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

FILED

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY

DAVID STRATTA, ANTHONY FAZZINO *Plaintiffs* **v.** **JAN A. ROE, BILLY L. HARRIS, BRYAN F. RUSSJR., JAYSON BARFKNECHT, MARK J. CARRABBA, GORDON PETER BRIEN, STEPHEN C. CAST, BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT** *Defendants*	§ § § § § § § § § § § § §	**CIVIL NO. 6-18-CV-00114-ADA-JCM**

<u>FINAL JUDGMENT</u>

In accordance with the Order Granting Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted on the Basis of Qualified Immunity, the Court enters its Judgment as follows:

IT IS ORDERED that Plaintiffs' Equal Protection and First Amendment claims against Defendant Directors in their individual capacities are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that any remaining pending motions are now **MOOT**.

IT IS FINALLY ORDERED that this case is **CLOSED**.

SIGNED this 4th day of December 2018.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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

DAVID STRATTA, ANTHONY FAZZINO, *Plaintiffs*	§	
v.	§	**CIVIL NO. 6-18-CV-00114-ADA-JCM**
JAN A. ROE, BILLY L. HARRIS, BRYAN F. RUSSJR., JAYSON BARFKNECHT, MARK J. CARRABBA, GORDON PETER BRIEN, STEPHEN C. CAST, BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT, *Defendants*	§	

ORDER GRANTING DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION ON THE BASIS OF ELEVENTH AMENDMENT IMMUNITY AND RIPENESS

Came on for consideration this date the Motion of Defendants Brazos Valley Groundwater Conservation District (the "District") (including its Directors in their official capacities) and in their individual capacities Jan A. Roe, Billy L. Harris, Bryan F. Russ, Jr., Jayson Barfknecht, Mark J. Carrabba, and Stephen C. Cast (the "Directors," and together with the District the "Defendants"), move to dismiss Plaintiffs' § 1983 claims pursuant to Rule 12(b)(1). The District and Defendants Jan A. Roe, Billy L. Harris, Bryan F. Russ, Jr., Jayson Barfknecht, Mark J. Carrabba, and Stephen C. Cast (together the "Directors"), each of whom is a director of the District who is sued in his/her individual capacity, together move to dismiss Fazzino's takings claim because of ripeness. The Court notes that two members of the District's Board of Directors do not join in this Motion—David Stratta, who is a Plaintiff in this action, and Peter Brien, who in addition to being a fellow member of the District's Board of Directors is also Director Stratta's father-in-law.

LEGAL STANDARD

In considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir.1996). The issue is not whether the plaintiff will prevail but whether the plaintiff is entitled to pursue his complaint and offer evidence in support of his claims. *Doe v. Hillsboro Indep. Sch. Dist.,* 81 F.3d 1395, 1401 (5th Cir.1996). The Court may not look beyond the pleadings in ruling on the motion. *Baker,* 75 F.3d at 196. Motions to dismiss are disfavored and are rarely granted. *Beanal v. Freeport-McMoran, Inc.,* 197 F.3d 161, 164 (5th Cir.1999). Dismissal should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 164 (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). However, the Court does not accept conclusory allegations or unwarranted deductions of fact as true. *Tuchman v. DSC Commc'ns Corp.,* 14 F.3d 1061, 1067 (5th Cir.1994).

BACKGROUND

Chapter 36 of the Texas Water Code and Section 59, Article XVI of the Texas Constitution allow for the creation of Groundwater Conservation Districts ("GCDs") in Texas. TEX. WATER CODE § 36.0015, 36.011. A GCD is a political subdivision exercising state powers and it stands upon the same legal footing as a county. *South Plains Lames R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1,* 52 S.W.3d 770, 774 (Tex. App.—Amarillo 2001, no pet.). The Court notes that counties are not entitled to Eleventh Amendment Immunity and may be sued 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). Although the Texas Legislature has recognized that land owners have property rights in the groundwater located

beneath their land, the Legislature has stated that "those [property] rights may be limited or altered by rules promulgated by a [groundwater conservation] district." TEX. WATER CODE § 36.002; *see Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996) (describing the historical development of groundwater property rights in Texas).

A GCD may sue and be sued in Texas state courts. TEX. WATER CODE at § 36.066. It is part of a well thought out administrative scheme created by the Texas Legislature. It may also make and enforce district rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater. *Id.* at § 36.101. It may enforce the provisions of Chapter 36 or its own district rules by instituting a lawsuit to obtain injunctive relief and/or reasonable civil penalties for breach of any district rule, not to exceed $10,000 per day. *Id.* at § 36.102. Although a GCD may exercise the power of eminent domain to acquire by condemnation a fee simple or other interest in property, it may not exercise this power to acquire rights to groundwater, surface water, or water rights. *Id.* at § 36.105.

A GCD shall require a permit for the drilling, equipping, operating, or completing of wells, and it shall promulgate District Rules that shall determine each activity regulated by the district for which a permit or permit amendment is required. *Id.* at §§ 36.113(a), 36.114(a), 36.115. A GCD may exempt wells from the requirement of obtaining a drilling permit, an operating permit, or any other permit required by this chapter or the district's rules. *Id.* at § 36.117(a). A GCD may set fees for administrative acts of the district, such as filing applications for permits. *Id.* at § 36.205(a). Administrative fees may not unreasonably exceed the cost to the district of performing the administrative function for which the fee is charged. *Id.* A GCD may also assess

production fees based on the amount of water authorized by permit to be withdrawn from a well or the amount actually withdrawn. *Id.* at § 36.205(c).

The primary question before the Court is whether to find the District is an arm of the State of Texas, because, if it is, it would be immune from many of the Plaintiffs' claims under the Eleventh Amendment. *See* Tex. Spec. Dist. Local Laws Code Ch. 8835. Pursuant to authority granted it under Chapter 36, the District has promulgated rules to govern the production of groundwater from the Simsboro formation. (Doc. 1 at ¶16.) Stratta is a Director of the GCD. (Doc. 1 at ¶14).

Plaintiffs separately own parcels of land within the boundaries of the District. Plaintiff Fazzino applied for a permit to drill and operate a groundwater well on his property. The application expired without being granted as the result of Fazzino's failure to provide required information reflecting that he legally controlled water rights to support the permit. (Doc. 1 at ¶¶26-29). The expiration was without prejudice and Fazzino does not contend that he could not refile it. Plaintiff Stratta later attempted, as a director, to address the neighboring well being operated by the City of Bryan. As is addressed in the other motion to dismiss, when Stratta was not allowed to add it to the agenda, he attempted to present the issue as a member of the public under the public comment agenda item. The District's board invoked the restriction compelled by the Texas Open Meetings Act[1] (the "Act") to prevent him from doing so. The GCD observed that while Stratta could address his remarks under the agenda item for "Director Comments," the Texas Open Meetings Act barred his comments during the public-comment period. (Doc. 1 at ¶¶32-34.)

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1 Compliance with the Texas Open Meetings Act is a source of substantial litigation. So much so that the Texas Attorney General's Office puts out documents providing the public with guidance as to how to comply with the Act. *See https://d3n8a8pro7vhmx.cloudfront.net/clcca/pages/171/attachments/original/1441163504/TOMA_2010_Easy.pdf?1441163504.* The issue of postings related to public comments is directly addressed on page 5.

