mission/ [emphasis added] (last viewed 2/14/19).

The District's Board is comprised solely of locally appointed officials, the District's purpose is to respond to local issues of groundwater and property rights management, and the District's authority is limited to its local geographic boundaries.[3] In *Celanese Corp. v. Coastal Water Authority*, 475 F.Supp. 2d 623. 634 (S.D. Tex. 2007), the court noted the important difference between the Levee Board at issue in *McDonald* (which consisted solely of locally elected officials),[4] and the Coastal Water Authority ("CWA"), which included directors appointed by the Governor with the advice and consent of the state Senate, indicating a "moderate degree of state control." BVGCD's Board, like the Levee Board in *McDonald*, consists solely of local officials. Because the State's only role in groundwater management is to provide assistance in developing a water management plan if

[3] TEX. SPEC. DIST. LOCAL LAWS CODE § 8835.052.

[4] *McDonald*, 832 F.2d at 907.

needed, and approving that plan, the trial court incorrectly found that the third *Clark* factor weighs in favor of 11th Amendment immunity applying to the District.

4. Local versus statewide interests.

The fourth *Clark* factor looks to whether the entity is concerned primarily with local, as opposed to statewide, problems. *Clark*, 798 F.2d at 745. The trial court found that this factor weighs in favor of 11th Amendment immunity because "water supply" is both a local and statewide concern. ROA.378-79. As discussed above, the Texas Supreme Court considered these aspects of a groundwater district's authority and role vis-à-vis State oversight, and concluded that these districts "remain under the local electorate's supervision" and "have little supervision beyond the local level." *Day*, 369 S.W.3d at 834.

The trial court also cites to language in *Celanese*, 475 F.Supp. at 634, stating that the protection of water supply within a groundwater conservation district is "part of a larger statewide concern." ROA.378. However, there are distinguishing facts between the entity at issue in that case – the CWA – and the District here. The court noted that CWA's boundaries included "multiple political subdivisions," and that it was "authorized to operate outside of its boundaries." In contrast, the District's jurisdictional boundaries only include Robertson and Brazos Counties, and the District has no authority to operate outside of these local boundaries. Texas Special District Local Laws Code § 8835.004. The District, like all groundwater districts in

Texas, was created to manage local groundwater in a specific and defined area of the state. The trial court improperly found that the District's authority is a matter of statewide rather than local concern.

As the District itself states, it is "a not-for-profit local government that is required, by law, to protect and conserve the groundwater resources of Robertson and Brazos counties through local management. . . . Representatives of groundwater interests in both Robertson and Brazos counties will work together for the good of the area as a whole."[5] The District is concerned with regulation of groundwater only in these two counties. It makes no mention of any authority or purpose regarding statewide concerns.

5. The right of the District to sue and be sued and hold property in its own name.

The District and trial court concede that the District has authority to sue and be sued in its own name, and the right to hold and use property. ROA.379. The court states, without citation, that the "*Celanese* Court found these factors to be less significant than the others." ROA.379. Amicus has not located such language in the *Celanese* opinion, and this Court did not minimize the importance of these final two *Clark* factors, which weigh against District immunity, in *McDonald*. 832 F.2d at 908.

[5] https://brazosvalleygcd.org/our-mission/ (last viewed 3/13/19).

Because the District exists to manage the groundwater within its defined geographical boundaries, its Board is comprised of local officials, it operates on permitting fees, it operates for the most part autonomously from the state, and Texas law does not treat it as an "arm of the state," the trial court erred in finding that the District is immune from suit.

B. The trial court incorrectly dismissed Fazzino's equal protection claim.

Because, as explained above, the District is not immune from suit, it was inappropriate for the trial court to deny Appellant Fazzino's equal protection claim against the District on the basis of 11th Amendment immunity. TFB respectfully requests that this Court remand the equal protection claim to the trial court for a determination on the merits of this claim, which mitigate in favor of Appellant.

