NO. 08-0964

IN THE
SUPREME COURT OF TEXAS

THE EDWARDS AQUIFER AUTHORITY AND THE STATE OF TEXAS,
Petitioners and Cross-Respondents,

v.

BURRELL DAY AND JOEL MCDANIEL,
Respondents and Cross-Petitioners.

On Petition for Review from the
Court of Appeals for the
Fourth District of Texas at San Antonio

BRIEF OF AMICUS CURIAE THE HARRIS-GALVESTON SUBSIDENCE DISTRICT IN SUPPORT OF THE PETITION FOR REVIEW OF THE EDWARDS AQUIFER AUTHORITY AND THE STATE OF TEXAS

Charles W. "Rocky" Rhodes
State Bar No. 00784838
South Texas College of Law
1303 San Jacinto Street
Houston, TX 77002
(713) 646-2918
(713) 647-1777 (fax)

Gregory M. Ellis
State Bar No. 06562500
Attorney at Law
2104 Midway Court
League City, TX 7753
(713) 705-4861

**ATTORNEYS FOR AMICUS CURIAE
HARRIS-GALVESTON SUBSIDENCE DISTRICT**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Thirteen years ago, in *Barshop v. Medina County Underground Water Conservation District*, this Court recognized—but did not resolve—the critical question regarding whether the legislature's constitutionally mandated regulation of Texas' limited groundwater resources somehow constitutes a taking of a landowner's vested property rights requiring just compensation. 925 S.W.2d 618, 625-26 (Tex. 1996). This case squarely presents the opportunity to finally settle this vital issue. The importance of this issue transcends the parties in this case, impacting all Texas taxpayers, citizens, industries, landowners, and, of course, groundwater districts and special purpose conservation districts, such as amicus curiae Harris-Galveston Subsidence District (HGSD).

THE IMPORTANCE OF THIS CASE TO AMICUS HGSD

HGSD is a special purpose district created by the Texas Legislature in 1975 under the authority of article XVI, section 59 of the Texas Constitution. *See* TEX. SPEC. DISTS. CODE §§ 8801.001-.204. The mission of HGSD is to regulate groundwater withdrawals throughout Harris and Galveston Counties in order to halt further land subsidence, which is the permanent lowering (in relation to mean sea level) of the elevation of the surface of land. *Id.* §§ 88.001.001(5) & .003. When underground water levels decline, the loss of support pressure from the water causes subsurface clay layers to compact, thereby depressing the surface elevation. This subsidence, the legislature found, precipitates flooding from either surface water sources or storm surge events, necessitating immediate preventive measures to benefit all land and property within the district. *Id.* §§ 88.001.003-.004.

HGSD's regulatory efforts protect property and even lives within Harris and Galveston Counties. Before the creation of HGSD, groundwater withdrawals from the area had already formed one of the largest subsidence "bowls" in the United States, with approximately 4700 square miles of land subsiding more than ½ foot during a thirty-year period from 1943-1973. Some areas along Galveston bay have even sunk as much as 10 feet since 1906. A long memory is not required to recall the devastating impact from the combination of lower land elevations and hurricanes, such as Hurricane Ike in 2008 and Hurricane Katrina in 2005. In addition to the immeasurable costs from these storms in human lives, some low lying coastal areas have become permanently inundated, lost forever.

In order to prevent further subsidence in the district, the legislature has required HGSD to formulate plans for reducing groundwater withdrawals to amounts that will maintain sufficient artesian pressure to prevent additional depressions. *Id.* § 88.01.111. HGSD has accordingly adopted a series of regulatory plans, with the current plan seeking to reduce underground water pumping to no more than 20% of the total water demand in all areas throughout the district by 2030. 1999 District Regulatory Plan (available at www.hgsubidence.org/assets/pdfdocuments/HGRegPlan.pdf). To accomplish this goal, HGSD must regulate the amount of groundwater that may be withdrawn from aquifers, allowing the wise use of groundwater for all without causing subsidence or depleting the aquifers.

However, the holding of the court of appeals below impedes HGSD's beneficial and necessary groundwater regulation. The appellate court concluded that, because landowners

have "some ownership rights" in water under their land, they have a "vested property right" in the groundwater beneath their property entitled to constitutional protection under a takings analysis. 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008). This holding, if applied to HGSD, would cause HGSD's groundwater withdrawal limits—designed to save lives and property by preventing further subsidence—to impact the vested property rights of countless landowners in Harris and Galveston Counties, potentially giving rise to numerous compensation awards. HGSD has accordingly wholly funded this amicus curiae brief requesting this Court to grant the petitions for review and reverse the holding of the court of appeals that landowners have vested property rights in groundwater under their property.