The Act, Chapter 551 of the Texas Government Code, requires governmental bodies to provide advance written notice to the public of all its meetings. The notice must include the date, hour, place and subjects scheduled to be considered in either open or closed session of each meeting. TEX. GOV'T CODE § 551.041; *Cox Enters., Inc. v Bd. Of Trs.*, 706 S.W.2d 956 (Tex. 1986); *Porth v. Morgan,* 622 S.W.2d 470 (Tex. App.—Tyler 1981, writ ref'd n.r.e.). The Act dictates the amount of time that the notice must be posted for (at least 72 hours).[2]

The purpose of the Act is to ensure the public's access to meetings of governmental bodies so that they have the opportunity to be informed concerning the transactions of public business. Generally, meeting notices should be specific enough to notify the public about the subjects that are scheduled to be considered at the meeting. Op. Tex. Att'y Gen. No. H-662 (1975). Notices should include more description of a particular subject if it is of special interest to the community. *River Rd. Neighborhood Ass'n v S. Tex. Sports.* 720 S.W.2d 551 (Tex. App—San Antonio 1986, writ dism'd). There is an "emergency" exception to the requirement of 72 hours that does not apply in this case. TEX. GOV'T CODE 551.045. EXCEPTION TO GENERAL RULE: NOTICE OF EMERGENCY MEETING OR EMERGENCY ADDITION TO AGENDA.

The Act does not provide a public forum for every citizen wishing to express an opinion on a matter. A governmental body is not required to let citizens speak at every meeting. However,

2 Sec. 551.043. TIME AND ACCESSIBILITY OF NOTICE; GENERAL RULE. (a) The notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting, except as provided by Sections 551.044-551.046.(b) If this chapter specifically requires or allows a governmental body to post notice of a meeting on the Internet: (1) the governmental body satisfies the requirement that the notice must be posted in a place readily accessible to the general public at all times by making a good-faith attempt to continuously post the notice on the Internet during the prescribed period; (2) the governmental body must still comply with any duty imposed by this chapter to physically post the notice at a particular location; and (3) if the governmental body makes a good-faith attempt to continuously post the notice on the Internet during the prescribed period, the notice physically posted at the location prescribed by this chapter must be readily accessible to the general public during normal business hours. Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by: Acts 2005, 79th Leg., Ch. 624 (H.B. 2381), Sec. 1, eff. September 1, 2005.

if the governmental body decides to allow citizens to speak up, it must not unfairly discriminate, but may establish reasonable restraints on the number, length, and frequency of presentations. Members of the governmental body such as the GCD may not deliberate or make any decision about an unposted issue at a meeting of the governmental body. If, at a meeting, someone inquires about a subject not on the agenda, any deliberation or decision about the subject must be limited to: (1) a proposal to place the subject on a future agenda; (2) a statement of factual information; or (3) a recitation of existing policy.

Plaintiffs filed suit under Section 1983 alleging a deprivation of civil rights under color of state law. Specifically, Stratta asserts that the District deprived him of his First Amendment right to free speech, and Fazzino alleges that the District deprived him of his Fourteenth Amendment right to equal protection and has taken his property without just compensation. (Doc. 1 at ¶¶35-56.) If the Defendant District qualifies as sufficiently in the same shoes as the State of Texas, then it is immune from a suit brought under Section 1983 by operation of the Eleventh Amendment. In addition, Plaintiffs' claims against the Directors in their official capacities would be immune from suit as well.

I. Arms of the State?

i. The District is an "arm of the State" and there is immune under the Eleventh Amendment.

There is little dispute that Texas would be immune from suit. Texas "is a sovereign entity in our federal system." *See Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). As a result, Texas is "not to be amenable to the suit of an individual without its consent." *See Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting *The Federalist* No. 81, at 487 (Alexander Hamilton)). The doctrine of state sovereign immunity is enshrined in the Eleventh Amendment. U.S. CONST. amend.XI. The Eleventh Amendment bars federal suits against a State unless the State has specifically waived its

immunity or unless Congress has exercised its power under the Fourteenth Amendment to override that immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (citing *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 472–73 (1987) (plurality opinion)). Specifically, regarding Section 1983 suits, the Court in *Will* explained that Congress "had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal–state balance," nor did Congress "intend to override well-established immunities or defenses under the common law." *Will,* 491 U.S. at 66-67 (discussing *Quern v. Jordan*, 440 U.S. 332 (1979)). If Congress intends to so alter this balance, "it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 65. In enacting Section 1983, Congress opted not to do so. *Id.* at 66.

The more important question the Court must determine is whether the GCD is to be treated as "an arm of the State partaking of the State's Eleventh Amendment immunity." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The answer to this inquiry depends "upon the nature of the entity created by state law." *Id.*

The Fifth Circuit has set out six factors to be considered in determining whether an entity shares the state's Eleventh Amendment immunity: 1) whether the state statutes and case law view the agency as an arm of the state; 2) the source of the entity's funding; 3) the degree of local autonomy; 4) whether the entity is concerned primarily with local, as opposed to statewide problems; 5) whether the entity has the authority to sue and be sued in its own name; and 6) whether the entity has the right to hold and use property. *Clark v. Tarrant Cty.*, 798 F.2d 736, 744 (5th Cir. 1986).

Applying the *Clark* factors to different entities responsible for water and organized under Article XVI, Section 59 of the Texas Constitution, courts in the Fifth Circuit have consistently

held such entities to be arms of the State of Texas. *See Celanese Corp. v. Coastal Water Auth.*, 475 F. Supp. 2d 623, 632–33 (S.D. Tex. 2007); *accord Pillsbury Co., Inc. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995); *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir.1983).

As was the case with the Coastal Water Authority, the District is established under Article XVI, Section 59 of the Texas Constitution, which states that "the conservation and development of [the State's] . . . water . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties." TEX. CONST. art XVI, § 59(a); TEX. SPEC. DIST. LOCAL LAWS CODE § 8835.002. To carry out these public duties, the Texas Constitution authorizes the creation of "conservation and reclamation districts . . . which districts shall be governmental agencies and bodies politic and corporate with such powers of government . . . as may be conferred by law." TEX. CONST. art XVI, § 59(b).

Defendants cite to a decision in which a Texas state court has concluded that an underground water conservation district organized under Article XVI, Section 59 of the Texas Constitution is "an arm of the state created to administer the enumerated governmental powers delegated to it." *Lewis Cox & Son, Inc. v. High Plains Underground Water Conserv. Dist. No. 1*, 538 S.W.2d 659, 662 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.); *disapproved of on other grounds by Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 940–41 (Tex. 1993). While this case, by itself, is not dispositive, it certainly mitigates in favor of this Court making such a finding as well. The case is certainly consistent with logic, meaning that the District 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.

The Court agrees with the Defendants' assertion that while no single factor is dispositive, the "second *Clark* factor—the source of the entity's funding—is the weightiest factor." *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004). The District's funding is derived from fees. TEX. SPEC. DIST. LOCAL LAWS CODE § 8835.151; TEXAS WATER CODE § 36.0171. But unlike the Coastal Water Authority, Texas law authorizes the District to receive grant funding and loans directly from the State. *Compare* TEX. WATER CODE §§ 36.158-161 (authorizing state grants to groundwater conservation districts) *and* TEX. WATER CODE §§ 36.3705-374 (establishing a loan assistance fund for groundwater conservation districts) *with Celanese Corp.*, 475 F. Supp. 2d at 633. The State's funds therefore are implicated in an action against a groundwater conservation district. Accordingly, this factor weighs more strongly in favor of Eleventh Amendment immunity than did the funding of the Coastal Water Authority.

