

No. 08-0591

IN THE SUPREME COURT OF TEXAS

ROLLING PLAINS GROUNDWATER CONSERVATION DISTRICT,

Petitioner

vs.

CITY OF ASPERMONT, TEXAS,

Respondent

On Petition for Review from the Eleventh Court of Appeals
at Eastland, Texas

BRIEF OF AMICUS CURIAE
TEXAS ALLIANCE OF GROUNDWATER DISTRICTS

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The Texas Alliance of Groundwater Districts (“TAGD”) is a 501(c)(3) nonprofit association composed of seventy-nine (79) groundwater conservation districts (“Districts”) from across the State of Texas. The Texas Legislature and Texas Commission on Environmental Quality created TAGD’s member Districts with the statutory mandate to preserve, conserve and protect the groundwater resources of the State of Texas. TEX. WATER CODE ANN. § 36.0015 (Vernon 2008). The locally elected and appointed directors of Districts across the state are responsible for governing the Districts and ensuring conservation of precious groundwater resources both for current and future demands. To further these purposes, the Districts formed TAGD in 1988 to

provide technical, operational and executive experience for themselves and to exchange information and ideas with each other.

The members of TAGD have a vital interest in preserving the authority given to them by the Legislature to regulate municipal water production. The court of appeals' decision would, for many of the member Districts, curtail or compromise that authority.

The fees for preparing this brief are being borne entirely by TAGD and contributions from member Districts.

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SUMMARY OF ARGUMENT

At issue in this appeal is whether groundwater conservation enforcement mechanisms created by the Legislature can be used against municipalities and other governmental entities, or if the doctrine of governmental immunity means that only private entities are subject to the legislative scheme.

In exercising its constitutionally-mandated exclusive power to regulate groundwater in Texas, the Legislature created Groundwater Conservation Districts (“Districts”) to conserve, preserve, and protect the state’s groundwater. In Chapter 36 of the Water Code, the Legislature empowered the Districts to regulate all those who withdraw and transport groundwater, including municipalities, through the use of permits and assessment of fees. To ensure payment of these fees, and adherence to other District regulations, the Legislature also gave the Districts an array of enforcement mechanisms, including the ability to seek injunctions, penalties, attorneys’ fees, and other remedies against all users.

In accordance with this authority, Rolling Plains Groundwater Conservation District (“Rolling Plains” or “Petitioner”) levied statutorily-authorized export fees against the City of Aspermont (“Aspermont”) for the transportation of water outside the Rolling Plains District. When Aspermont continued to pump groundwater but ceased paying the mandated fees, Rolling Plains instituted the current action.

This Court’s primary objective in construing the statute at issue must be to give effect to the Legislature’s intent, considering the legislation’s objective and the consequences of a particular construction. Under this standard, there is no reasonable

way to construe Chapter 36 and its enforcement provision other than as a waiver of a groundwater user's governmental immunity.

Municipalities are significant users of groundwater in this state, and fees from municipalities will be increasingly important. Districts depend on fees from municipalities to facilitate their groundwater conservation efforts. If the enforcement provisions of Chapter 36 apply only to private parties, District regulation would be meaningless and ineffective. Forcing private users to bear the entire cost of the state's groundwater management efforts, while excepting all end users who secure their groundwater through a governmental entity as an intermediary, is not merely nonsensical and inefficient, but raises inequities of constitutional magnitude. Such a holding could also endanger the future conservation efforts in this state, as a finding of non-waiver may deny many Districts an important revenue source to conduct their operations.

The primary purposes for governmental immunity are not in play in this case. Subjecting municipalities and other governmental entities to enforcement actions by Districts does not open up these entities to unlimited damages or oblige governmental entities to honor questionable or unwise obligations incurred by previous administrations. Instead, the obligations of both public and private users under Chapter 36 are expressly determined and limited by the Legislature itself. Thus, a mechanical application of governmental immunity would compromise our state's fundamental conservation efforts without preserving the government structure from noxious lawsuits.

ARGUMENT

I. The Texas Legislature created Districts to regulate the use of groundwater for the purpose of conserving and protecting our state's groundwater resources.