SUMMARY OF THE ARGUMENT

The concept of "vested property rights" for a takings analysis requires more than the mere existence of "some ownership rights." The police power allows numerous interferences with so-called "ownership rights" without infringing a constitutionally protected interest. A property or ownership interest only becomes a "vested property right" under the Takings Clause when the interest is of such an exclusive and certain nature that any governmental deprivation of the interest requires compensation.

A landowner's interest in groundwater cannot satisfy the correct standard for "vested property rights" under the Takings Clause. Landowners have no means of redress if adjoining landowners entirely drain the groundwater beneath their property under the longstanding rule of capture, barring any legitimate expectation that the groundwater will be available for use. In the absence any legal right to exclude others, and without any

reasonable expectation of the groundwater's continued presence, a landowner's interest is hypothetical and contingent—not a vested property right for takings purposes.

The tests under the Takings Clause confirm that governmental regulations limiting groundwater withdrawals do not deprive landowners of vested property rights. Groundwater withdrawal limits do not involve a direct government appropriation, physical invasion, or exaction of private property. Nor do limitations on the pumping of groundwater deprive landowners of all economically viable uses of their property. Finally, the rule of capture bars landowners from having any reasonable investment-backed expectation to a particular level of groundwater withdrawals, while such limits are a vital public program for conserving the state's limited water resources and protecting both lives and property as mandated by the Texas Constitution's Conservation Amendment.

This Court has repeatedly recognized the necessity of legislative intervention to ensure that water is available for all Texans. The legislature has hence designed a system of water districts and other special districts designed to reasonably regulate water withdrawals for the benefit of all. The erroneous holding below that such regulations interfere with vested property rights protected by the Takings Clause threatens the very viability of this system and necessitates this Court's attention.

ARGUMENT

The fundamental mistake of the court of appeals was equating the "some ownership rights" landowners have in groundwater with a "vested property right" protected by the Takings Clause. 274 S.W.3d at 756. The law, however, distinguishes between ownership

rights and ***vested*** property rights. As this Court held in *Tarrant County v. Ashmore*, even those financial and property interests that are protected by law under some circumstances are not necessarily vested rights within the contemplation of the protection against governmental takings. 635 S.W.2d 417, 422 (Tex. 1982) (holding justice of the peace had no vested right in elected office under a takings analysis even though he did have some legally protected financial and property interests in the office).[1] The proper formulation of the issue in this case is thus not whether landowners have some ownership interests in groundwater, but whether governmental regulations of groundwater withdrawals interfere with vested property rights protected against governmental takings.

This Court has never addressed this "complex and multi-faceted" issue. *Barshop*, 925 S.W.2d at 626. The question cannot be resolved, as the court of appeals attempted to do, by resort to a simplistic syllogism predicated on the premise that landowners have some rights in groundwater. 274 S.W.3d at 756. Instead, a proper analysis must address the nature of vested property rights for governmental takings, evaluate the extent of landowners' rights in groundwater, and balance the competing interests at stake.

I. GOVERNMENTAL GROUNDWATER WITHDRAWAL LIMITS DO NOT IMPLICATE A VESTED PROPERTY RIGHT PROTECTED BY THE TAKINGS CLAUSE.

Vested property rights under the Takings Clause consist solely of those interests that are exclusive and certain enough to receive protection from governmental deprivations. As the United States Supreme Court explained, "vested property rights" are those rights of

[1] *Cf. United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 280 (1943) (preexisting state law "valuable right" to use eminent domain power was not protected "private property" under Takings Clause).

private persons which the government cannot deprive "except for a 'public use' and upon payment of 'just compensation.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Only those economic interests sufficiently recognized and backed by force of law qualify. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

Although no singular rule for discerning a legally protected vested property right has been articulated, this Court and the United States Supreme Court have identified several relevant considerations. First, the most important distinguishing "hallmark" of legally protected property interests is "the right to exclude others." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). The second factor is the extent to which the interest is sufficiently bound up with the claimant's reasonable expectations. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978); *cf. Ashmore*, 635 S.W.2d at 421-22. Finally, settled legal expectations are also critical—a vested property right "must be something more than a mere expectancy based upon an anticipated continuance of existing law." *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937). These three considerations here all point to the same conclusion—governmental regulations of groundwater withdrawals do not implicate a vested property right.

A. Landowners Cannot Exclude Others from Capturing Groundwater.

Groundwater is not static. It typically flows beneath the surface, traveling from place to place, and can be recharged or discharged through springs. The water particles currently underneath a landowner's property will not be there in the future, and the total quantity of water beneath a particular piece of property changes on a regular basis. Unless a landowner

captures the water molecules under the land, he or she simply cannot exclude others from obtaining them—the water particles will continue their journey to be captured by some other landowner or to feed surface springs that are the property of the State.

The rule of capture recognizes that landowners have no legal right to exclude others from obtaining the groundwater currently beneath their property. Under the rule of capture as adopted by this Court in *Houston & Texas Central Railway Co. v. East*, landowners cannot recover in tort against others for depleting their wells or depriving them of the use of water. 81 S.W. 279, 280-81 (Tex. 1904). As a result, the landowner in *East* had no recourse when his existing well for household purposes went dry after a railroad dug a deeper and wider well on neighboring property. *Id.* Of course, if Mr. East had the right to exclude others from interfering with the groundwater under his property, he should have prevailed—but he did not. Landowners thus have no legally recognized right to prevent others from capturing and obtaining ownership of the water currently beneath their land. *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999); *cf. Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 13 (Tex. 2008) (noting the rule of capture "gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract.").

Without the right to exclude, a landowner's interest in groundwater does not rise to the level of a vested property right under a takings analysis. Landowners may have "absolute ownership" of the groundwater under the rule of capture in the sense that they are not liable to others for damages due to the amount of water withdrawn, but that does not mean that they

have a vested property right to exclude anyone else from taking the groundwater first. *Cf. Coastal Oil*, 268 S.W.3d at 13 (noting gas claimed to be lost under tract by mineral lessee from subsurface fracing operation "simply d[id] not belong to him" under rule of capture). Without the right to exclude, the landowner's claimed right to withdraw all the groundwater beneath the property lacks one of the vital ingredients of a ***vested*** property right protected against governmental deprivation by the Takings Clause.

B. Landowners Cannot Reasonably Rely on the Continued Presence of Groundwater.

Not only does the landowner not have a right to exclude others from the groundwater beneath the property, the very continued presence of the groundwater to withdraw is speculative and uncertain. Although a landowner has an opportunity to recover groundwater, the rule of capture does not guarantee any specific level of groundwater or ensure that any water will be there at all.

Under the rule of capture, the landowner's groundwater is always subject to depletion or exhaustion by a neighbor. Even landowners with extremely productive wells may encounter a corporation or a governmental entity on a neighboring tract that pumps thousands—or even millions—of gallons of groundwater each and every day until the once productive wells are severely depleted. *See Sipriano*, 1 S.W.3d at 76 (90,000 gallons a day by Ozarka); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 800 (Tex. 1955) (10 million gallons a day by municipal corporation). Thus, until the groundwater is actually captured, the landowner cannot reasonably rely on its continued presence.

This is especially true because the story of water in Texas "is also the story of its

droughts." *In re Adjudication of Water Rights*, 642 S.W.2d 438, 441 (Tex. 1982). These droughts, of course, typically cause a reduction of groundwater levels as demand increases and recharge decreases. Hence, there is never any certainty, until the water is captured, that groundwater will be available. The landowner only has a mere expectancy that the water still in the ground can be captured, but the landowner cannot reasonably expect or justifiably rely on the continued presence of the groundwater.

C. This Court's Prior Decisions Have All Indicated That Groundwater Rights Are Subject to Necessary Legislative Modification.

This Court has indicated for more than 100 years that the legislature has the right—and now even the duty—to regulate groundwater for the benefit of all. Landowners have thus had notice from the beginning that their common law rights in groundwater are subject to legislative modification, defeating any claim of a settled legal expectation to withdraw unlimited amounts of water. *Cf. Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 44-48 (1944) (no vested right in tentative judicial rules later abrogated by legislation).

East—this Court's very first groundwater case—anticipated legislative involvement in groundwater regulation, noting that the rule of capture only applied in the absence of "'positive authorized legislation.'" 81 S.W. at 280 (quoting *Frazier v. Brown*, 12 Ohio St. 294 (1861)). Every decision since then from this Court has confirmed the legislative role. *See, e.g.*, *Barshop*, 925 S.W.2d at 926; *City of Corpus Christi*, 276 S.W.2d at 803. Indeed, this Court's most recent groundwater decision, *Sipriano*, while confirming the rule of capture, exhorted the legislature to take "appropriate steps to protect groundwater" and to fulfill "its constitutional charge to regulate this natural resource." 1 S.W.3d at 79-80.

Although some landowners undoubtedly desire a continued right to withdraw as much groundwater as possible without any governmental regulation, they have no legitimate expectation of doing so, especially in light of this Court's repeated calls for legislative action.

A vested property right must be more than a mere expectancy based on the continuation of existing law. *Trammell*, 101 S.W.2d at 1014. Yet landowners do not have a reasonable expectation of a right to unlimited groundwater withdrawals, either legally or factually. Plus, under the rule of capture, landowners do not have the right to exclude anyone else from obtaining their groundwater first, the very "hallmark" of a protected property interest.

If a governmental entity can drain 10 millions of gallons of water a day and lose almost 75% of it in transport without incurring any liability to neighboring landowners, *see City of Corpus Christi*, 276 S.W.2d at 800-02, then certainly the government can establish groundwater withdrawal limits for the benefit of all Texans without incurring takings liability for interfering with vested property rights. This Court should thus recognize that a landowner's right to groundwater under the land is subject to the "state's police power to conserve and develop the state's natural resources." *Cf. Seagull Energy E & P, Inc. v. R.R. Comm'n of Tex.*, 226 S.W.3d 383, 389 (Tex. 2007) (mineral rights). Such police power regulations do not interfere with any vested property right of landowners when their interests in groundwater are neither exclusive, certain, nor legally insulated from legislative adjustment. Groundwater withdrawal limits thus do not impact those "vested property rights" that are immune from governmental deprivations in the absence of compensation.

II. TAKINGS STANDARDS CONFIRM THAT REGULATIONS LIMITING GROUNDWATER WITHDRAWALS DO NOT IMPLICATE A VESTED PROPERTY RIGHT.

A "vested property right" is one that the government cannot deprive "except for a 'public use' and upon payment of 'just compensation.'" *Landgraf*, 511 U.S. at 266. Because limits on groundwater withdrawals similar to those in the Edwards Aquifer Act do not require compensation under any takings standard, landowners cannot, by definition, have vested property rights in unlimited and unregulated groundwater withdrawals.

A. Withdrawal Limits Do Not Oust Landowners from Property.

The paradigm taking is a direct government appropriation or physical invasion of private property, such as the inverse condemnation of a parcel of property for a road or the occupation of a private warehouse needed for governmental operations. *See, e.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). This type of invasion forms the baseline for takings analysis, as the other standards frequently aim "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 539. Government effects such a physical taking "where it requires the owner to submit to the physical occupation of the land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

Limiting groundwater withdrawals is not comparable to the seizure, appropriation, or ouster of the landowner's property. No one has occupied the land, nor even impacted the owner's right to exclude others from entering and using the land. The limits only seek to conserve a limited natural resource beneath the land—a resource that the landowner cannot exclude others from obtaining in any event under the rule of capture.

The types of regulatory takings that are dependent on the physical appropriation concept are likewise not at issue. Withdrawal limits do not require an owner to suffer a permanent physical occupation of property, as occurred when landlords had to provide space for the installation of cable facilities. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Nor has the government demanded the dedication of an easement allowing public access to property as a condition for a development permit that the government was entitled to deny. *Dolan v. City of Tigard*, 512 U.S. 374, 384-91 (1994). Although a takings analysis under these strands might be necessary, for instance, if the government required a landowner to allow others access to the land's surface to obtain groundwater, or if the landowner's right to drill a well was conditioned on granting a surface easement to others, withdrawal limits implicate none of the concerns related to physical takings. A cap on withdrawals does not interfere in any respect with the landowner's right to exclude—the foundation of physical takings and "one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435-36.

B. Withdrawal Limits Do Not Deprive Landowners of All Economically Viable Use of Property.

Land does not become valueless merely because a landowner cannot withdraw unlimited amounts of groundwater. Even when a well permit is completely denied by the Edwards Aquifer Authority, landowners not within platted subdivisions can still drill an "exempt" well to withdraw up to 25,000 gallons of water a day for household purposes, watering animals, and irrigating a family garden. *Barshop*, 925 S.W.2d at 624. This type of cap cannot be a per se regulatory taking, then, which only occurs when the regulation denies

all economically viable use of the property, rendering the property economically idle such that the regulation is tantamount to a physical occupation. *Lingle*, 544 U.S. at 538; *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004).

In determining whether a regulation denies all economically viable use of a claimant's property, the aggregate of all the bundle of rights included within the claimant's property must be analyzed. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central*, 438 U.S. at 130-31. Thus, a statute compelling coal owners to keep millions of tons of coal in place to support the surface did not constitute a taking when the regulation did not deny all economically viable use of their property "in the context of any reasonable unit of [their] coal mining operations." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498-99 (1987). This principle in the present context requires that the whole parcel of property owned by landowners must be considered to determine whether capping groundwater withdrawals makes their land entirely worthless. Because there are numerous valuable uses of property that require no groundwater or only limited groundwater withdrawals from an exempt well, groundwater regulations simply cannot constitute a per se taking denying landowners all economically viable use of their property.

C. Withdrawal Limits Serve Compelling Governmental Purposes with Minimal Impact on Investment-Backed Expectations.

Limits on groundwater withdrawals—which serve compelling governmental interests in conservation of limited natural resources and protection of lives and property—are not regulations that go "too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Such groundwater regulations are clearly permissible under the key considerations of their

economic impact, especially in light of distinct investment-backed expectations, and the character and purposes of the government action. *Lingle*, 544 U.S. at 538-39; *Penn Central*, 438 U.S. at 124; *Sheffield Dev.*, 140 S.W.3d at 672.

Landowners have no reasonable investment-backed expectations to unlimited groundwater withdrawals for all the reasons discussed previously—they have no right to exclude others from the groundwater, the continued presence of the groundwater is uncertain and speculative, and any interest in attempting to obtain unlimited quantities of groundwater has always been subject to legislative modification. In the absence of reasonable investment-backed expectations, even diminutions of almost 90% of a property's entire aggregate value are not takings when the governmental regulations are "reasonably related to the promotion of the general welfare." *Penn Central*, 438 U.S. at 131. And here, the challenged regulations do not merely satisfy—but actually surpass—this standard.

The governmental interests in this case are at the apex of governmental responsibilities—to protect lives and property and to conserve limited water supplies so that all Texans, including future generations, may enjoy this vital resource. These interests certainly exceed those interests that have been found sufficient in prior decisions, such as the government's interest in enhancing the quality of life by preserving historical landmarks, *Penn Central*, 438 U.S. at 129; a town's interest in maintaining its unique rural character and lifestyle, *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998), or even the state's interest in saving an apple orchard from cedar rust disease, *Miller v. Schoene*, 276 U.S. 272, 278-80 (1928).

The Texas Constitution confirms the importance of the governmental interests at stake in this case. The Conservation Amendment mandates that the preservation and conservation of Texas' natural resources are "public rights and duties." TEX. CONST. art. XVI, § 59. And one of the most crucial of these resources to the future of Texas is water.

Groundwater withdrawal limits substantially advance the fundamental governmental purposes articulated in the Conservation Amendment with only a minimal intrusion on the rights of landowners. The government has not physically intruded on the landowners' property, seized the groundwater for itself, or even barred all access to the groundwater. Instead, government has merely allocated the amount of groundwater that can be wisely taken among all the competing claimants based on their historic use. This is neither a taking nor an interference with any vested property right.

The legislature has established a system of local water districts designed to protect citizens throughout Texas. Today, numerous water districts and authorities are actively engaged in the regulation of groundwater. The erroneous holding of the court of appeals that such regulations constitute an interference with a vested property right protected against takings threatens the very viability of this system.

This cause thus exemplifies "importance to the jurisprudence of the state."

PRAYER

HGSD requests that this Court grant the petition for review, reverse the court of appeals, and render judgment that landowners have no vested property rights in the groundwater beneath their property.

Respectfully submitted,

By: _____

Charles W. "Rocky" Rhodes
State Bar No. 00784838
1303 San Jacinto Street
Houston, Texas 77002
(713) 646-2918 (Telephone)
(713) 646-1777 (Telecopier)

Gregory M. Ellis
State Bar No. 06562500
2104 Midway Court
League City, Texas
(713) 705-4861

ATTORNEYS FOR AMICUS CURIAE
HARRIS-GALVESTON SUBSIDENCE DISTRICT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing amicus curiae brief was served via United States mail, postage prepaid, on counsel for all parties and amicus curiae as listed below on the 27th day of April, 2009.

Greg Abbott
C. Andrew Weber
James C. Ho
Kristofer S. Monson
Office of the Attorney General
P.O Box 12548 (MC 059)
Austin, TX 78711-2548
Counsel for State of Texas

Tom Joseph
909 N.E. Loop 410, Suite 600
San Antonio, TX 78209
Counsel for Day & McDaniel

Michael J. Booth
Booth, Ahrens & Werkenthin, P.C.
515 Congress, Suite 1515
Austin, TX 78701-3503
Counsel for Amicus City of Victoria

Hunter Burkhalter
Andrew S. Miller
Kemp Smith LLP
816 Congress, Suite 1150
Austin, TX 78701
Counsel for Edwards Aquifer Authority

Thomas H. Crofts, Jr.
Crofts & Callaway
4040 Broadway, Suite 525
San Antonio, TX 78209
Counsel for Amicus Medina County Irrigators

Marisa Perales
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, TX 78701
Counsel for Amicus Angela Garcia