More interesting is the question of local autonomy. The District is governed by the Board of Directors, the members of which are appointed by the local governmental entities within the District. TEX. SPEC. DIST. LOCAL LAWS CODE § 8835.052. The question is whether the lack of power on the part of the state to appoint board members divests the District of its argument that it is entitled to state immunity. According to the Defendants, the Texas Water Development Board and Texas Commission on Environmental Quality provide technical assistance in the formulation of the District's groundwater management plan and the Water Development Board must approve this plan before it can be enacted or modified. *See* TEX. WATER CODE §§ 36.1072(a). This requires the Water Development Board to ensure that the District's management plan contains detailed information, including estimates of modeled available groundwater and annual recharge and an assessment of the amount of groundwater used annually. TEX. WATER CODE §§ 36.1071(e), 36.1072(b). The Court finds that this is a substantial amount of State supervision.

In addition, Chapter 36 of the Water Code authorizes the Texas state auditor and the Legislature to audit the District's operations with the technical assistance of the Texas Water Development Board, Texas Parks and Wildlife Department and Texas Commission on Environment Quality. TEX. WATER CODE §§ 36.061, 36.302. Demonstrating that the District does not act independently, if the state auditor determines that the District is not appropriately managing groundwater within its boundaries, it can deem the District "non-operational" and the Texas Commission on Environmental Quality must then assert jurisdiction and undertake one or more measures it deems necessary to ensure the accomplishment of comprehensive management in the District. TEX. WATER CODE §§ 36.302(f), 36.303; *cf. Guitar Holding Co., L.P. v. Hudspeth Cty. Underground Water Conserv. Dist. No. 1*, 263 S.W.3d 910, 913 (Tex. 2008) (recounting case in which the state auditor deemed a district to be non-operational under Chapter 36). The Court finds that the State of Texas retains a direct hand in the management and oversight of the District with respect to both fiscal and operational matters.

The next issue is whether the District is concerned primarily with local or statewide problems. Water conservation and supply appears to the Court to necessarily be one of both statewide and local concern. The State has elected to create a statutory scheme that best allows this administration to take place in a manner that can take into consideration local concerns; therefore, it follows that a District may be "primarily concerned with protecting the water supply within its district, this is part of a larger statewide concern." *Celanese Corp.*, 475 F. Supp. 2d at 634; *accord* TEX. CONST. art. XVI, § 59(b) (authorizing the Legislature to divide the state into "such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment."). There is no evidence that the State has abdicated its responsibility for statewide management of coastal water applicable to the Coastal

Water Authority, and the District is part of the State's comprehensive statewide management of groundwater that has developed over the past century.

As part of that management, groundwater conservation districts are required to work together in close coordination with and relying upon the technical assistance of the Texas Water Development Board. *See* TEX. WATER CODE § 36.108; *accord Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 834–35 (Tex. 2012) (describing the State's management of groundwater resources through groundwater management areas and groundwater conservation districts). The District's management plans must be approved by the Texas Water Development Board and those plans may be reviewed by the state auditor. *See* TEX. WATER CODE §§ 36.1072(a), 36.302(c). In sum, there can be little room for argument that the Districts each act to implement a statewide regulatory scheme in a manner that is most effective on a local level.

Defendants concede that, as in *Celanese*, the District has authority to sue and be sued in its own name. TEX. WATER CODE § 36.066(a). Furthermore, as in *Celanese*, the District has the right to hold and use property. *Id.* at §§ 36.103-36.105. The *Celanese* Court found these factors to be less significant than the others. This Court concurs.

As set forth in the Texas Constitution, the Legislature is authorized to create groundwater conservation districts, which "shall be governmental agencies and bodies politic and corporate with such powers and government . . . as may be conferred by law." TEX. CONST. art. XVI, § 59(b). Every court to have considered the role of similar districts under the Texas Constitution has found the district/authority at issue to be an "arm of the state" of Texas for purposes of Eleventh Amendment immunity. Consistent with those cases, "the overwhelming impression" is that the District is immune from suit under the Eleventh Amendment. *Cf. Celanese Corp.*, 475 F. Supp. 2d at 634.

This Court has carefully applied the *Clark* factors, and determines that the District is an arm of the State of Texas; therefore, the District is immune from suit under the Eleventh Amendment. The Court **GRANTS** the Motion to Dismiss of the District on the basis that it is immune from suit under the Eleventh Amendment.

Therefore, it is immune from suit under the Eleventh Amendment and the Court **GRANTS** the Defendants' Rule 12(b)(1) Motion to Dismiss for Lack of Subject-Matter Jurisdiction on the Basis of Eleventh Amendment Immunity and Ripeness as to the District.

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

Eleventh Amendment immunity extends to state officials acting in their official capacities "when the state is the real, substantial party in interest." *Hughes v. Savell*, 902 F.2d 376, 377 (5th Cir. 1990); (quoting *Ford Motor Co., v. Department of Transp.*,323 U.S. 459, 464 (1945)); *accord Anderton v. Texas Parks & Wildlife Dep't*, 605 F. App'x. 339, 349 (5th Cir. 2015). The state is the "real party in interest" if the decision rendered in this case would "operate against the sovereign, expending itself on the public treasury, interfering with public administration, or compelling the state to act or to refrain from acting." *Anderton*, 605 F. App'x. at 349 (quoting *Hughes*, 902 F.2d at 378). The Court in *Hughes* summarized this reasoning by holding "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State." *Hughes*, 902 F.2d at 378 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984)).

The fundamental question posed by Plaintiffs' suit—i.e., whether the principles of Texas oil and gas law apply in their entirety to groundwater rights (Pls.' Orig. Compl. at ¶46)—is an issue solely of state law. *See, e.g., Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 829 n.70, 83–32 (Tex. 2012) (adopting one aspect of Texas oil and gas common law (i.e., ownership in place) to groundwater, but noting that other aspects (e.g., correlative rights) have not been adopted);

Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53, 63 (Tex. 2016) (adopting the accommodation doctrine from oil and gas law in the groundwater context).

Plaintiffs seek "compensatory" and "punitive damages" to be paid by the Directors in their official capacity, which is to say from the District's public funds. Pls.' Orig. Compl. at Prayer; *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000). This Court has determined the District, as an arm of the State of Texas, is immune to suit under the Eleventh Amendment; therefore, so are its Directors sued in their official capacity. The Court **GRANTS** the Motion to Dismiss of the Directors in their official capacities, as officials of the State of Texas, on the basis that they are also immune from suit under the Eleventh Amendment.

II. The Plaintiffs' Motion to Dismiss Plaintiffs' Takings Claim on the Basis of Ripeness

Having determined that the movants are entitled to immunity under the Eleventh Amendment, the Court addresses the issue of whether Fazzino's takings claim is ripe for adjudication in this Court before the State has taken any property without just compensation under the Texas Constitution. Fazzino alleges that "[t]he District's conduct in permitting the City of Bryan to produce disproportionate amounts of groundwater from its small tract of land results in depriving [him] of his fair chance to produce a fair share of the groundwater." (Doc. 1 at ¶52.) In support of this proposition, Fazzino cites an oil and gas case—*Halbouty v. Railroad Commission.* (Doc. 1 at ¶52.) Defendants cite a host of cases, including a Texas Supreme Court case, to argue that this rule of Texas oil and gas law does not apply to groundwater. It is hard to imagine an issue that more clearly should be resolved by a state court. The proper vehicle for resolving this is a suit in state court seeking just compensation under Article I, Section 17 of the Texas Constitution.