A. These Districts are the sole protectors of our state's groundwater resources.

The Conservation Amendment to the Texas Constitution grants the Legislature the exclusive power to regulate the use of groundwater in Texas. TEX. CONST. art. XVI, § 59(a); *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 77 (Tex. 1999). Under this authority, the Legislature has established Groundwater Conservation Districts, TEX. CONST. art. XVI, § 59(b); Act of May 26, 1993, 73rd Leg., R.S., ch. 1028, § 1(a), 1993 Tex. Gen. Laws 4435 (establishing Rolling Plains District), as the “state’s preferred method of groundwater management.” TEX. WATER CODE ANN. § 36.0015. In truth, these Districts “are not just the preferred method of groundwater management [in this state], they are the *only* method presently available.” *Sipriano*, 1 S.W.3d at 81 (Hecht, J., concurring) (emphasis added).

Ninety-seven groundwater conservation districts have been created in Texas.¹ Operating in every region of the state, these Districts perform a vital role in protecting the state’s natural resources. Of Texas’s 254 counties, 145 are either fully or

¹ Tex. Comm’n on Env’tl. Quality, What is a Groundwater Conservation District (GCD)? (December 2008), http://www.tceq.state.tx.us/assets/public/permitting/watersupply/groundwater/maps/gcd_text.pdf (last visited January 15, 2009). This total includes 93 confirmed districts and four districts that have yet to be confirmed by voters in local elections. *Id.*; see also Tex. Comm’n on Env’tl. Quality, Texas Groundwater Conservation Districts (January 2, 2009), <http://www.tceq.state.tx.us/assets/public/permitting/watersupply/groundwater/maps/gcdmap.pdf> (last visited January 15, 2009) (displaying map of all Texas Groundwater Conservation Districts as of January 2009).

partially within a District.² More importantly, roughly ninety percent of reported groundwater usage in the year 2000 was captured inside the boundaries of a District.³

B. The Legislature authorized Districts to impose fees and other regulations to effectuate conservation plans.

Each District has the responsibility “to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater” TEX. WATER CODE ANN. § 36.0015. To further these objectives, Districts must develop and implement groundwater management plans, along with the rules necessary to implement them. TEX. WATER CODE ANN. § 36.1071(a), (f) (Vernon 2008); 31 TEX. ADMIN. CODE § 356.3 (2008) (Tex. Water Dev. Bd., Groundwater Mgmt.). These management plans must address the District’s strategies for providing the most efficient use of groundwater, controlling and preventing waste of groundwater and subsidence, addressing surface water issues, dealing with drought conditions, and achieving desired future aquifer conditions. TEX. WATER CODE ANN. § 36.1071(a)(1)-(8); 31 TEX. ADMIN. CODE § 356.5(a)(1)(A)-(H) (2008) (Tex. Water Dev. Bd., Groundwater Mgmt.).

To successfully achieve the goals and strategies set forth in these management plans, Districts have the authority to develop, adopt, and promulgate rules related to the regulation of the state’s groundwater. TEX. WATER CODE ANN. § 36.0015, 36.101(a) (Vernon 2008). This includes the power to establish fees, within legislatively-

² Tex. Comm’n on Env’tl. Quality, What is a Groundwater Conservation District (GCD)?, *supra*.

³ Tex. Water Dev. Bd., GCD Facts (April 28, 2008), <http://www.twdb.state.tx.us/gwr/GCD/facts.htm> (last visited January 13, 2009).

established parameters, as a regulatory tool for groundwater management. *See id.* at §§ 36.122(d)-(e), 36.205 (Vernon 2008).

Section 36.205 of the Texas Water Code authorizes Districts to impose production fees, administrative fees such as permit application filing fees, and transportation fees. TEX. WATER CODE ANN. § 36.205. Section 36.122(e) authorizes Districts to assess fees if the water produced is to be transferred outside the boundaries of the District (“export fees”). TEX. WATER CODE § 36.122. Export fees under Chapter 36 are based on the amount of water transferred out of a District, TEX. WATER CODE § 36.122(e), (h), while production fees are based on either the amount of water actually withdrawn or the amount authorized to be withdrawn under an issued permit. TEX. WATER CODE § 36.205(c). These fees act as an economic disincentive for groundwater use while at the same time providing revenue to fund District operations. *See Beckendorff v. Harris-Galveston Coastal Subsidence Dist.*, 558 S.W.2d 75, 79-80 (Tex. Civ. App.—Houston [14th Dist.] 1977), *writ ref’d per curiam*, 563 S.W.2d 239 (Tex. 1978) (determining that revenue generated from fees does not detract from regulatory purpose where fees based on amount of water taken from well and intended to operate as economic disincentive to groundwater withdrawal); *see also* TEX. WATER CODE ANN. § 36.205(c) (“district may use revenues generated by the [production] fees for any lawful purpose”).