The District adopted new rules regarding the production of groundwater within its jurisdictional boundaries from the Simsboro aquifer formation on December 2, 2004. ROA.15. The City of Bryan, Texas began drilling a new well-known as Well No. 18 on December 8, 2004 on a 2.7 acre tract, and completed drilling on October 28 of 2005. ROA.16. The City of Bryan filed its application for a permit to operate this well on June 8, 2006. *Id*. The well had no historic use associated with it under the District's rules. *Id*. On February 20, 2007, the District conditionally granted a permit for Well No. 18, authorizing the City to produce 4,838 acre-feet per year at a rate of 3,000 gpm. ROA.17. A second conditional permit was

issued by the District for this well on April 17, 2013, re-authorizing production from the same 2.7 acre tract at the same rate. *Id*. Importantly, the cone of depression from this well stretches well into Fazzino's property. ROA.25-26.

Under the District's spacing rules for new wells, which apply the acreage-based formula discussed above, the production limit for Well No. 18 would be 192 gpm, not 3,000 gpm, and would have an annual production of approximately 315 acre-feet per year, not 4,838 acre-feet per year. ROA.16.

In order to offset the production from Well No. 18, which had the effect of draining water from under Fazzino's property, Fazzino applied for a drilling and operating permit for a new well from the District on April 4, 2017. ROA.18. Fazzino sought the same production rate that the District permitted for Well No. 18 – 3,000 gpm. *Id*. However, unlike the City of Bryan's application for its new well permit, the District denied Fazzino's application, noting that he would need 649 acres of land under control (rather than the 26 acres he held) in order to attain a production rate of 3,000 gpm. *Id*. Because the District applied its spacing and production rules to Fazzino (but not the City), Fazzino was limited to 192 gpm and 315 acre-feet per year, an insufficient amount to produce his fair share of water and offset the vastly greater production from the neighboring Well No. 18. ROA.16.

When a "class-of-one" equal protection claim is raised, the plaintiff must "show that (1) he or she was intentionally treated differently from others similarly

situated and (2) there was no rational basis for the difference in treatment." *Lindquist v. City of Pasadena*, 660 F.3d 225, 223 (5th Cir. 2012). "In contrast to a due process action, which looks solely to the government's exercise of its power vis-à-vis the [plaintiff], an equal protection claim asks whether a justification exists for the *differential* exercise of that power." *Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir. 2006).

The District essentially granted certain municipal water suppliers an exception from the well spacing and production requirements of its rules without advancing a rational basis to do so (other than, perhaps, the fact that those municipalities appoint directors to the District's governing body).[6] While private landowners, such as Fazzino, appear to be subject to these restrictive spacing requirements, Rule 7.1 – which sets forth the formula for calculating production on new wells – contains no exception for municipal water suppliers.

Because of the unequal and unjustified application of the District's spacing and production rules, landowners like Fazzino are deprived of their chance to produce their fair share of their groundwater while it is drained by similarly situated neighboring landowners – in this case, Well No. 18 – that have been exempted from the same otherwise-applicable rules and regulatory requirements for new wells. This inequitable and disparate application of rules by the District meets the elements of

[6] Special District Local Laws Code § 8835.052(c).

an equal protection claim because the actions of the District treat Fazzino differently than other similarly situated applicants for new wells, and there is no rational basis for the difference in said treatment. Dismissal of Fazzino's equal protection claim is therefore inappropriate because Appellant has stated an equal protection claim upon which relief may be granted.