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, directs that "private property" shall not "be taken for public use, without

just compensation." *Chicago, B. Sc. Q.R. Co. v. Chicago,* 166 U.S. 226, 234, 17 S. Ct. 581, 41 L. Ed. 979 (1897). Before addressing the merits of a takings claim, this Court must be convinced that the claim in question is ripe, even if neither party has raised the issue. *Urban Developers, L.L.C. v. City of Jackson, Miss.,* 468 F.3d 281, 292 (5th Cir.2006); *Samaad v. City of Dallas,* 940 F.2d 925, 933 (5th Cir.1991). In this case, Defendants have raised the ripeness issue. Ripeness is a question of law that implicates this court's subject matter jurisdiction. *Urban Developers,* 468 F.3d at 292; *Sandy Creek Investors, Ltd. v. City of Jonestown, Tex.,* 325 F.3d 623, 626 (5th Cir.2003); *Groome Res. Ltd., L.L.C. v. Parish of Jefferson,* 24 F.3d 192, 198-99 (5th Cir.2000).

There are two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court. *Suitum, v. Tahoe Regional Planning Agency,* 520 U.S. 725, 733, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997). *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* explained that a plaintiff must demonstrate that she has both received a "final decision regarding the application of the [challenged] regulations to the property at issue" from "the government entity charged with implementing the regulations" and sought "compensation through the procedures the State has provided for doing so." *Suitum,* 520 U.S. at 734, 117 S. Ct. 1659 (citing *Williamson County,* 473 U.S. 172, 186 & 194, 105 S. Ct. 3108 (1985)).

In adopting the first prong, the Fifth Circuit explained its reluctance to hear premature takings claims as follows:

> This Court consistently has indicated that among the factors of particular significance in the [*Penn Central*] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. *Urban Developers,* 468 F.3d at 293 (citing *Williamson County,* 473 U.S. at 189-90, 105 S. Ct. 3108).

The Fifth Circuit has strictly construed the finality prong. For example, a property owner alleging a takings claim must seek "variances or waivers, when potentially available, before a court will hear their takings claims." *Urban Developers,* 468 F.3d at 293. The Fifth Circuit has held that "whenever the property owner has ignored or abandoned some relevant form of review or relief, such that the takings decision cannot be said to be final, the takings claim should be dismissed as unripe." *Id.* (citing *Hidden Oaks Ltd. v. City of Austin,* 138 F.3d 1036, 1041 (5th Cir.1998)).

Fazzino acknowledges, however, that there is a mechanism for him to obtain just compensation from the State—Article I, Section 17 of the Texas Constitution—and even cites that provision as a basis for recovery in this case before the federal Court. (Doc. 1 at ¶51.) Plaintiff Fazzino does not dispute that he has yet to seek compensation in state court for his alleged harm. (Doc. 1 at ¶ 54.) It is highly relevant that he could have—but chose not to—seek relief under Article I, Section 17 if he believes that he is the victim of a wrongful regulatory taking by actors of the State. *Coates v. Hall*, 512 F. Supp. 2d 770 (W.D. Tex. 2007) (dismissing the suit without prejudice as unripe because the plaintiffs "have not asserted their takings claim in state court under article I, section 17 of the Texas Constitution.") *Id.* at 785–86.

It cannot be disputed that the state law issue the Plaintiff invites the Court to decide is one that state courts, including the Texas Supreme Court, have been wrestling with for years. Texas statutory law "requires groundwater districts to consider several factors in permitting groundwater production, among them the proposed use of water, the effect on the supply and other permittees, [and] a district's approved management plan." *Id.* at 841 (citing TEX. WATER CODE § 36.113(d)(2)-(4)); *see also* TEX. WATER CODE § 36.116(a)-(e) (citing several additional factors, including "acreage or tract size" and "historic or existing use").

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them'" by Congress. *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800, 821, 96 S. Ct. 1236, 1248, 47 L. Ed. 2d 483 (1976) (internal citation omitted). *See also England v. Louisiana Bd. of Med. Examiners,* 375 U.S. 411, 415, 84 S. Ct. 461, 464-65, 11 L. Ed. 2d 440 (1964) ("When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction'") (internal citation omitted). Abstention, that is, declining to resolve a dispute over which a federal court has subject matter jurisdiction "is the exception, not the rule." *Colorado River Water Cons. Dist.,* 424 U.S. at 813, 96 S. Ct. at 1244; *Wilson v. Valley Electric Membership Corp.,* 8 F.3d 311 (5th Cir.1993). The *Burford* abstention doctrine is an "extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 728, 116 S. Ct. 1712, 1727, 135 L. Ed. 2d 1 (1996) (quoting *Colorado River Water Cons. Dist.,* 424 U.S. at 813, 96 S.Ct. at 1244) (internal quotation omitted). The *Burford* abstention doctrine allows a federal court to dismiss a case if it presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar', or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial policy concern.'" *Id.* at 726–27, 116 S. Ct. at 1726 (quoting *NOPSI v. Council of City of New Orleans,* 491 U.S. 350, 361, 109 S. Ct. at 2514, 105 L. Ed. 2d 298 (1989) (internal quotation omitted)).

In *Burford,* Sun Oil brought suit against Burford and others to enjoin the enforcement of an order of the Texas Railroad Commission granting Burford a permit to drill four wells on a plot of land in the East Texas oil field. 319 U.S. at 316–17, 63 S. Ct. at 1098-99. The Supreme Court held that the federal district court should have dismissed the case because Texas had established a

state regulatory system to deal with complicated issues involved in local oil drilling regulation. The Court further noted that Texas law provided for "a system of thorough judicial review by its own State courts" which concentrated "all direct review of the Commission's orders in the State district courts of Travis county," with further review by a branch of the Court of Civil Appeals and by the State Supreme Court "[t]o prevent the confusion of multiple review of the same general issues." *Id.* at 325–26, 63 S. Ct. at 1103. Under such circumstances, federal courts should be reluctant to become involved in inherently local matters involving the management of oil and gas fields, covered by a complex state regulatory scheme, with the inevitable product being "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy." *Id.* at 327, 63 S. Ct. at 1104. The Court held that federal courts should abstain from exercising federal question jurisdiction to adjudicate "colorable constitutional claims," and defer to a state's resolution of "difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case then at bar." *Colorado River Water Cons. Dist.*, 424 U.S. at 814–15 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315).

A decision to avoid deciding a case involving disputed Texas State law in this posture is well supported by other cases, including the *Coates* decision and others from this district. The Court came to a similar decision in *Williamson v. Guadalupe County Groundwater Conservation Dist.*, 343 F. Supp. 2d 580 (W.D. Tex. 2004). In that case, Plaintiffs sought review of the Guadalupe County Groundwater Conservation District's ("GCGCD") denial of their permit applications for groundwater withdrawal. The Court reviewed the Supreme Court and Fifth Circuit cases and determined that *Burford* abstention was applicable even though GCGCD did not exercise the same sort of regulatory control over the waters at issue as the Edwards Aquifer Authority holds over the Edwards Aquifer. The level of unified management and decision-making authority of the

defendant was not determinative. The Court explained that *Burford* abstention serves to avoid cases that could be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Id.* at 596; *see also, Day v. Edwards Aquifer Auth.*, 2004 WL 1118721 (W.D. Tex. Mar. 26, 2004).