C. The Districts' ability to regulate groundwater use extends to municipalities and other governmental entities.

It is clear on the face of the statute that the Legislature intended municipalities to be subject to Chapter 36 and any regulations promulgated thereunder. A municipality is a "governmental subdivision," and therefore a "person," as defined in the Code Construction Act. TEX. GOV'T CODE ANN. § 311.005(2) (Vernon 2005). Chapter 36 provides that any "person" within a District's jurisdiction is subject to regulation by that District. Pursuant to this, no "person" may drill a well, alter the size of a well, or operate a well without first obtaining a permit from the appropriate District. TEX. WATER CODE ANN. § 36.115(a), (b), and (c) (Vernon 2008). Districts may also adopt rules requiring a "person" to obtain a permit to transfer groundwater out of a District, and they can assess fees for such permits. *Id.* at § 36.122(b), (d).

Many other statutes also permit regulation of municipalities and other governmental entities through the regulation of "persons." For example, the Texas Water Quality Act, TEX. WATER CODE ANN. §§ 26.001(25), 26.121 (Vernon 2008), the Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. §§ 361.003(23) (Vernon 2001), 361.271(a) (Vernon Supp. 2008), and the Texas Clean Air Act, *id.* at §§ 382.003(10), 382.085 (Vernon 2001), all depend on the definition of "person" to define who must comply with these laws. *See* Br. of Pet'r at 25-30.

Municipalities use almost one-third of all of the groundwater in this state.⁴

The Legislature acknowledged municipal use of groundwater by expressly distinguishing between municipal and non-municipal uses in Chapter 36. For example, temporary boards establishing a District may set fees to pay for the creation and initial operation of a District; fees for agricultural uses of groundwater shall be no more than 20 percent of the rate applied to “municipal uses.” TEX. WATER CODE ANN. § 36.206(b) (Vernon 2008). The Legislature also exempted from regulation under Chapter 36 a well, and water produced by a well, that is located in a county with a population of 14,000 or less if the “water is to be used solely to supply a municipality that has a population of 121,000 or less.” *Id.* at § 36.121 (Vernon 2008). A District may not prohibit a “municipality [exempt under this provision] from transporting produced water inside or outside the [D]istrict’s boundaries.” *Id.*

II. The Legislature intended to waive governmental immunity for enforcement of District regulations.

If governmental immunity applies at all to these legislatively-mandated fees, which TAGD does not concede, the Legislature intended to waive any such immunity with regard to the regulatory power of Districts under Chapter 36. The court of appeals erred in holding that governmental entities are immune from suit for past due fees, penalties, and costs. *City of Aspermont v. Rolling Plains Groundwater Conservation Dist.*, 258 S.W.3d 231, 236 (Tex. App.—Eastland 2008, pet. filed).

⁴ Tex. Water Dev. Bd., 2006 Water Use Survey Summary Estimates in Acre-Feet, Region and State Totals (2008), <http://www.twdb.state.tx.us/wrpi/wus/2006est/2006wus.htm> (follow link to 2006 Water Use Survey Summary Estimates - Regional & State Totals) (last visited January 15, 2009); *see also* TEX. WATER DEV. BD., WATER FOR TEXAS: 2007 176 (2007), <http://www.twdb.state.tx.us/wrpi/swp/swp.htm> (last visited January 15, 2009).

A. The primary objective in construing a statute is to ascertain and give effect to the Legislature’s intent.

“It is a well-established rule that for the Legislature to waive [governmental] immunity, it must do so by clear and unambiguous language.” *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995). But that rule cannot be applied so rigidly that the intent of the Legislature is disregarded. *Id.* at 292. The Court’s primary objective in construing a statute must be to give effect to the Legislature’s intent. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003).