C. The trial court's order dismissing Fazzino's takings claim should be reversed.

1. This is a case about a landowner's right to produce a fair share of his groundwater.

Appellant Fazzino sought, from his locally-governed groundwater conservation district, a basic right ensured by our state Constitution as well as the Texas Supreme Court's interpretation of it: The right to produce a fair share of the groundwater under his land in the same manner, and under the same application of rules, as his neighbor. Fazzino does not seek a new right in groundwater, or even entitlement to a greater amount of that property right than his neighbors. Rather, Appellant observed a neighbor pumping a vastly greater amount of groundwater – with a cone of depression that stretches well into Appellant's land – than the District has informed Appellant that he can pump from a new well under those same rules. The City of Bryan's Well No. 18 may pump at a much higher rate, without regard to acreage, than the District allowed Fazzino. This deprives Fazzino of his property

rights, equal treatment under the District's rules, and the opportunity to produce his fair share of his groundwater.

The trial court dismissed Fazzino's fair-share takings claim on ripeness grounds because "[i]t is hard to imagine an issue that more clearly should be resolved by a state court." ROA.381. The court opined that federal abstention is appropriate because this issue "is one that state courts, including the Texas Supreme Court, have been wrestling with for years." ROA.383. In this respect, the trial court incorrectly summarized the well-settled state of groundwater ownership in Texas. The Texas Supreme Court in *Day* announced that groundwater is a property right bearing great similarity to mineral interests like oil and gas, and determined therefore that Courts may apply oil and gas legal principles to the ownership and production of groundwater. Following the *Day* decision, the San Antonio Court of Appeals reiterated that a landowner has "absolute title in severalty to the water in place beneath his land," and that a district's regulation could result in a compensable taking. *Bragg,* 421 S.W.3d at 137. 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. Fazzino's takings claim is predicated upon this well-established principle of Texas law. The trial court incorrectly dismissed this claim.

A property owner's right to produce a fair share of the groundwater under his or her property is well established in the *Day* case. The Supreme Court in *Day*

stated that, like in oil and gas law, landowners have vested rights in the groundwater beneath their land. *Day*, 369 S.W.3d at 830. These rights afford landowners the opportunity to remove their fair share of the recoverable groundwater that lies in a common reservoir under their property. "[O]ne purpose of [gcd] regulatory provisions is to afford landowners their fair share of the groundwater beneath their property." *Id*. Just as in the oil and gas context, these rights are a "creature of regulation" rather than common law. *Id*. As the Court in *Day* stated,

> …as the State tells us in its petition: "While there are some differences in the rules governing groundwater and hydrocarbons, at heart both are governed by the same fundamental principle: each represents a shared resource that *must* be conserved under the Constitution." In any event, the Authority's argument is that groundwater cannot be treated like oil and gas because landowners have no correlative rights, not because their rights are different. That argument fails.

Id. at 831.

More recently, the Texas Supreme Court again found that the application of oil and gas law to groundwater was appropriate. *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53, 58 (Tex. 2016). The Court noted that the similarities between groundwater and oil and gas led to its holding in *Day* that "groundwater, like oil and gas, is owned by the landowner in place below the surface." *Id.* at 63. The Court explained its reasoning as follows:

> Analogizing groundwater to minerals in determining the applicability of the accommodation doctrine is no less valid than it is in determining ownership. Common law rules governing mineral and groundwater

> estates are not merely similar; they are drawn from each other and from the same source.

Id. at 64.

The "fair share" doctrine, as applied from oil and gas cases, explains how absolute ownership of groundwater and the rule of capture can coexist with a regulatory scheme. In *Elliff v. Texon Drilling Co*., 210 S.W.2d 558 (Tex. 1948) – a case cited in *Day* – the Court explained:

> The landowner is privileged to sink as many wells as he desires upon his tract of land and extract therefrom and appropriate all the oil and gas that he may produce, so long as he operates within the spirit and purpose of conservation statutes and orders of the Railroad Commission. These laws and regulations are designed to afford each owner a *reasonable opportunity* to produce his proportionate part of the oil and gas from the entire pool and to prevent operating practices injurious to the common reservoir. In this manner, if all operators exercise the same degree of skill and diligence, each owner will recover in most instances his *fair share* of the oil and gas.

Id. at 582 (emphasis added). The regulatory authority must therefore allow landowners the "reasonable opportunity" to produce their "fair share" of water beneath his or her property, which is consistent with the common law rule of capture and rule of absolute ownership of the resource. *Id*.

The converse of the "fair share" doctrine is that if the regulatory authority does *not* afford owners the reasonable opportunity to produce their fair share of the groundwater beneath their property, a taking has occurred. In *Marrs v. Railroad Commission*, 177 S.W.2d 941, 948 (Tex. 1944), certain mineral rights owners

challenged a decision by the Texas Railroad Commission concerning production allowances in an oil field. The Railroad Commission had established field rules that prohibited a certain formation of wells, effectively allowing oil from the southern part of the field to migrate north. *Id*. at 945. The owners in the southern portion alleged that the Commission's order prevented them from being able to recover their fair share of their mineral property before it was drained away. *Id*. at 946. The Court, in holding that plaintiffs' property had been taken, stated:

> Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns and such owner has the right to mine such minerals subject to the conservation laws of this state. *Every owner or lessee is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation*.

Id. at 948. The Texas Supreme Court found that the plaintiffs were denied their fair chance because the amount of production allowed by the Railroad Commission's orders for these two areas was "entirely out of proportion" to the relative amount of oil found there; although there was "several times" more oil under the plaintiffs' land, they were only allowed to produce as much oil as the northern section of the field. *Id*. The Court concluded that this confiscation of the plaintiffs' right to a fair chance of recovery of their fair share of their oil and gas resulted in "the taking of one man's property and the giving it to another." *Id*. As the Court has later reiterated, a mineral owner is entitled to a fair chance to recover the oil and gas in

or under his land, or their equivalents in kind. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W. 3d 1, 15 (Tex. 2008). In order to prevent confiscation, production may be regulated to assure a fair recovery by each owner. *Id*.

In *Marrs*, a Railroad Commission order caused oil to flow towards producers in one section of a field, who were then able to produce in greater amounts. Fazzino suffers a similar fate, as his groundwater property flows preferentially towards the City of Bryan's Well No. 18, which is allowed by the District to produce at a much greater rate and volume from a 2.7 acre parcel than its rules for similarly situated new wells would allow – the rules that it *has* applied to Fazzino's application. BVGCD's application of its well spacing and production rules to deny Fazzino's permit applications, based solely on his amount of contiguous acreage under control, denies Fazzino the opportunity to produce his fair share of the water beneath his property – effectively taking Fazzino's property and giving it to another, the City of Bryan.

By applying its rules in a way that allows the City of Bryan to produce a disproportionately larger amount of groundwater from its tract while depriving adjacent property owners such as Fazzino of his opportunity to produce a fair share of this groundwater, the District effects an uncompensated taking from his adjacent tract. *See Halbouty v. Railroad Commission*, 357 S.W.2d 364 (Tex. 1962) ("It is an obvious result that if in a common reservoir one tract owner is allowed to produce

many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land."); *Atlantic Refining Co. v. Railroad Comm'n of Texas*, 346 S.W.2d 274, 289 (Tex. 1961) (invalidating rule allowing well on small parcel to produce at rate much greater than well on larger neighboring parcel as confiscatory); *Railroad Comm'n of Texas v. Shell Oil Co*., 369 S.W.2d 363 (Tex. App.—Austin 1963, aff'd 380 S.W.2d 556 (Tex. 1964)) (each producer in a field must be allowed the opportunity to produce his fair share from the reservoir). When, as is the case here, a well is permitted to produce at a great rate on a small tract but landowners on adjacent tracts are denied the right to produce their water at the same rate, their right to produce their water has been confiscated.

These principles are well established under Texas law and have been announced by the Texas Supreme Court to be applicable to groundwater conservation districts such as BVGCD.

2. Fazzino's federal takings claim is ripe for adjudication.

The trial court's Order finds that Fazzino's federal takings claim is not ripe because Fazzino has not first asserted a claim for relief from a state court. ROA.381. The court cites several cases for this proposition, notably *Coates*, 512 F.Supp. 2d 770 and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 189-90 (1985).

As a principal matter, *Coates* is predicated upon an outdated question of state law that has since been decisively answered by the Texas Supreme Court – whether plaintiffs "do have a cognizable property interest in the groundwater beneath their land." *Id*. at 786. *Day* categorically determined that landowners have a vested property right in the groundwater beneath their property. *Day* and, subsequently, *Bragg* demonstrated that a regulation that deprives a landowner of the ability to produce that water may constitute a taking without just compensation. *Day*, *Bragg*, and *Coyote Lake Ranch* had not yet been decided when the *Coates* opinion was issued. The reasoning in *Coates* has thus been superseded; Texas courts have determined that Fazzino has a compensable property interest in groundwater, and it was inappropriate for the trial court to dismiss the takings claim on ripeness grounds in the belief that it must "avoid deciding a case involving disputed Texas law." ROA.385. The law is no longer disputed; the Texas Supreme Court has spoken.

The trial court concluded, based on *Coates* and *Williamson*, that a plaintiff is required first to seek compensation in a state court on a takings claim before he or she may assert a federal takings claim in order to "avoid cases that could be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." ROA.385-86. However, since the time of *Coates* and *Williamson*, not only has the Texas Supreme Court emphatically determined that landowners hold a compensable interest in their groundwater property, but both the

United States Supreme Court and the Fifth Circuit have ruled that a plaintiff does *not* have to first seek compensation in state court before a federal claim may ripen. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot*., 560 U.S. 702, 729 (2010); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 89 (5th Cir. 2011) ("[T]he Supreme Court has since explicitly held that . . . ripeness requirements are merely prudential, not jurisdictional.").

In *Stop the Beach Renourishment*, beachfront property owners asserted that an effort led by two cities to restore 6.9 miles of beach that were eroded by hurricanes by adding dry sand seaward of their property was an unconstitutional taking, because they should have the right to receive natural accretions to their property, and to have their property's access to the water remain intact. *Id*. at 720. The respondents (a City and County) argued that the landowners could not assert a takings claim under the 5th Amendment to the United States Constitution because landowners had not first sought just compensation from them. *Id*. at 729. The Court concluded that this argument was "not jurisdictional," and that the takings claim was ripe for adjudication because, based on their argument under Florida law, the landowners had been deprived of property. *Id*. at 729 and n.10.

Further, even if Fazzino's takings claim could be litigated in a state court, a federal court may exercise supplemental jurisdiction over a state claim in a federal proceeding that presents other live federal claims in the interests of fairness and

judicial economy. 28 U.S.C. § 1367(a); *Archbold-Garret v. New Orleans City*, 893 F.3d 318, 324-25 (5th Cir. 2018). To bifurcate Appellants' claims and have one set proceed in federal court while the other proceeds in state court would result in piecemeal litigation of claims that arise from the same facts and same challenged District actions, which only serves to increase expense for the parties and add unnecessary burdens for the courts. Appellants have asserted other federal claims, including an equal protection claim, against the District.

CONCLUSION

For the reasons stated above, Texas Farm Bureau urges that this Court grant this appeal and reverse the District Court's granting of the District's two motions to dismiss.

Respectfully submitted,

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Dated: March 13, 2019

Certificate of Service

This is to certify that a true and correct copy of the foregoing was filed electronically and that notice of this filing will be sent to all parties of record via the Court's electronic filing system on March 13, 2019.

/s/ Joshua D. Katz
Joshua D. Katz

Certificate of Conference

This is to certify that, pursuant to Federal Rule of Appellate Procedure 29(a)(2), counsel for the Texas Farm Bureau conferred with counsel for Appellants and Appellees, and all parties have consented to the filing of this amicus brief by the Texas Farm Bureau.

/s/ Joshua D. Katz
Joshua D. Katz

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