A decision to abstain under *Burford,* must be "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute" and ultimately represents a determination "that the State's interest are paramount and that [the] dispute would best be adjudicated in a state forum." 319 U.S. at 327, 63 S. Ct. at 1104. Although there is no "formulaic test" for deciding whether the case at bar comes within the narrow exception of *Burford,* the Fifth Circuit has extracted five factors that should be considered: (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." *Wilson v. Valley Elec. Membership Corp.,* 8 F.3d 311, 314 (5th Cir.1993). The Court finds that all these factors mitigate in favor of abstention in this case.

With respect to the first two factors, the Court has addressed these above and they are clearly answered in the affirmative. With respect to the third and fourth factors, certainly groundwater regulation is a matter in which the State has a significant interest in maintaining a "coherent policy." Nonetheless, the mere existence of an administrative infrastructure, however, does not bring the case within *Burford.* "While *Burford* is concerned with protecting complex state administrative processes from undue federal influence, it does not require abstention whenever there exists such a process, or even in all cases where there is a `potential for conflict' with state regulatory law or policy." *NOPSI v. Council of City of New Orleans,* 491 U.S. 350, 362, 109 S.

Ct. 2506, 2515, 105 L. Ed. 2d 298 (1989) (quoting *Colorado River Water Cons. District,* 424 U.S. at 815-16, 96 S.Ct. at 1245).

Plaintiffs' claims in this case, at bottom, are claims that "a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors." *Id.* at 362, 109 S. Ct. at 2515 (citation omitted). The State has a significant interest in ensuring that state law is correctly and uniformly applied. *See Stewart-Sterling One, LLC v. Tricon Global Restaurants, Inc.,* No. Civ. A. 00-477, 2002 WL 1837844 at *4 (E.D. La., Aug. 9, 2002) (quoting *Quackenbush,* 517 U.S. at 727, 116 S.Ct. at 1726). The Texas Legislature, by providing for groundwater conservation districts, has set the stage for a court case to decide the permissibility of pumping limits.

With respect to the fifth factor, the applicable provisions of the Texas Water Code address judicial review "in a court of competent jurisdiction in any county in which the district or any part of the district is located." Unlike the situation addressed in *Burford*, which deferred to the consolidated judicial review of decisions of the Texas Railroad Commission in Travis County, any State court of competent jurisdiction in the county in which the groundwater conservation district is located is proper court for suit. As noted above, Plaintiff for his own reasons has elected not to avail himself of the state court. The Court notes that the Texas Legislature chose to allow county-based conservation districts to make the decisions on permits, subject to review by a local State court of competent jurisdiction, a regional civil Court of Appeals, and the Texas Supreme Court, would appear to underline the strong State preference for local decision-making.

Consequently, the Court finds that Plaintiffs' takings claim must be **DISMISSED WITHOUT PREJUDICE** because it is not ripe for adjudication.

CONCLUSION

The Court finds that Plaintiffs' claims against Defendant District are barred by the Eleventh Amendment. Accordingly, the Court lacks jurisdiction over both Plaintiffs' Section 1983 claims against the District and its Directors in their official capacities. These claims are **DISMISSED WITHOUT PREJUDICE** because of lack of subject-matter jurisdiction. With respect to the Plaintiff Fazzino's takings claim, it is **DISMISSED WITHOUT PREJUDICE** because it is not ripe for adjudication.

SIGNED this 9th day of November 2018.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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

DAVID STRATTA, ANTHONY FAZZINO
Plaintiffs

v.

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

§

CIVIL NO. 6-18-CV-00114-ADA-JCM

ORDER GRANTING DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED ON THE BASIS OF QUALIFIED IMMUNITY

Before the Court is Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted on the Basis of Qualified Immunity (Docket No. 13), Plaintiff's Response (Docket No. 17), and Defendants' Reply (Docket No. 19). The Court recently issued an Order dismissing (1) Plaintiffs' claims as to the District and its Directors in their official capacities on the basis of Eleventh Amendment immunity; and (2) Fazzino's takings claim as to all Defendants on the basis of ripeness (Docket No. 30). Considering this, the Court will only address Plaintiff's First Amendment and Equal Protection claims against the Directors in their individual capacities.

I. Background

Plaintiffs David Stratta and Anthony Fazzino are landowners within the jurisdictional boundaries of the Brazos Valley Groundwater Conservation District (the "District"). Pl.'s Compl. at 5. The individual defendants are all members of the Board of Directors of the District.

Id. at 2–3. On December 2, 2004, the District promulgated new rules (the "Rules") governing the production of groundwater from the Simsboro formation within the District's boundaries. *Id.* at 5. The Rules make distinctions between Existing Wells, New Wells, and wells with Historic Use. *Id.*

The District imposes two specific regulations on all wells in its jurisdiction: spacing requirements and production limits. *Id.* The spacing requirements are only applicable to New Wells. *Id.* Production limits vary depending on what type of Well is being regulated. *Id.* The District's Rules require 649 contiguous acres surrounding a New Well producing 3,000 gallons per minute ("GPM"). *Id.* at 6. Existing Wells are not subject to spacing or acreage requirements. *Id.* at 6.

The City of Bryan completed drilling a well, Well No. 18, on October 28, 2005. *Id.* The City of Bryan owned or controlled 2.7 surrounding acres; therefore, if the well was a New Well, it could only produce 192 GPM per the District's production limits. *Id.* However, if the well was an Existing Well, then the well would not be subject to the spacing requirements or production limits. *Id.* at 7. The well did not qualify as a Historic Use Well. *Id.* at 6.

On February 20, 2007, the District "conditionally" granted a permit authorizing the City of Bryan to produce 4,838 acre-feet per year of groundwater at a rate of 3,000 GPM. *Id.* at 7. On April 17, 2013, the District granted another "conditional permit" to the City of Bryan to operate the well at a rate of 3,000 GPM. *Id.* At this time, the City of Bryan still only owned 2.7 acres. *Id.*

On January 30, 2017, Fazzino filed a complaint with the District asserting that Well No. 18 was not properly permitted because it was not a Historic Well and should be subject to the same production limits imposed on all New Wells. *Id.* After a finding that Fazzino was not authorized to assert such a complaint, Fazzino filed an application for a permit that would allow

him to produce 3,000 GPM despite owning or controlling only 26 acres of groundwater rights. *Id.* 7–8. His application lapsed because he failed to provide the District documentation showing he owned or controlled sufficient property (i.e., at least 649 acres) to produce 3,000 GPM. *Id.* at 8.

Stratta, concerned with what he believed to be unequal application of the District's Rules, requested that the agenda for the March 8th, 2018 meeting include an item to discuss whether Well No. 18 was a New Well or an Existing Well (Stratta was a member of the District's Board of Directors). *Id.* at 9–10. The President of the Board informed Stratta that a discussion regarding Well No. 18 could not be had because it might affect pending litigation. *Id.* at 10. Stratta then called Director Russ who also told Stratta he should not discuss Well No. 18. *Id.* Nevertheless, Stratta attempted to express his views during the "Public Comment" item on the agenda. *Id.* He was prohibited from doing so because "directors" could not discuss things that are not on the agenda. *Id.* Stratta was prohibited from speaking even though "Public Comment" was listed as an agenda item and "Non-agenda items" as a specific type of public comment. *Id.*

II. Applicable Law

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996). The issue is not whether the plaintiff will prevail but whether the plaintiff is entitled to pursue his complaint and offer evidence in support of his claims. *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401 (5th Cir.1996). The Court may not look beyond the pleadings in ruling on the motion. *Baker*, 75 F.3d at 196. Dismissal should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 164

(quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). However, the Court does not accept conclusory allegations or unwarranted deductions of fact as true. *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir.1994).