To ascertain the Legislature’s intent, the law’s objective should be considered, along with the consequences of a particular construction. *Id.* Though Aspermont argues that the Legislature failed to include “clear and unambiguous” language of waiver in the contested legislation, this Court has explained that “[t]he clear and unambiguous requirement is not an end in itself, but merely a method to guarantee that courts adhere to legislative intent.” *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 3 (Tex. 2000). The doctrine “should not be applied mechanically to defeat the true purpose of the law.” *Id.* Nor should a statute be construed in such a way that it “lead[s] to absurd results.” *Tex. Workers’ Comp. Comm’n v. City of Eagle Pass*, 14 S.W.3d 801, 806 (Tex. App—Austin 2000, pet. denied). Instead, a statute must be construed to achieve the Legislature’s intent, not to eviscerate its purpose or usefulness:

Legislative intent remains the polestar of statutory construction. We will not read statutory language to be pointless if it is reasonably susceptible of another construction. If a statute leaves no reasonable doubt of its purpose, we will not require perfect clarity, even in

determining whether governmental immunity has been waived.

Barfield, 898 S.W.2d at 292 (internal citations omitted). The presumption is that a “just and reasonable result was intended by the legislature.” *State v. City of Greenville*, 726 S.W.2d 162, 170 (Tex. App.—Dallas 1986, writ ref’d n.r.e.); *see also* TEX. GOVT. CODE ANN. § 311.021(3) (Vernon 2005).

Even where waiver of immunity is “not expressed in so many words,” as Aspermont claims it must be, this Court has found waiver of immunity where it “could discern no other reasonable intent in the [legislation’s] provisions.” *Barfield*, 898 S.W.2d at 297; *see also Kerrville*, 28 S.W.3d at 6 (determining waiver, in both *Kerrville* and *Barfield*, based on “whether a statute makes any sense if immunity not waived”). Finding that a statute has no purpose if immunity is waived, for example, is sufficient to satisfy the “clear and unambiguous” standard. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 700 (Tex. 2003) (“In *Barfield*, we found a clear and unambiguous waiver of immunity for claims of wrongful discharge against municipalities *because* the statute had no purpose if immunity had not been waived.”) (citing *Barfield*, 898 S.W.2d at 296-97) (emphasis added).

In adopting the enforcement provisions of Chapter 36, the Legislature granted Districts the authority to enforce District regulations by way of injunction, civil penalties, attorney’s fees, court costs, and “other appropriate remed[ies].” TEX. WATER CODE ANN. § 36.102 (Vernon 2008). Though this provision does not list the entities subject to District enforcement, the only reasonable construction of the statute is that

Districts have enforcement power over *all* District customers, both public and private. Construing this statute in any other way would defeat the Legislature’s intent to regulate groundwater use and transportation by all “person[s],” render the statute meaningless, and fatally impact the future of Districts and their ability to conserve and protect groundwater in this state.

B. A holding of non-waiver encourages municipalities to ignore District and other state agency regulations.

A finding of non-waiver in this case would lead to the absurd results and useless legislation this Court endeavors to avoid. If the Legislature did not intend to waive governmental immunity under Chapter 36, only private users who do not obtain water through a municipality could be held accountable for failure to pay production and export fees. Why would the Legislature, understanding the importance of water conservation and the significant use of groundwater by municipalities across this state, create fees that could be assessed against both private users and governmental entities, but only enforced against those who do not receive their water through a municipality? It is inconceivable that the Legislature would intend such a result.

Further, a finding of non-waiver is nonsensical given the similarity of Chapter 36 to other legislation that regulates municipalities. A finding of non-waiver in this case could result in municipalities and other governmental entities claiming immunity from enforcement of regulations concerning water quality, solid waste disposal, and air pollution. Like Chapter 36, neither the Texas Water Quality Act, the Solid Waste Disposal Act, nor the Texas Clean Act contain “magic words” waiving

sovereign immunity. *See* TEX. WATER CODE ANN. § 26.001 *et seq.* (Vernon 2008); TEX. HEALTH & SAFETY CODE ANN. §§ 361.001 *et seq.* (Vernon 2001 and Supp. 2008), § 382.001 *et seq.* (Vernon 2001 and Supp. 2008). But in passing these laws, the Legislature clearly did not intend to offer municipalities free reign to pollute the water, soil and air of this state.