The plaintiff has the burden of demonstrating that the defendant official is not entitled to qualified immunity. *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013). Qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This demands a two-step analysis: whether a constitutional right was violated and whether the allegedly violated right was "clearly established." *McClendon v. City of Columbia*, 305 F.3d 314, 322–23 (5th Cir. 2002) (en banc) (per curiam). A court has discretion to perform either prong first. *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015).

To defeat qualified immunity, the plaintiff must show that the official's conduct was objectively unreasonable in light of a clearly established rule of law. *McClendon*, 305 F.3d at 323. This is a demanding standard because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). A court does not deny its protection unless existing precedent places the statutory or constitutional question "beyond debate." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)). The Court must "ask whether the law so clearly and unambiguously prohibited [the official's] conduct that *every* reasonable official would understand that what he is doing violates [the law]." *Id.*

Although a case *directly* on point is not necessary, there must be adequate authority at a sufficiently high level of specificity to put a reasonable official on notice that his or her conduct

is definitively unlawful. *Id.* at 372. Abstract or general statements of legal principle untethered to analogous or near-analogous facts are not sufficient to establish a right "clearly" in a given context; rather, the inquiry must focus on whether a right is clearly established as to the specific facts of the case. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Therefore, the Court must decide whether the Directors (1) application of the District's Rules; and (2) their decision to prohibit Stratta from speaking during the March 8th, 2018 meeting were objectively unreasonable in light of clearly established law.

III. Equal Protection Claim

Plaintiffs allege the Directors have "engaged in a pattern of conduct designed to prevent production of groundwater by some owners while allowing such production from others such as the City of Bryan." Pl.'s Compl. at 13. Specifically, Plaintiffs claim the Rules have been applied in an unequal and inconsistent manner in an effort to protect Well No. 18 from being subjected to the production limitations applied to other New Wells. *Id.* According to Plaintiffs, allowing the City of Bryan to produce large amounts of groundwater while refusing Fazzino a similar opportunity to produce his fair share deprives Fazzino of his right to Equal Protection under the Fourteenth Amendment to the U.S. Constitution. *Id.* at 15.

i. Applicable Law

A longstanding practice of federal courts is that of judicial restraint, which "requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Camreta v. Greene*, 563 U.S. 692, 705 (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988)). Considering this practice, the Court will first address whether the allegedly violated right was "clearly established" before reaching the merits. *See id.* (stating that "courts should think hard, and then think hard again, before turning small cases into larger

ones" by addressing the merits first). The Court will conduct the same analysis when analyzing Stratta's First Amendment claim below.

Landowners own the groundwater beneath their land. TEX. WATER CODE ANN. § 36.002(a) (West 2017); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012). Although landowners have property rights in the groundwater located beneath their land, the Texas Legislature has stated these rights are subject to regulation by Groundwater Conservation Districts ("GCD"). TEX. CONST. art. XVI, § 59; TEX. WATER CODE ANN. §§ 36.0015, 36.011 (West 2017). GCDs are tasked with conserving, preserving, protecting, recharging, and preventing the waste of groundwater, and of groundwater reservoirs or their subdivisions. TEX. WATER CODE ANN. § 36.0015(b).

GCDs have broad discretion to create and enforce rules to further their purpose. *See, e.g.*, TEX. WATER CODE ANN. §§ 36.101(a), 36.113(d)(2)–(4), and 36.116. When creating these rules, GCDs must consider (1) all ground water uses and needs; (2) whether the rules are fair and impartial; (3) groundwater ownership rights; (4) the purpose of GCDs outlined in Texas Water Code § 36.0015(b); and (5) the district's management plan's goals. TEX. WATER CODE ANN. § 36.101(a) (1)–(5). GCDs are required to consider additional factors when granting permits for wells such as whether "the proposed use of water is consistent with the district's approved management plan." TEX. WATER CODE ANN. § 36.1113(d)(1)–(7). In short, the Texas Legislature gives GCDs broad discretion to manage and regulate Texas' groundwater usage.

One purpose of regulating groundwater is ensuring that owners in a common, subsurface reservoir receive their fair share. *Edwards Aquifer Auth.*, 369 S.W.3d at 840. Determining an owner's fair share of groundwater is different from determining an owner's fair share of oil and gas. When distributing oil and gas, the primary concern is land surface area. *Id.* However,

groundwater must be distributed differently because groundwater can be replenished while oil and gas cannot. *See id.* at 840–41 ("Reasonable regulation [of oil and gas] aims at allowing an owner to withdraw the volume beneath his property and sell it. Groundwater is different."). Because of this difference, groundwater regulation must consider factors other than surface area. *Id.* at 841. This idea is codified in the Texas Water Code (the "Code") as discussed above. *See, e.g.*, TEX. WATER CODE ANN. § 36.116.

ii. Application

Plaintiffs claim that: (1) the District intentionally treats them differently from similarly situated landowners; and (2) there is no rational basis for the District's unequal application of the Rules. Pls.' Resp. at 5. As mentioned before, the City of Bryan is allowed to produce groundwater at a rate of 3,000 GPM despite owning or controlling only 2.7 surrounding acres—the Rules require a landowner to own or control at least 649 contiguous acres. Plaintiffs contend they also should be allowed to produce groundwater at a rate of 3,000 GPM despite owning less than 649 contiguous acres because the District allows the City of Bryan to do so. In short, they claim that owners of groundwater rights in the same aquifer must be treated equally under Texas law.

As discussed above, GCDs have broad discretion when adopting and enforcing rules—the Code does not create a precise formula for doing so. The Code does require GCDs to take into consideration certain factors; however, the Code does not specify how much weight should be given to each factor. *See, e.g.,* TEX. WATER CODE ANN. § 36.101 (a)(1)–(6). By not addressing this issue, the Code appears to confer to GCDs discretion in how much weight should be given to each factor when adopting a district's rules. Additionally, GCDs are not even required to adopt the same set of rules for all areas of a single district. TEX. WATER CODE ANN. § 36.116(d) ("For

better management of the groundwater resources located in a district . . . the district may adopt different rules for: (1) each aquifer . . . or geologic strata located in whole or in part within the boundaries of the district; or (2) each geographic area overlying an aquifer or subdivision of an aquifer located in whole or in part within the boundaries of the district."); *Edwards Aquifer Auth.*, 369 S.W.3d at 836.

The broad discretion GCDs have in adopting and enforcing rules is expounded on in the seminal case of *Edwards Aquifer Authority v. Day*. In *Day*, the Texas Supreme Court explains the importance of permitting GCDs to consider factors other than land surface area when regulating groundwater. 369 S.W.3d at 841 ("[R]egulation that affords an owner a fair share of subsurface water must take into account factors other than surface area."). For example, groundwater, unlike oil and gas, generally can be replenished and has many beneficial uses that do not involve the sale of water. *Id.* The *Day* court also notes that groundwater regulation must consider "future needs, including the relative importance of various uses, as well as concerns unrelated to use, such as environmental impacts and subsidence." *Id.* at 831.

Although GCDs are given broad discretion in adopting and enforcing rules, this rulemaking power is subject to a landowner's ownership of their groundwater. TEX. WATER CODE ANN. § 36.002(a)–(b). However, this acknowledgement does not create absolute protection for groundwater ownership rights. *See* TEX. WATER CODE ANN. § 36.101(a)(1)–(6) (stating that groundwater ownership and rights is just one of six considerations that a GCD must consider when adopting rules); TEX. WATER CODE ANN. § 36.002(b)–(b-1), (d) (stating that a landowner's ownership of groundwater is subject to certain limitations and has no impact on certain rulemaking powers). For example, the Code explicitly states that groundwater ownership has no affect on "the ability of a district to regulate groundwater production as authorized under Section

36.112, 36.116, or 36.122 or otherwise under this chapter . . ." TEX. WATER CODE ANN. § 36.002(d)(2). The Code also states that GCDs are not required to adopt rules allocating to "each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner" *Id.* at § 36.002(d)(3). In short, although the Texas Legislature acknowledges the importance of ownership rights in groundwater, this right is subject to regulation.

Plaintiffs cite one case supporting the claim that owners of groundwater rights in the same aquifer must be treated equally under Texas law. Pls.' Compl. at 15. However, this is an oil and gas case and to what extent it should be applicable to groundwater issues is unclear.[1] Although the Texas Supreme Court has used oil and gas law to resolve groundwater issues in the past—for example *Edwards Aquifer Authority v. Day* and *Coyote Lake Ranch v. City of Lubbock*—no case clearly establishes that the entirety of oil and gas law should be used to resolve groundwater issues. In short, the mere fact that the Texas Supreme Court has used oil and gas law to resolve *some* groundwater disputes does not necessarily mean that it intended oil and gas law to resolve *all* such disputes.

Axiomatically the Fourteenth Amendment guarantees Plaintiffs equal protection under the law—similarly situated persons should be *treated* equally. However, it is an entirely different question whether Texas groundwater law requires GCDs to apply their respective rules in a way that produces identical *outcomes*. The Texas Legislature has chosen to grant GCDs broad discretion when adopting or enforcing rules regulating groundwater. Moreover, Texas courts have not clarified to what extent oil and gas law applies to groundwater disputes. Because of this,

[1] The Court has already analyzed this issue in great depth in its Order Granting Defendants' Rule 12(b)(1) Motion to Dismiss for Lack of Subject-Matter Jurisdiction on the Basis of Eleventh Amendment Immunity and Ripeness. As stated in that Order, the Court abstained from Plaintiff Fazzino's takings claim because of the uncertainty surrounding this question. As a result, the Court will not delve into much detail as to why it is unclear to what extent oil and gas law is applicable to groundwater law.

a reasonable director might reasonably believe it is lawful for him or her to apply groundwater rules in a way that produces unequal outcomes so long as the rules' applications are justified by lawful considerations. *See, e.g.*, TEX. WATER CODE ANN. § 36.101(a) (listing some permissible purposes for which a district may adopt and enforce rules regulating groundwater production). In short, the Court fails to see how the law "so clearly and unambiguously prohibited [the Directors'] conduct that *every* reasonable official would understand" that what they are doing violates the law. *Morgan*, 659 F.3d at 371.

In sum, Plaintiffs' have failed to show that the Directors' conduct was objectively unreasonable in light of a clearly established rule of law because of: (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 all groundwater disputes. As a result, the Directors in their individual capacities are entitled to qualified immunity as to Plaintiffs' Equal Protection Claim.

IV. First Amendment Claim

Plaintiff Stratta alleges the Directors deprived him of his First Amendment right by prohibiting him from speaking at a public meeting. Pls.' Compl. at 11. Prior to the March 8th, 2018 Board meeting, Stratta attempted addressing the District's alleged disparate and unequal application of its Rules to Well No. 18. *Id.* At 9. In the days leading up to the Board meeting, Stratta requested that Well No. 18 be placed on the agenda—the Board refused to do so. *Id.* 9–10. After failing to place Well No. 18 on the agenda, Stratta attended the March 8th Board meeting as a member of the public. *Id.* At 10. He intended on making a public comment requesting that the Board place Well No. 18 on its next agenda. *Id.* The Board refused to allow Stratta to speak. *Id.* Defendants claim the Board did so because allowing Stratta to speak would

have violated the Texas Open Meetings Act (TOMA). Defs.' Rule 12(b)(6) Mot. to Dismiss at 15–17.

i. Applicable Law

The TOMA requires every meeting of a governmental body to be open to the public, except for executive sessions as permitted by the statute. TEX. GOV'T CODE ANN. § 551.002. The purpose of the Act is to ensure the public is given the opportunity to be informed concerning the transaction of public business. *Hays Cty. Water Planning P'ship v. Hays Cty., Tex.*, 41 S.W.3d 174, 178 (Tex. App.—Austin 2001, pet. denied). TOMA furthers this purpose by requiring governmental bodies to give written notice of the subject of each meeting held by a governmental body. TEX. GOV'T CODE ANN. § 551.041. The written notice must be descriptive enough to alert the public to the issues the governmental body plans on addressing. *Hays Cty. Water Planning P'ship*, 41 S.W.3d at 180. A failure to give written notice in compliance with TOMA risks making any action taken at the improperly noticed meeting voidable. TEX. GOV'T CODE ANN. § 551.141.

TOMA's notice requirement does not apply in every circumstance. For example, a governmental body is not required to give notice of every subject raised during a "public comment" period. Op. Tex. Att'y Gen. No. JC-169 (2000) at 3–4. Public comment periods are not subject to TOMA's notice requirements because of the inherent difficulty in predicting the subject matter of the comments and questions. *See id.* at 4 ("Unlike such briefings and presentations for which a governmental body may post specific notice of the particular subject matter, public comment sessions pose notable difficulties in predicting the subject matter of citizen comments and questions"). Considering this difficulty, requiring specific notice of each item raised in a public comment period would effectively end the practice. *Id.* However, "if the

governmental body is, prior to the meeting, aware, or reasonably should have been aware, of specific topics to be raised" then TOMA's notice requirements apply. *Id.* If, for example, a governmental body is apprised that members of a local neighborhood association will attend to comment on landfill problems, the governmental body must insure its notice is tailored to its prior knowledge. *Id.* at 5 (citing *Cox Enterprises, Inc. v. Bd. of Trustees of Austin Indep. Sch. Dist.*, 706 S.W.2d 956 (Tex. 1986)).

Section 551.042 is related to "public comment" periods in that it sheds light on what kind of responses governmental bodies may give regarding inquiries about a subject for which notice has not been given. *Hays Cty. Water Planning P'ship*, 41 S.W.3d at 181 ("Its purpose is to authorize a governmental body to make a limited response to an inquiry about a subject not included in the posted notice while preventing 'deliberation' or making a 'decision' about the subject matter of the inquiry") (citing Op. Tex. Att'y Gen. No. JC-169 (2000)). Section 551.042 limits any deliberation or decision about the inquired subject "to a proposal to place the subject on the agenda for a subsequent meeting." In sum, § 551.042 does not address what members of the public or governmental bodies may inquire or opine on at meetings of governmental bodies. Instead, it addresses how governmental bodies may *respond* to inquiries about a subject for which notice has not been given.