C. The regulatory purpose and effect of District fees is lost if municipalities do not pay.

The fees Districts charge for the transportation and export of water are regulatory in nature, based on the amount of groundwater withdrawn and the amount of groundwater transported out of a district. TEX. WATER CODE § 36.205(c); 36.122(e), (h). These fees operate as an economic disincentive for removing and transporting groundwater and therefore further the purpose of District conservation efforts. The regulatory purpose and effect of these fees will be lost if municipalities do not pay them, thereby defeating the entire purpose of Chapter 36. Given the importance of Districts as the sole protectors of our state's groundwater resources, the Legislature surely did not intend to give Districts regulatory authority like this while simultaneously limiting the strength and purpose of that authority by exempting municipalities and other governmental entities from compliance.

D. A finding of non-waiver could have constitutional implications.

The construction urged by Aspermont also raises constitutional concerns. If private groundwater users like agribusinesses and industrial users have to bear all the costs, and city customers get a free ride, equal protection concerns are apparent. *See*,

e.g., Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985) (holding tax exemption that discriminated on the basis of residence unconstitutional). Legislation such as Chapter 36 of the Water Code is presumptively constitutional. TEX. GOV'T CODE ANN. § 311.021(1); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). Thus, when two reasonable interpretations of legislation are available, a court should apply the one which avoids constitutional difficulties. *Id.*

Only an interpretation of waiver of immunity avoids such equal protection concerns in this case. If, in creating the Districts, the Legislature intended that all may obtain water, but only a few are forced to pay for it, the entire conservation effort would be clouded by constitutional infirmity. That conclusion, being absurd, should be rejected.

E. The court of appeals decision incorrectly limits District remedies against municipalities to declaratory relief.

Likewise absurd is the court of appeals decision in this case limiting Districts to declaratory relief against municipalities. *City of Aspermont*, 258 S.W.3d at 236 (“Aspermont is not immune from . . . a declaration regarding whether Aspermont is subject to and must comply with the rules and regulations of Rolling Plains . . . [but] is immune from . . . past due fees, penalties, and costs”). If a court declares that a municipality must abide by the rules and regulations of a District, but the municipality continues to evade payment of fees, what then? Is the District restricted to seeking a second declaration that the municipality must abide by the first declaratory judgment on the matter? And what then? The court of appeals never says whether at some point this chain of declaratory judgments stops or whether “the road goes on forever and the party

never ends.”⁵ As the Legislature surely did not intend such a result, the Court should disavow the court of appeals’ construction.

F. If municipalities ceased paying export and transportation fees, some Districts could conceivably be forced out of operation, ultimately defeating the overriding goals of groundwater protection and conservation.

In creating groundwater conservation districts, the Legislature intended to provide Districts with sufficient funding resources. *See, e.g.*, TEX. WATER CODE ANN. §§ 36.159, 36.171(a), 36.201(c), 36.205(c), 36.206, 36.207 (Vernon 2008). It did not intend to force these Districts out of business. But such could be the result if municipalities ceased paying District fees.

The Legislature controls the methods by which Districts can finance their operations and dictates for each District whether it may levy taxes to support its operations.⁶ In many cases, the Legislature denies a District taxing authority.⁷ In others, the Legislature establishes a lower cap on the taxing rate than that established for Districts generally in the Texas Water Code.⁸ And in others, District residents vote against the District’s taxing authority, leaving it with no means by which to collect tax revenue.⁹ As of 2005, twenty percent of the Districts had no taxing authority,¹⁰ thirty

⁵ ROBERT EARL KEEN, *The Road Goes on Forever*, on WEST TEXTURES (Sugar Hill Records 1989).

⁶ LAURA BROCK AND MARY SANGER, ENVTL. DEF., SPOTLIGHT ON GROUNDWATER CONSERVATION DISTRICTS IN TEXAS 8-9 (2003), http://www.texaswatermatters.org/pdfs/groundwater_report.pdf.

⁷ *Id.* at 9.

⁸ *Id.*; *see also* TEX. WATER CODE ANN. § 36.201(b).

⁹ LAURA MARBURY AND MARY KELLY, ENVTL. DEF., 2005 UPDATE: SPOTLIGHT ON GROUNDWATER CONSERVATION DISTRICTS IN TEXAS 11 (2005) http://www.texaswatermatters.org/pdfs/articles/conservation_districts.pdf.

percent could not issue bonds, and approximately fifty percent did not have the authority to establish well production fees.¹¹

It is only with sufficient funding that Districts can serve the public and fulfill their mandate to protect and conserve the state's groundwater resources.¹² If municipalities ceased paying District fees, it would effectively cut off an important and substantial funding source for a number of Districts. The gravity of this problem is compounded by the projections that groundwater use by municipalities is expected to more than double in the next fifty years¹³ while the state's groundwater supplies decline.¹⁴ A finding of non-waiver may have the practical effect of forcing some Districts out of business. Having limited the methods by which each District can finance its operations, the Legislature surely did not intend to make funding impossible for those Districts that rely on fees. *See Members Mut. Ins. Co. v. Hermann Hosp.*, 659 S.W.2d 132, (Tex. App.—Houston [14th Dist.] 1983), *rev'd on other grounds*, 664 S.W.2d 325

¹⁰ These Districts include, among others, Brazos Valley, Pineywoods, Bluebonnet, Lost Pines, Mid-East Texas, Brock and Sanger, *supra*, Brazoria County, Corpus Christi Aquifer Storage and Recovery Conservation District, Lower Trinity, TEX. COMM'N ON ENVTL. QUALITY, TEX. WATER DEV. BOARD, PRIORITY GROUNDWATER MANAGEMENT AREAS AND GROUNDWATER CONSERVATION DISTRICTS, REPORT TO THE 80TH TEXAS LEGISLATURE 25-26 (January 2007), http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/053_05.pdf (last visited January 15, 2009), NECHES AND TRINITY VALLEYS, NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DIST., 1 THE WATER WORLD (March 2007), <http://www.ntvgcd.org/newsletter/docs/WaterWord-Vol.1.pdf>, and Upper Trinity, Upper Trinity Groundwater Conservation Dist., A Short History, <http://uppertrinitygcd.com/history.pdf> (last visited January 15, 2009).

¹¹ *MARBURY AND KELLY*, *supra*, at 11.

¹² *BROCK AND SANGER*, *supra*, at 10.

¹³ Tex. Water Dev. Board, 2006 Regional Water Plan (2007), http://www.twdb.state.tx.us/data/popwaterdemand/2003Projections/DemandProjections/mun_demand.htm (last visited January 15, 2009).

¹⁴ TEX. WATER DEV. BD., WATER FOR TEXAS: 2007, *supra*, at 176, 234-35.

(Tex. 1984) (“Where a statute is subject to two interpretations, it should not be given one which would cause the carrying out of its purpose to be impossible.”).

This Court has previously deferred to the Legislature’s authority to regulate groundwater and refused to “mov[e] into the arena of water-use regulation by judicial fiat.” *Sipriano*, 1 S.W.3d at 80. Like in *Sipriano*, “[i]t would be improper for [the Court] to intercede at this time by changing the common-law framework within which the Legislature has attempted to craft regulations to meet this state’s groundwater-conservation needs.” *Id.*

III. Waiver does not subject municipalities to the dangers governmental immunity was designed to protect.

The primary purpose of governmental immunity from suit is to protect state agencies and officials from lawsuits for money damages. *Reata v. Construct. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). In some situations, “a lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purpose.” *Id.* at 376. In others, corrupt contracts made by previous administrations, now tossed out of office, would have to be honored, frustrating democracy. See Major Bruce D. Page, Jr., *When Reliance is Detrimental: Economic, Moral, and Policy Arguments for Expectation Damages in Contracts Terminated for the Convenience of the Government*, 61 A.F. L. REV. 37 (2008) (discussing immunity and its effect on government to complete contract of previous administration even if not in the national interest to do so). In others, government would be the only deep pocket in a tort

case, paying big damages when most of the fault rests with private, but perhaps insolvent, co-defendants. See Carolyn Hacker, *Fair to Whom? Misapplication of the Fair Responsibility Act*, 39 CAL. W. L. REV. 69, 72 (2002) (citing CAL. CIV. CODE § 1431.1 (West 2008)) (discussing change in California’s joint and several liability scheme, or “deep pocket rule,” after suits “threatened financial bankruptcy of local governments [and] other public agencies”).

But these concerns are not implicated in this case. Waiver of governmental immunity is proper here because the enforcement provision of Chapter 36 “provide[s] an objective limitation on the [governmental entity’s] potential liability.” *Wichita Falls*, 106 S.W.3d at 698; see TEX. WATER CODE ANN. § 36.102. The types of remedy limitations in Chapter 36 are consistent with this Court’s prior holdings in similar governmental immunity waiver cases. See *City of Eagle Pass*, 14 S.W.3d at 806 (finding waiver and levying administrative penalties against city, as dictated in applicable statute finding of waiver); *Barfield*, 898 S.W.2d at 299 (finding waiver and awarding back pay to former employees); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (finding waiver and awarding attorneys fees). The court of appeals erred in directly contradicting these holdings and finding no waiver with regard to these remedies.

Aspermont’s reliance on this Court’s decisions in *Wichita* in support of its non-waiver argument is misplaced, as *Wichita* is based on a statute allowing for unlimited actual and exemplary damages, not enforcement of legislatively-created fees and corresponding penalties. See 106 S.W.3d at 698, 701 (“Unlike the statutes in *Barfield*, *Kerrville*, and *Leeper*, [the statute at issue in *Wichita*] would . . . subject the State to

indeterminate damage awards.”). The same can be said for Aspermont’s reliance on *City of Galveston v. State*, 217 S.W.3d 466, 468, 474 (Tex. 2007) (finding no waiver where negligence claim against city could lead to “potentially unlimited liability”).

In *Wichita*, a widow filed wrongful death and survival claims against Wichita Falls State Hospital after her husband committed suicide just four days after being released from treatment. 106 S.W.3d at 694. The widow alleged that her husband’s death was caused by the negligence of the treating physician and Hospital in failing to properly diagnose and treat her husband’s mental illness, and that the defendant’s acts and omissions violated the patient’s bill of rights. *Id.* The Court found no waiver of immunity based, in part, on the Legislature’s failure to include any limits on the damages available under the statute and the corresponding fear of such suits depleting the public treasury. *Id.* at 695, 701-02.

In *City of Galveston*, the State sued the City of Galveston over the “negligent installation, maintenance, and upkeep” of a water line that ruptured and damaged state property. 217 S.W.3d at 468. No statute limited the remedies available for such a claim. In finding no waiver of immunity, the Court expressly discussed concerns of “unlimited liability” and claims for “billion[s]” of dollars against municipalities if the Court were to find waiver in that case. *Id.* at 472, 474.

Allowing Districts to enforce regulatory fees against municipalities and other political subdivisions does not “open a can of worms” and subject cities to “potentially unlimited liability” as this Court feared in *Wichita* and *City of Galveston*. See *City of Galveston*, 217 S.W.3d at 474. No governmental functions are hampered by

requiring a municipality to pay for the cost of groundwater it transports from a water district to its own customers and allowing Districts to collect those fees when the municipality refuses to pay. And none of the purposes of governmental immunity are served by holding Aspermont immune from suit in this case and saddling private users with the cost of protecting everyone's water use.

Because the concerns before the Court in *Wichita* and *City of Galveston* are not at issue in this case, these cases provide an improper basis on which to assess whether the Legislature intended to waive immunity for municipalities under the Districts' enforcement provision. The fact that Aspermont must rely on cases so distinguishable from the facts at issue illustrates the weakness of its position.

CONCLUSION

If governmental immunity applies at all to these legislatively-mandated fees, the Legislature intended to waive that immunity. A finding of non-waiver renders Chapter 36's enforcement provision and related District regulations not only meaningless and ineffective, but raises constitutional concerns. Regulatory plans of Districts across the state will simply be ignored by municipalities and other governmental entities, fatally impacting District conservation efforts and depleting the funds on which these Districts operate. In allowing Districts to enforce non-payment of the fees against municipalities, the Legislature limited the remedies available to Districts in both kind and amount, thereby thwarting any argument that governmental immunity is necessary to protect municipalities from unlimited money judgments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief of Amicus Curiae, Texas Alliance of Groundwater Districts has been served upon the following counsel of record on the 2nd day of February, 2009 by certified mail:

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