Notwithstanding the above, TOMA may not abridge protected speech. *Hays Cty. Water Planning P'ship*, 41 S.W.3d at 182. TOMA is constitutional in that it seeks to regulate the location and timing of speech rather than the content of speech. *Asgeirsson v. Abbott*, 696 F.3d 454, 467 (5th Cir. 2012).; *See Hays Cty. Water Planning P'ship*, 41 S.W.3d at 18 ("The problem with Molenaar's remarks is not that he could not make them at all, but rather the location and timing of his comments"). Therefore, requiring governmental bodies and members of the public

to comply with TOMA is not a First Amendment violation. *Hays Cty. Water Planning P'ship*, 41 S.W.3d at 181–82.

ii. Application

Stratta argues that had he been allowed to speak the Board would not have violated TOMA. He argues that the decision to prevent him from speaking was motivated by the content of his speech—placing Well No. 18 on the Board's future agenda. According to Stratta, Defendants' claim that they prevented him from speaking to avoid violating TOMA is "merely a fig leaf to cover rank viewpoint discrimination." The Court disagrees.

Both parties focus on Stratta's status as a Board member in their respective briefs. Defendants argue that Stratta is "no mere member of the 'public' for TOMA purposes, and cannot use a 'public-comment' period to circumvent the notice requirements of TOMA." Defs.' Rule 12(b)(6) Mot. to Dismiss at 15. Stratta, on the other hand, argues Defendants are not seeing the whole picture—the focus should be on merely whether (1) Stratta registered as a member of the public; and (2) was scheduled to speak during a public comment period. *See* Pls.' Resp. at 15–16 (arguing that Stratta's case is different from *Hays County Water Planning Partnership* since Stratta (1) was scheduled to speak during a public comment period; (2) was registered as a member of the public; and (3) was prohibited from speaking). However, both parties failed to discuss a crucial element—the Board's prior knowledge that Stratta wished to speak on Well No. 18 at the meeting.

As explained above, neither members of the public or a governmental body may use a "public comment" period to circumvent TOMA's notice requirement. If a "governmental body is, prior to the meeting, aware, or reasonably should have been aware, of specific topics to be raised" then TOMA's notice requirements apply. Op. Tex. Att'y Gen. No. JC-169 (2000) at 4.

Here, Stratta concedes in his Complaint that he discussed raising the issue of Well No. 18 with several Directors *prior* to the March 8th, 2018 meeting. Pls.' Compl. at 10–11. As a result, the Directors had knowledge, or at the very least reasonably should have been aware, that Strata would attempt raising Well No. 18 during the "public comment" period despite not having given notice on that particular subject. Therefore, the Directors, considering current Texas law, were justified in believing that they could not allow Stratta to speak because they had not insured that the written notice complied with TOMA. *See* Op. Tex. Att'y Gen. No. JC-169 (2000) at 4 ("If, for example, a governmental body is apprised in advance that members of a particular neighborhood association will be present to comment on drainage problems, it must insure that its notice is tailored to its prior knowledge.") (citing *Cox Enterprises, Inc. v. Bd. of Trustees of Austin Indep. Sch. Dist.*, 706 S.W.2d 956 (Tex. 1986)).

Whether Stratta was scheduled to speak during the public comment period or registered as a member of the public is irrelevant—the focus is whether the governmental body, here the Directors, had prior knowledge that Stratta would raise a specific topic, here Well No. 18. If the Directors were aware, or reasonably should have been aware, then the whole purpose of not applying TOMA's notice requirements to public comment periods is no loner present. The Directors are no longer hampered by the inherent difficulty of predicting the subject matter of comments and questions that might be raised during the public comment period. Instead, they have knowledge of a specific topic that might be raised, which triggers TOMA's notice requirements. Op. Tex. Att'y Gen. No. JC-169 (2000) at 4 ("We caution that the use of 'public comment' or similar term will not provide adequate notice if the governmental body is, prior to the meeting, aware, or reasonably should have been aware, of specific topics to be raised"). Stratta has failed to raise to the Court's attention any other case or statute that compels a

different opinion. As a result, no adequate authority has been presented that should have placed the Directors on notice that their conduct was definitively unlawful.

Stratta also argues that the comments he intended to make fall squarely within the exception provided by § 551.042. "There is broad scope to the coverage of the Open Meetings Act and a narrowness to its few exceptions." *Hays Cty. Water Planning P'ship*, 41 S.W.3d at 181. As explained earlier, the purpose of § 551.042 is to "authorize a governmental body to make a limited response to an inquiry about a subject not included in the posted notice while preventing 'deliberation' or making a 'decision' about the subject matter of the inquiry." *Id.* In short, the statute is directed at regulating *responses* by *governmental bodies* to inquiries regarding topics not included in the required notice (i.e., comments made during "public comment" periods). Besides a conclusory statement that his request "falls squarely within the exception provided" by § 551.042, Stratta fails to explain why a section of TOMA regulating governmental bodies' responses to unnoticed topics gives him a right to speak on such topics despite the governmental body's prior knowledge that the specific topic would be raised.

Based on Stratta's proposed statement— "to merely suggest that Well No. 18 be placed on the board's next agenda"—the Court assumes Strata intended to argue that § 551.042(b) clearly established his right to speak. However, § 551.042(b) has nothing to do with what comments a member of the public or governmental body may make during a "public comment" period. Instead, it merely limits what type of deliberation or decision may be had on the inquiry regarding the unnoticed subject. Op. Tex. Att'y Gen. No. JC-169 (2000) at 5 ("When an inquiry or a comment from a member of the public requires such deliberation or decision, members of the governmental body may respond merely that the matter shall be placed on a future agenda"). Stratta was not responding to an inquiry by either a member of the public or a colleague on the

Board; therefore, the Directors had no reason to believe that § 551.042 exempted Stratta's comments. *See Hays Cty. Water Planning P'ship*, 41 S.W.3d at 181 (holding Section 551.042 did not exempt a presentation made by a member of a governmental body because he was not responding to an inquiry by a member of the public or the governmental body of which he was a member).

In sum, Stratta has failed to show that the Directors' conduct in prohibiting him from speaking on a topic that was not included in the notice required by TOMA was objectively unreasonable in light of a clearly established rule of law. Texas statutory and case law provides that TOMA's notice requirement cannot be circumvented by the "public comment" period. This means that if the governmental body, prior to the meeting, was aware, or reasonably should have been aware, that a specific topic would be raised, then TOMA's notice requirement applies. Here, Stratta admitted to expressing to the Directors a desire to speak about Well No. 18 prior to the March 8th, 2018 meeting. Based on this prior knowledge, the Directors prohibited Stratta from speaking at the meeting in fear of violating TOMA. Defs.' Rule 12(b)(6) Mot. To Dismiss at 15. Furthermore, because Stratta was not responding to an inquiry on an unnoticed topic made by a member of the public or of the governmental body, it was reasonable for the Directors to assume that § 551.042 did not exempt his comments. Under these circumstances, the Court struggles to see how *every* reasonable director on a GCD would understand that what he or she is doing violates the law.

V. Conclusion

Because of the foregoing reasons, the Court finds that Plaintiffs' Equal Protection and First Amendment claims against Defendant Directors in their individual capacities are barred by qualified immunity. Accordingly, these claims are **DISMISSED WITH PREJUDICE** because of the failure to state a claim.

SIGNED this 3rd day of December 2018.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE