IN THE SUPREME COURT OF TEXAS

NO. 19-0400

SAN JACINTO RIVER AUTHORITY, PETITIONER,

v.

VICENTE MEDINA, ASHLEY MEDINA AND ARIS ANTONIOU, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

~consolidated with ~

NO. 19-0401

SAN JACINTO RIVER AUTHORITY, PETITIONER,

v.

MICHAEL A. BURNEY, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

~consolidated with ~

NO. 19-0402

SAN JACINTO RIVER AUTHORITY, PETITIONER,

v.

CHARLES J. ARGENTO, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued October 6, 2020

JUSTICE DEVINE delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE BOYD, JUSTICE BUSBY, JUSTICE BLAND, and JUSTICE HUDDLE joined.

JUSTICE BLACKLOCK filed a dissenting opinion.

During Hurricane Harvey in 2017, the San Jacinto River Authority released water from its Lake Conroe reservoir into the San Jacinto River. Contending that this release caused or contributed to the flooding of their properties, downstream property owners filed three multi-party suits in two different district courts, asserting both common-law inverse condemnation claims under Article 1, Section 17 of the Texas Constitution and statutory takings claims under Chapter 2007 of the Government Code. These cases reach us as interlocutory appeals from trial

court orders denying the River Authority's motions to dismiss the three suits. The three cases have been consolidated for purposes of this appeal.[1]

The issue we must decide is whether Chapter 2007 applies strictly to regulatory takings, as the River Authority maintains, or whether it may also apply to a physical taking, as the property owners contend. The court of appeals affirmed the trial courts' orders, which denied the River Authority's motions to dismiss, concluding that Chapter 2007's statutory takings claim included the physical takings claim alleged in the property owners' pleadings. *San Jacinto River Auth. v. Burney,* 570 S.W.3d 820 (Tex. App. —Houston [1st Dist.] 2018). We agree and affirm.

I

The San Jacinto River Authority is a conservation and reclamation district created in 1937 as a political subdivision of the State of Texas.[2] The River Authority has many responsibilities, including "storing, controlling, and conserving storm and floodwaters of the San Jacinto River and its tributaries."[3]

In 1973, the River Authority completed the construction of an earthen dam across the West Fork of the San Jacinto River to create Lake Conroe. The River Authority has operated

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[1] Cause No. 19-0400, *San Jacinto River Auth. v. Vicente Medina, Ashley Medina, and Aris Antoniou*; Cause No. 19-0401, *San Jacinto River Auth. v. Michael A. Burney, Ginger R. Burney, Charles A. Casey, Maureen S. Casey, John M. Daniel, Carolyn F. Daniel, Robert C. Miles, Sherry K. Miles, Jack L. Nowlin, Linda S. Nowlin, Barry L. Shepherd, Becky A. Shepherd, Charles H.F. Wherry, Diane S. Wherry, Rodney M. Wolf, and Nancy L. Wolf*; and Cause No. 19-0402, *San Jacinto River Auth. v. Charles J. Argento, Katharine Argento, Kristofer D. Buchan, Melissa Buchan, Brandon Burgess, Diane Burgess, Jeff Ensley, Anne Ensley, John Faulkinberry, Laurie D. Faulkinberry, John R. Freeman, Barbara Freeman, Kurt V. Huseman, Debbie L. Huseman, William E. Lange, Jennifer Wood Lange, David L. Miller, Sally T. Miller, Willaim J. Napier, Jr., Christine D. Napier, James R. Revel, Louise W. Revel, Bernard F. Ryan, Cecilia M. Ryan, Dana M. Stegall,* Danny C. *Stegall, Todd R. Sumner, and Kimberly A. Sumner*.

[2] Act of May 12, 1937, 45th Leg., R.S., ch. 426, § 1, 1937 Tex. Gen. Laws 861, 861 (creating the San Jacinto River Conservation and Reclamation District). The District was renamed the "San Jacinto River Authority" in 1951. Act of May 14, 1951, 52nd Leg., R.S., ch. 366, § 1, 1951 Tex. Gen. Laws 617, 617.

[3] Act of May 12, 1937, 45th Leg., R.S., ch. 426, § 3(c), 1937 Tex. Gen. Laws 861, 862.

and maintained the lake and dam since that time. The dam is about thirty miles north of the property owners' homes and properties.

The property owners allege that during Hurricane Harvey in late August and early September 2017, the River Authority released rising water from Lake Conroe into the West Fork of the San Jacinto River, causing or exacerbating the downstream flooding of their properties. They seek damages from the River Authority in three separate lawsuits in Harris County district courts. Each suit alleges takings claims under both the Texas Constitution[4] and the Private Real Property Rights Preservation Act, which is codified as Chapter 2007 of the Texas Government Code.[5]

The River Authority filed Rule 91a motions to dismiss the property owners' suits on grounds of governmental immunity. *See* TEX. R. CIV. P. 91a. The district courts denied the motions, and the River Authority appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (authorizing an interlocutory appeal from an order on the government's jurisdictional plea). In that appeal, the River Authority raised a new jurisdictional argument, asserting that the county civil courts at law in Harris County possessed exclusive, original jurisdiction over eminent domain proceedings. *See* TEX. GOV'T CODE § 25.1032(c) ("A county civil court at law has exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse.").

The court of appeals agreed that the district courts of Harris County lacked jurisdiction over the property owners' inverse-condemnation claims and dismissed them without prejudice to

[4] *See* TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation . . .").

[5] *See* TEX. GOV'T CODE § 2007.021 (authorizing suit to determine whether a taking has occurred under Chapter 2007).

refile in the proper court. 570 S.W.3d at 838–39. Concluding that the district courts otherwise possessed jurisdiction to determine the property owners' statutory takings claims under Chapter 2007, the court of appeals affirmed the trial courts' decision not to dismiss them. *Id*. at 839; *see also* TEX. GOV'T CODE § 2007.021(a) (stating that takings claims under the chapter "must be filed in a district court"). The River Authority's petition for review to this Court complains that the appellate court erred in not also dismissing the property owners' statutory claims because the taking alleged in their pleadings is outside Chapter 2007's scope and limited waiver of sovereign immunity.

II

Sovereign and governmental immunity protect the state and its political subdivisions, respectively, from suit and liability absent the state's express waiver. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93 (Tex. 2012). Chapter 2007's Property Rights Act waives that immunity "to the extent of liability created by this chapter" by authorizing a property owner to bring suit "to determine whether the governmental action of a political subdivision results in a taking under this chapter." TEX. GOV'T CODE §§ 2007.004(a), .021(a). The Act defines the term "taking" to include governmental actions compensable as takings under the state and federal constitutions, as well as less intrusive governmental actions that cause "a reduction of at least 25 percent in the market value of the affected private real property." *Id.* § 2007.002(5). The Property Rights Act further enumerates the governmental actions to which it applies, while specifying fourteen governmental actions to which it does not apply. *Id.* § 2007.003.

The River Authority makes a twofold argument that the Act's waiver of governmental immunity does not apply to its decision to release water from the Lake Conroe reservoir. First, it

contends that the Act applies only to regulatory takings and not the physical taking alleged by the property owners; that is, the flooding allegedly caused by the River Authority. Alternatively, the Authority maintains that even if the Act might be construed to cover a physical taking, its actions here are nevertheless excluded because they were responsive to "a grave and immediate threat to life and property." *See id*. § 2007.003(b)(7). We consider these arguments in turn.

III

The River Authority contends that Chapter 2007 applies to regulatory takings only. Takings may be classified as either physical or regulatory. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004). A physical taking occurs when the government literally takes property from its owner, such as when it "authorizes an unwarranted physical occupation of an individual's property." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998). A regulatory taking occurs when the government restricts a property owner's rights to such an extent as to become the functional equivalent of a physical seizure. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 490 (Tex. 2012). The River Authority maintains that a fair reading of the chapter indicates (1) that the liability created here is only for regulatory takings (not the physical taking alleged in the property owners' pleadings) and (2) that governmental immunity is waived only for suits to invalidate and rescind such regulations.

The court of appeals disagreed. It "reject[ed] the River Authority's contention that Chapter 2007 applies only to regulatory takings and does not apply to physical takings, such as flooding," noting that "the statute expressly applies to a governmental action 'that imposes a physical invasion . . . of private real property.'" 570 S.W.3d at 832 (quoting TEX. GOV'T CODE § 2007.003(a)(2)). The court relied further on the chapter's broad definition of "taking." That

definition includes both regulatory and physical takings. *See id*. at 831 (noting the inclusion of compensable takings under both the state and federal constitutions in the statutory definition). The court accordingly concluded that the property owners' allegations of a physical taking were sufficient to invoke the chapter's waiver of governmental immunity. *Id*. at 832.

The River Authority maintains that the court of appeals has misinterpreted the physical-invasion provision to expand the chapter's scope to physical takings. It concedes, however, that governmental actions that impose a "physical invasion" of real property can refer to either a physical or regulatory taking. But in the context of this statute, it reasonably refers only to the latter, according to the River Authority.

> The statute states that the chapter "applies only to the following governmental actions:"
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> (1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure;
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> (2) *an action that imposes a physical invasion* or requires a dedication or exaction *of private real property*;
>
> (3) an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality; and
>
> (4) enforcement of a governmental action listed in Subdivisions (1) through (3), whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.

TEX. GOV'T CODE § 2007.003(a)(1)–(4) (emphasis added). Because each action on the list can refer to a regulatory taking, the River Authority argues that "physical invasion" should be interpreted similarly and not as an outlier, different in type from the other enumerated actions. Although a physical invasion can refer to either a physical or regulatory taking, the River

Authority contends that the words here refer only to regulatory takings, like the actions of "dedication" or "exaction," which appear along with physical invasion in Section 2007.003(a)(2). *See Hearts Bluff Game Ranch*, 381 S.W.3d at 477 n.20 (referring to the terms exaction and dedication as "somewhat distinct types of regulatory takings matters"). Moreover, interpreting "physical invasion" to reference a regulatory taking only is consistent with the other enumerated governmental actions, which the River Authority submits are also regulatory in nature. *See* TEX. GOV'T CODE § 2007.003(a)(1), (3). Finally, the River Authority observes that "the text does not include the primary mode for physical takings: a condemnation petition filed in court," citing section 21.012 of the Texas Property Code.

Indeed, it does not. In fact, the chapter expressly excludes formal condemnation proceedings from its scope. *See* TEX. GOV'T CODE § 2007.003(b)(8) (excluding "a formal exercise of the power of eminent domain" from the chapter). Condemnation is the formal process by which private property is taken for a public use without the owner's consent, but on the payment of adequate compensation. *See* TEX. PROP. CODE § 21.012 (stating the requirements for a condemnation petition); 17 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE §§ 261.40–.47 (2020) (discussing procedure for exercising eminent domain power). When the government takes or damages property without first initiating formal condemnation proceedings, however, the owner of private property may bring a common-law action for inverse condemnation. *State v. Brownlow*, 319 S.W.3d 649, 652 (Tex. 2010) (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992)). The action is referred to as inverse because the property owner initiates a common-law action to recover compensation for a taking that has already occurred instead of the government initiating a formal statutory proceeding to determine

appropriate compensation for a prospective taking. *City of Dallas v. Stewart*, 361 S.W.3d 562, 567 (Tex. 2012). But as noted, Chapter 2007 expressly excludes formal condemnation proceedings. TEX. GOV'T CODE § 2007.003(b)(8). It does not similarly exclude claims for inverse condemnation.

The property owners argue that the exclusion of formal condemnation proceedings from the chapter, which the River Authority describes as "the primary mode for physical takings," confirms that Chapter 2007's application is not limited to regulatory takings. They submit that this exclusion is rendered superfluous under the River Authority's proposed limitation of the chapter to regulatory matters. It merely excludes that which the River Authority maintains is not included to begin with. The property owners argue that the exclusion has meaning only if Chapter 2007 otherwise applies to non-regulatory physical invasions that result in a physical taking of real property. The Legislature could have excluded all non-regulatory physical invasions of real property from the chapter's scope, just as it excluded the "formal exercise of the power of eminent domain" and thirteen other actions, many of which the property owners submit also include non-regulatory, physical takings. *See, e.g.*, *id.* § 2007.003(b)(2), (3), (6), (7), (8), and (13).

The property owners also maintain that the statute's physical-invasion provision expressly states what these statutory exclusions imply, that the chapter does not apply solely to regulatory takings. The chapter instead applies to non-regulatory governmental actions, such as the water release from the reservoir that flooded their properties and thus "impose[d] a physical invasion . . . of private real property." *Id.* § 2007.003(a)(2). The property owners conclude that construing the physical-invasion provision to include physical takings gives meaning to that text

and harmonizes it with the chapter's suit-authorization language, *id*. § 2007.021(a), and taking's definition, *id*. § 2007.002(5). We agree.

The chapter provides that private property owners may bring suit to determine whether governmental action results in a "taking under this chapter." *Id*. § 2007.021(a). "Taking" is defined broadly to include governmental actions that satisfy the takings standard under the federal or state constitution or that reduce the market value of the affected property by at least 25 percent. *Id*. § 2007.002(5). A compensable taking under the state or federal constitution can be physical or regulatory. *Gragg*, 151 S.W.3d at 554. And we have held under somewhat similar circumstances that a political subdivision's decision to flood downstream properties for a public purpose can be compensable as a physical taking under the Texas Constitution. *Id*. at 554–55 (citing TEX. CONST. art. I, § 17). Chapter 2007 thus authorizes a statutory takings suit for governmental actions that constitute takings under the state or federal constitution (either physical or regulatory) or that cause a reduction of at least 25 percent in market value.

The River Authority does not deny the breadth of these provisions, nor does it deny that "physical invasion" may refer to a physical taking. Rather, it argues that a physical invasion can also be the consequence of a regulatory taking and that we should construe the language here to reference only that type of taking because that construction better fits the statutory scheme and its remedies. For example, Subchapter C of the statute envisions an orderly process through which a political subdivision proposes a covered governmental action that may result in a taking, prepares a written takings impact assessment of that action, and provides a 30-day public notice of its intentions. TEX. GOV'T CODE §§ 2007.042 (public notice), .043 (takings impact assessment). If the governmental action is found to be a taking under the chapter, the "property

owner is only entitled to, and the governmental entity is only liable for, invalidation of the governmental action." *Id.* § 2007.023. The chapter does not obligate the governmental entity to pay damages. Instead, the River Authority submits that this statutory scheme establishes a new procedure for preventing excessive regulatory takings before they occur, allowing for a single remedy: a judgment rescinding the challenged action. *Id.* § 2007.024(a). It submits that these requirements cannot be satisfied during a tropical storm and that the chapter's remedy is of no benefit to the property owners, in any event, because they seek only damages caused by the flooding.

The Attorney General makes a similar argument as amicus curiae in support of the River Authority's petition for review. The Attorney General argues that the property owners lack standing under Chapter 2007 because the chapter offers them no prospect of redress. The only relief the property owners seek is an award of damages, and that is the only relief that can redress their alleged injuries. But the chapter does not include the judicial power to award damages. The chapter's only remedy for a taking is invalidation and rescission, which, the Attorney General argues, is not possible here. The River Authority echoes this sentiment. It argues that Chapter 2007's declaratory remedies serve a purpose only when a regulatory taking can be undone and that here it cannot rescind the floodwaters back into the reservoir.

We agree that Chapter 2007 does not obligate a governmental entity to pay damages. We also agree that rescission is not what the property owners seek. But we do not agree that rescission is the only remedy available to a prevailing property owner under the chapter. Chapter 2007 plainly provides for more than just rescission. *See id.* § 2007.006(a) ("The *remedies* provided by this chapter are in addition to other procedures or remedies provide by

law." (emphasis added)). For example, the property owners may sue to adjudicate whether governmental actions result in a taking under the chapter, *id.* § 2007.021; they are entitled to a "takings" determination made by the trier of fact, *id.* § 2007.023(b); they are entitled to invalidation of the governmental action resulting in the taking, *id.*; they are entitled to a judgment that "include[s] a fact finding that determines the monetary damages suffered by the private real property owner as a result of the taking," *id.* § 2007.024(b); and they are entitled to an award of attorneys' fees and costs, if they prevail, *id.* § 2007.026(a). Thus, even though damages are not generally available[6] under the chapter, the statute does provide additional relief beyond that available to the property owners at common law for inverse condemnation.

The Dissent, however, would relegate the property owners to their constitutional remedy under the takings clause and dismiss their statutory claims for lack of jurisdiction. *Post* at ___. The Dissent submits that the most the property owners can hope to achieve under their statutory claim is a judicial determination that the flooding of their homes was a taking and the cause of an identified amount of damages. *Id.* at ___. It describes these determinations as "abstract" and of "no practical effect" without the government's consent. *Id.* at ___. But the government has consented to this suit and to liability, and whether it chooses to pay the amount of damages determined under the statute is not a matter of jurisdictional concern.

The state has waived its immunity from suit and liability "to the extent of liability created by [Chapter 2007]" and has authorized suits against its political subdivisions to determine "whether the governmental action of a political subdivision results in a taking under this

[6] A judgment, final decision, or order under Chapter 2007, Subchapter B, must include a fact finding of the monetary damages caused by the taking, but the governmental entity is not obligated to pay those damages. TEX. GOV'T CODE § 2007.024(b). If the governmental entity does not wish to rescind the action that caused the taking, however, it "may elect to pay the damages as compensation" and its "immunity to liability is waived to the extent the governmental entity elects to pay." *Id.* § 2007.024(c).

chapter." TEX. GOV'T CODE §§ 2007.004(a), .021(a). If the property owner can establish a taking under the statutory definition, the property owner is entitled to invalidation of the governmental action resulting in the taking. *Id*. § 2007.023(b). The chapter further provides for alternative remedies of either rescission or damages for the taking. *Id*. § 2007.024. Damages are payable at the governmental entity's election from funds appropriated to it. *Id*. § 2007.024(c), (f).

Because the Dissent views the government's election to pay damages as unlikely and the rescission of prior governmental action as inconsequential, it concludes that any judgment the court might render would be "merely advisory" and intrude on the other branches of government. *Post* at ___ (citing *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 488 (Tex. 2018)). But it is the Legislature that has waived immunity from suit and liability for statutory takings and provided for these alternative remedies. That the government might decline to pay damages is no reason to dismiss the pending suits on jurisdictional grounds. Even if the statute had not waived immunity from liability to determine these damages, that would not affect a court's jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam) (explaining that immunity from liability is an "affirmative defens[e]" that "does not affect a court's jurisdiction to hear a case"). The Dissent's contrary rule would nullify many legislative grants of permission to sue, as any resulting suit against the government would fail the Dissent's redressability test if the government retains immunity from liability or limits collectability or enforcement of a judgment. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE §§ 101.107(a), 101.109, 107.002(b), 114.001; *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 414 (Tex. 1997) (Hecht, J.,

concurring) (noting that even without "governmental immunity from contract suits, successful plaintiffs still could not be paid without legislative appropriation").

Nor is it a reason to dismiss the statutory claim merely on the possibility that the constitution may provide the desired remedy. The taking defined by the chapter is broader than that cognizable under the constitution, and the remedy the statute provides may be all that is available to some of the property owners in these suits.

The statutory remedies are cumulative of other law but, of course, cannot be used to recover twice "for the same economic loss." TEX. GOV'T CODE § 2007.006(b). Moreover, the definition of "taking" does not say that the offending governmental action must be rescindable, continuous, or recurring, but instead provides that it may be actionable even though temporary or permanent. *Id*. § 2007.002(5)(A). Thus, we conclude that the statute's rescission remedy, while most relevant to a regulatory taking, does not otherwise modify or limit the scope of an actionable taking under the chapter or provide the basis for dismissal on jurisdictional grounds.

Similarly, the requirements and formal procedures that apply to proposed governmental action under Subchapter C of the statute do not limit the chapter's scope to regulatory takings only. Subchapter C may be concerned with regulatory matters, providing as it does for a takings impact assessment and public notice of proposed governmental action. But Subchapter C independently provides for a suit to invalidate governmental action, stating that "[a] governmental action *requiring a takings impact assessment* is void if an assessment is not prepared." *Id*. § 2007.044(a) (emphasis added). The subchapter authorizes an affected property owner to "bring suit for a declaration of the invalidity of the governmental action" and again provides for an award of reasonable attorney's fees and court costs to a prevailing property

owner. *Id*. § 2007.044(a), (c). The subchapter suggests, however, that not every governmental action or taking under Chapter 2007 implicates these requirements. Indeed, the subchapter's title states that its requirements are for "proposed governmental action."

We conclude that Chapter 2007 does not expressly limit its application to regulatory takings nor does it expressly exclude all physical takings from its terms. We note further that Subchapter C, titled "Requirements For Proposed Governmental Action," focuses on prospective regulatory takings and authorizes an affected property owner to "bring suit for a declaration of the invalidity of the governmental action" if the required takings impact assessment has not been done. *Id*. § 2007.044(a). The property owners obviously do not seek relief under that subchapter.

Their suit is instead under Subchapter B to determine whether the physical invasion of their properties by the River Authority's release of floodwaters constitutes a taking. *Id*. § 2007.021(a). As we have observed: "The Property Rights Act creates two causes of action in favor of real property owners: (1) a statutory cause of action for taking; and (2) a cause of action based on governmental action taken without preparing a TIA [takings impact assessment], if the Property Rights Act requires a TIA." *Bragg v. Edwards Aquifer Auth*., 71 S.W.3d 729, 734–35 (Tex. 2002). Subchapter B authorizes a private real property owner to "bring suit under this subchapter to determine whether the governmental action of a political subdivision results in a taking" under the statute. TEX. GOV'T CODE § 2007.021(a). The statute's "General Provisions" in Subchapter A define "taking" to include both physical and regulatory takings, and governmental action to include, among other things, the "physical invasion" of property, which the parties agree may refer to either type of taking. *Id*. §§ 2007.002(5), .003(a)(2).

The River Authority nevertheless maintains that the lower courts should have dismissed the property owners' statutory claims because Chapter 2007 does not waive governmental immunity for physical takings, which is all that the property owners have alleged. The court of appeals rejected that notion, and we agree that the chapter does not apply exclusively to regulatory takings. If that were true, no need would exist for several of the chapter's exclusions, including the two that the River Authority argues must apply to the actions it took during the Hurricane Harvey weather emergency. "As a general principle, we eschew constructions of a statute that render any statutory language meaningless or superfluous." *City of Dallas v. TCI W. End, Inc*., 463 S.W.3d 53, 57 (Tex. 2015) (per curiam); *see Spence v. Fenchler*, 180 S.W. 597, 601 (Tex. 1915) ("It is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous or inoperative.").

IV

We next consider the application of the statutory exceptions raised by the River Authority in the context of its motion to dismiss under Texas Rule of Civil Procedure 91a.

Chapter 2007 expressly excludes fourteen types of government actions, two of which apply here, according to the River Authority. *See* TEX. GOV'T CODE § 2007.003(b) (listing the governmental actions excluded from the chapter). The chapter does not apply to:

> (7) an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property;
>
> * * *
>
> (13) an action that: (A) is taken in response to a real and substantial threat to public health and safety; (B) is designed to significantly advance the health and

> safety purpose; and (C) does not impose a greater burden than is necessary to achieve the health and safety purpose[.]

Id. § 2007(b)(7), (13). Because Chapter 2007 excludes certain emergency situations and responses, the River Authority argues that its actions here, which were responsive to a weather emergency, preclude the property owners' statutory claims. It concludes that the statutory claims should therefore have been dismissed under Rule 91a, rather than remanded to the trial court.

Rule 91a provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id*. In ruling on a Rule 91a motion, a court "may not consider evidence . . . and must decide the motion based solely on the pleading of the cause of action." *Id*. 91a.6. We review the merits of a Rule 91a motion de novo. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam).

The River Authority argues that, as a matter of law and common sense, no reasonable person could believe Hurricane Harvey was not "a grave and immediate threat to life or property" or "a real and substantial threat to public health and safety." TEX. GOV'T CODE § 2007(b)(7), (13). It asks the Court to take judicial notice of the disaster declarations made by the President and Governor to establish that the River Authority was reacting to an emergency situation during the time it allegedly flooded the property owners' homes. The court of appeals declined to take judicial notice of the River Authority's proffered evidence, noting that Rule 91a expressly prohibits a court's consideration of evidence and expressly requires that the motion be

decided on the pleadings. 570 S.W.3d at 831. But even without judicial notice, the River Authority maintains that the property owners' pleadings similarly demonstrate that Hurricane Harvey presented an emergency that threatened life and property by indicating that the River Authority's purpose in releasing the water was to protect the integrity of the dam, maintain control over its flood gates, and protect upstream properties from flooding, among other things.

The property owners respond that the factual allegations in their pleadings do not conclusively establish either exclusion. They describe the statutory exclusions as affirmative defenses, which under Rule 91a must "be conclusively established by the facts in a plaintiff's petition." *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020). They submit that these exclusions raise inherent fact questions, which their pleadings do not resolve. For example, the pleadings do not conclusively establish the (b)(7) exclusion because the property owners have never asserted that the River Authority released water as it did with a reasonable good faith belief that doing so was necessary to prevent a grave and imminent threat to the dam's structure and operation. To the contrary, their pleadings indicate that the River Authority knew the dam could withstand much more rainfall and much higher inflow rates than the watershed rainfall and inflow rates experienced during Harvey and that it also knew the water from Harvey could have been released at much slower rates without damaging the dam or losing control of its floodgates. The River Authority allegedly knew this from another weather event decades earlier, which, according to the property owners, dropped almost twice as much rain in the watershed over a similar four-day period, with corresponding larger peak inflows and yet resulted in much slower and less damaging water release rates. Based on these allegations, the property owners submit a reasonable person could conclude that

the River Authority did not have a reasonable good faith belief that it was necessary to release water as it did to prevent a grave and immediate threat to life or property.

The property owners further maintain that the River Authority knew it was unnecessary to release water as it did to "prevent a grave and immediate threat to" the dam and its floodgates because Lake Conroe had the capacity to store additional floodwaters until Harvey passed. In this regard, they note the existence of a flowage easement, which allows the River Authority to store water up to 207 feet above mean sea level "during storm events." The recorded easement "notif[ies] landowners that any structures below this elevation are subject to being flooded."

According to the pleadings, Lake Conroe's water or pool level did not reach 207 feet above mean sea level during the storm. After the water reached its highest level of 206.24 feet, the River Authority began releasing water at record flow rates, reducing the pool level by about three and one-half feet over forty-eight hours and allegedly causing devastating flooding downstream. The property owners thus complain that the River Authority did not use all available capacity to store floodwaters during Harvey, even though it could have done so without threatening the dam's structural integrity. They submit that, as with the allegations regarding rainfall and flow rates, a reasonable person could conclude that the River Authority did not have a reasonable good faith belief that it was necessary to release water as it did to prevent a grave and immediate threat to life or property, based on their pleadings.

The River Authority, however, reads the plaintiffs' pleadings as an admission of its own good faith. It argues that the plaintiffs' pleadings concede that the River Authority released water "to relieve pressure on the dam" and "protect its stability and integrity" and thus conclusively establish its good faith in the matter.

Not so, the property owners respond. They submit that these phrases in their pleadings merely refer to the various public purposes supposedly furthered by the River Authority's decision to flood their downstream properties. The court of appeals agreed, summarizing these various public purpose allegations from the pleadings in its opinion:

> Regarding the public-use element, the homeowners alleged that in the face of Hurricane Harvey and other circumstances, the River Authority faced a choice. The River Authority could do nothing as the water level rose and accept all the associated risks. Or it could release floodwaters that it knew would cause "devastating flooding downstream" with "catastrophic consequences." The River Authority "chose the latter option and intentionally, knowingly, affirmatively and consciously inundated, flooded, took, inversely condemned and sacrificed" the homeowners' property for the greater public good.
>
> The homeowners also alleged that the River Authority's intentional, knowing, affirmative, and conscious acts, conduct, and decisions were done for public use. They alleged that the River Authority's management and operation of the lake, dam, and related infrastructure, combined with its release of water between late August and early September 2017, was done for public use because the governmental actions protected the stability and integrity of the dam, its earthen embankment, and other infrastructure; ensured that the lake would continue to be available for use as a reservoir for critical freshwater storage and for recreational activities and sporting uses like boating and fishing once the storm and its effects had passed; protected and spared homes and other properties on the lake and upstream from flooding; minimized the danger to the public by keeping docks, bulkheads, small islands, and other structures unsubmerged for as long as possible; minimized the danger to the public associated with electrical outlets and equipment coming into contact with water; and enabled the lake, adjacent parks, and adjacent roads to reopen and become fully operational as quickly as possible for the public's benefit.

570 S.W.3d at 837.

The property owners submit that their pleadings do not establish that the River Authority's actions met either the "reasonable good faith belief" test of (b)(7) or the measured-and-appropriate response required by (b)(13). Rather, they submit that the River Authority's reasonable good faith belief that it was necessary to release the water as it did or whether its

actions imposed a greater burden than necessary to protect public safety are fact questions which their pleadings do not answer. *See* TEX. GOV'T CODE § 2007.003(b)(7) (excluding "an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat"); *id*. § 2007.003(b)(13) (requiring that the governmental action "not impose a greater burden than is necessary to achieve . . . safety"). The property owners' pleadings thus put at issue whether it was reasonable or necessary for the River Authority to release the floodwaters as it did.

The pleadings assert that Lake Conroe's water level can exceed 207 feet above mean sea level for a short time without threatening the dam's structural integrity when necessary to minimize risk to life and property on both sides of the dam. The pleadings further compare Harvey to another slow-moving storm decades earlier that the property owners allege produced more rainfall and higher inflow rates, but which the River Authority managed with slower release rates. The pleadings also allege that the River Authority had additional capacity to store Harvey's floodwaters without harm to the dam and note the existence of upstream flood easements for water levels at 207 feet above mean sea level, ostensibly for this purpose. The property owners submit that a reasonable person might therefore conclude that the River Authority could have stored more water and released it more slowly, while protecting the dam's structure and operations. The pleadings thus suggest that the River Authority's experience with the prior extreme weather event bear on the application of these exclusions and the reasonableness of the burden cast on the downstream property owners.

The River Authority vividly responds that "[d]odging a bullet once does not make later gunfire any less life-threatening." Thus, a disaster avoided in a previous storm does not allow

reasonable persons to believe Harvey posed no threat to life or property. While that may be true, neither does it establish as a matter of law the elements of the two exclusions at issue. The pleadings indicate that the River Authority's knowledge and past experiences inform the issues of good faith and reasonableness entwined in the two exclusions. The parties have not briefed the meaning of good faith in the context of this statute, and we accordingly express no opinion on the subject. We hold only that the property owners' pleadings do not conclusively establish either statutory exception, which is what Rule 91a demands. The lower courts accordingly did not err in denying the Rule 91a motions to dismiss.

* * * * *

In summary, we hold that Chapter 2007 creates liability and waives governmental immunity for two causes of action: (1) a statutory takings claim under Subchapter B and (2) a suit to rescind proposed governmental action under Subchapter C. We hold further that the statutory takings claim may include a physical taking, such as the flooding alleged by the property owners, and is not limited solely to regulatory takings. Finally, we conclude that statutory exceptions to liability under the chapter are not established by the property owner's pleadings and that the court of appeals therefore did not err in affirming the trial courts' orders, which denied the River Authority's motions to dismiss under Rule 91a.

The judgment of the court of appeals is affirmed.

_____
John P. Devine
Justice

OPINION DELIVERED: April 16, 2021

IN THE SUPREME COURT OF TEXAS

NO. 19-0400

SAN JACINTO RIVER AUTHORITY, PETITIONER,

v.

VICENTE MEDINA, ASHLEY MEDINA AND ARIS ANTONIOU, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

~consolidated with ~

NO. 19-0401

SAN JACINTO RIVER AUTHORITY, PETITIONER,

v.

MICHAEL A. BURNEY, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

~consolidated with ~

NO. 19-0402

SAN JACINTO RIVER AUTHORITY, PETITIONER,

v.

CHARLES J. ARGENTO, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

JUSTICE BLACKLOCK, dissenting.

This Court held long ago that a dispute "is not a judicial question" if a court's "judgment would only amount to a declaration" that an unlawful act had taken place, which "might result incidentally in benefit . . . to some citizen" but is "not . . . enforced by any process issued from the court." *State v. Owens*, 63 Tex. 261, 266 (1885). This rule exists because Texas courts, including this one, exercise only "the *judicial power* of the state . . . ." TEX. CONST. art. V, § 3 (emphasis added). The judicial power does not include the authority to answer an "abstract question of law without binding the parties." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Instead, the "judicial power" is the authority "of a court to . . . pronounce a judgment *and carry it into effect* between . . . parties who bring a case before it for a decision." *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933) (emphasis added).

The "redressability" element of standing preserves these limitations on the judicial power. To establish a court's jurisdiction, the plaintiff must show that its alleged injury "will 'likely' . . .

be 'redressed by a favorable decision.'" *Heckman v. Williamson County*, 369 S.W.3d 137, 154–55 (Tex. 2012) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). A "lawsuit does not fall within [the constitutional] grant of judicial authority unless, among other things, courts have the *power* to 'redress' the 'injury'" alleged by the plaintiff. *Utah v. Evans*, 536 U.S. 452, 459 (2002) (emphasis added).

Contrary to these well-established limitations on the judicial power, the Court's decision authorizes a statutory takings claim under Chapter 2007 of the Government Code even though a favorable judgment on that claim would do nothing to redress the plaintiffs' alleged injury. The alleged injury is the flooding of the plaintiffs' homes during Hurricane Harvey as a result of the San Jacinto River Authority's decision to release water from Lake Conroe. Years after the fact, that injury can only be redressed by monetary damages, and the plaintiffs have a claim pending in another lawsuit seeking takings damages through the normal channels. Chapter 2007, however, creates a unique statutory cause of action under which the courts have no authority to award damages. Instead, Chapter 2007 *requires* the courts, if the plaintiff prevails, to issue a judgment "rescinding" the taking. In this case, such a judgment would be nonsensical. The flooding of homes several years ago cannot be undone, so judicial "rescission" of the taking is a meaningless gesture that does nothing for the plaintiffs.

The most the plaintiffs could hope to achieve using Chapter 2007 is a free-floating judicial "finding" that the flooding of their homes was a taking by the SJRA resulting in damages in an amount identified by the court. They cannot use Chapter 2007 to actually obligate the SJRA pay that amount, which would be the only way to redress their injuries. Indeed, the judgment the plaintiffs seek would not require the SJRA to do or refrain from doing anything. The plaintiffs,

however, anticipate that the judgment's persuasive, precedential, or preclusive effect would help them obtain damages from the SJRA in the future, either in another lawsuit or by the SJRA's voluntary decision to pay. In other words, their Chapter 2007 claims invite the courts to "decid[e] a question . . . abstract in its nature . . . simply to be taken notice of and observed by all officers and citizens." *Ex parte Towles*, 48 Tex. 413, 436 (1877). This is precisely the sort of "extra-judicial question" that is not properly "a subject of legal adjudication." *Id.* at 437.

I would dismiss the Chapter 2007 claims for lack of jurisdiction. Although Chapter 2007 is not an appropriate vehicle for the plaintiffs' grievances, they are of course free to pursue their pending constitutional takings claims in the county court at law.

I.

Standing—which consists of a concrete, particularized stake in the resolution of "a real controversy" capable of "be[ing] resolved by the court"—is a constitutional requirement for maintaining suit. *Heckman*, 369 S.W.3d at 154, 150. As a component of subject matter jurisdiction, standing "may be raised for the first time on appeal." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018). Even where neither party questions standing, as here, courts are "duty-bound" to consider the issue *sua sponte* if in doubt. *Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019).[1] Although this Court did not explicitly adopt the U.S. Supreme Court's standing jurisprudence until 1993, the principles animating the modern standing requirement in Texas courts are at least as old as the Texas Constitution. Our Constitution vests "the judicial

[1] Although the parties themselves did not raise standing, *amicus* the State of Texas briefed the issue thoroughly, and the plaintiffs had ample opportunity to respond to those arguments.

power" in the courts, art. V, § 1, and prohibits the judiciary from "exercis[ing] any power properly attached to either" the legislative or executive branches, art. II, § 1.[2] This Court has defined the "judicial power" as the authority "of a court to . . . pronounce a judgment *and carry it into effect* between . . . parties who bring a case before it for a decision." *Morrow*, 62 S.W.2d at 644 (emphasis added). The "character stamped upon [the courts] by the Constitution" is that of arbiters of disputes "in which there are usually contesting parties; some valuable right recovered or adjudged; a judgment of record, *and execution to enforce it*." *Towles*, 48 Tex. at 433 (1877) (emphasis added). To decide a case brought by a party without standing would constitute an impermissible "advisory" opinion, in that it would "address[] only a hypothetical injury" or "abstract question of law without binding the parties." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

Article III of the U.S. Constitution imposes an analogous standing requirement in federal courts. *See Lujan*, 504 U.S. at 561. This Court has adopted the standing criteria articulated by the U.S. Supreme Court as a means of evaluating litigants' standing under the Texas Constitution. *Heckman*, 369 S.W.3d at 154. To establish standing under this framework, a plaintiff must plead facts showing that (1) he or she has suffered, or is at imminent risk of suffering, a "concrete and

[2] This language has been part of the Texas Constitution since its ratification in 1876, and substantially identical vesting and separation-of-powers clauses appeared in all four of the State's previous constitutions since statehood in 1845. Recognizing that "constitutional language . . . means to-day what it meant . . . when . . . adopted," *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1012 (Tex. 1934), this Court has held that such language "must be interpreted in light of the historical context in which it was enacted," *Travelers Indem. Co. of Ill. v. Fuller*, 892 S.W.2d 848, 850 (Tex. 1995). Historically informed interpretation is especially important to understanding a capacious constitutional "term[] ('The judicial Power' . . .) that ha[s] virtually no meaning except by reference to . . . . the traditional, fundamental limitations upon the powers of . . . courts." *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting). Although I believe modern standing case law requires dismissal of this case, Texas cases and other sources written prior to or contemporaneously with the Texas Constitution's adoption also support the conclusion that this case is outside our power to decide. *See Towles*, 48 Tex. at 436 (1877) ("question[s] . . . abstract in [their] nature" are "extra-judicial" matters not properly the "subject[s] of legal adjudication"); 1 BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, A TREATISE UPON THE UNITED STATES COURTS 186 (1869) ("determinations of the judicial power are limited to . . . determinations of . . . concrete *rights*, and cannot extend to purely abstract questions.").

particularized . . . injury"; (2) the injury is "traceable" to the defendant's challenged actions; and (3) the injury will "'likely' . . . be 'redressed by a favorable decision.'" *Id.* at 154–55 (quoting *Lujan*, 504 U.S. at 560–61). We often look to federal case law for guidance in applying these criteria. *Id.* at 152 n.60. Although this Court does not defer uncritically to the federal judiciary when interpreting the Texas Constitution, we afford respectful consideration to federal decisions to the extent they are "well-reasoned and persuasive." *Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992).

Redressability is the element of standing most clearly implicated in this case. This "concept has been ingrained" in American "jurisprudence from the beginning." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998). A "lawsuit does not fall within [the constitutional] grant of judicial authority unless, among other things, courts have the *power* to 'redress' the 'injury'" alleged by the plaintiff. *Evans*, 536 U.S. at 459 (emphasis added). Indeed, the U.S. Supreme Court had described it as an "established . . . principle of constitutional law" prior to the Texas Constitution's adoption that a "[c]ourt . . . has no jurisdiction" over a dispute in which it is not "authorized by law" to issue a "mandate to carry into effect" its judgment. *Gordon v. United States*, 69 U.S. 561 (1864), *opinion reported*, 117 U.S. 697 (1885). To decide such a case would be to exercise a power not "judicial in its character." *Id.*; *accord McNulty v. Batty*, 51 U.S. 72, 79 (1850).

II.

With these principles in mind, the question is whether a favorable judgment under Chapter 2007 can redress the plaintiffs' alleged injuries. This inquiry, like any question of statutory interpretation, depends on the statute's plain language. *See Entergy Gulf States, Inc. v. Summers*,

282 S.W.3d 433, 437 (Tex. 2009). "Time-honored canons of interpretation, both semantic and contextual, can aid interpretation." *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 84 (Tex. 2017). "Strictly speaking," however, the "canons" are "but grounds of argument resorted to for . . . ascertaining the true meaning of the law." *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) (quoting *Mills County v. Lampasas County*, 40 S.W. 403, 404 (Tex. 1897)). However strong the desire to afford relief for deprivations of the fundamental right to property, such "policy concerns do[] not bear directly on . . . statutory-interpretation question[s]." *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 490 (Tex. 2019). "Our job is to apply the statutory text as written, not as we would have written it." *Id*.

Chapter 2007 says that a property owner who prevails "is *only* entitled to, and the governmental entity is *only* liable for, invalidation of the governmental action . . . resulting in the taking." TEX. GOV'T CODE § 2007.023 (emphasis added). It further provides that a court "shall order [a] governmental entity to rescind" an action found to be a taking. *Id*. § 2007.024. Far from authorizing a court to award damages, this language negates the existence of such authority. "There is a difference between voiding" an official act "and seeking damages as a remedy for [that] act." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995). The statute reflects a deliberate legislative choice to provide "only" for courts to order rescission/invalidation, not damages. Yet only damages can redress the injury that brings these plaintiffs to court.[3]

[3] Other claims do provide for damages that would redress the plaintiffs' injuries, such as an inverse-condemnation claim in county courts, which have exclusive jurisdiction over such claims. Indeed, the plaintiffs have just such a claim pending. *See Medina v. San Jacinto River Auth.*, No. 1123430 (Harris Co. Ct. at Law No. 1, Tex.). Their counsel explained at oral argument that they also pursued a duplicative claim under Chapter 2007 primarily

Unequivocal statutory language notwithstanding, the Court shrugs off concerns about redressability by claiming that rescission is not "the only remedy available to a prevailing property owner under [Chapter 2007]." *Ante* at __. Although the Court agrees that Chapter 2007 does not entitle the plaintiffs to monetary damages, it suggests that the statute nonetheless provides for redress of their injury by entitling them to two "findings:" (1) whether the government action was a taking and, if so, (2) the amount of monetary damages resulting from the taking. *Ante* at __.

Yes, the statute requires these findings, but the only relief a court may *order* on the basis of these findings is rescission of the taking. The court's judgment must "include a fact finding that determines the monetary damages [the plaintiff] suffered . . . as a result of the taking." TEX. GOV'T CODE § 2007.024(b). But this language provides for an *estimate*—not an award—of damages. That estimate comes into play only when a government defendant "*elect*[*s*] to pay the damages as compensation" to a prevailing property owner in exchange for a court's "withdraw[al] [of] the . . . order rescinding the governmental action" determined to be a taking. *Id.* § 2007.024(c), (d) (emphasis added). Under this peculiar framework, the court orders rescission of the taking but also identifies a dollar amount that the government may elect to pay in lieu of rescission, purely at the government's option. In no event does the statute empower a court to order payment of damages.[4] The defendant may choose between rescinding the taking and paying the damages

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because "attorney's fees are recoverable under [the statute]" that are unavailable in inverse-condemnation actions. *See* TEX. GOV'T CODE § 2007.026(a). The desire to recover attorney fees is understandable, but it does nothing to establish the injury or redressability required for standing. *See infra* at ___. Contrary to the Court's suggestion, I do not contend that we should "dismiss the statutory claim merely on the possibility that the constitution may provide the desired remedy." *Ante* at __. I urge dismissal because the property owners lack standing in this case, and whether they have standing in this case in no way depends on what happens in county court.

[4] Even if a government defendant that elects to compensate a prevailing plaintiff rather than rescind the taking fails to pay within thirty days of when judgment is rendered (as the statute requires), a court remains powerless to

amount found by the court. When rescission is impossible, however, the court has no power to order the payment of damages, and the defendant has no obligation to pay them (or to do anything at all).

Without a judgment carrying their desired "findings" into effect, the plaintiffs have nothing but a piece of paper signed by a court containing pronouncements in their favor. They may hope to use these findings to redress their injury down the road by (1) convincing the SJRA to voluntarily pay damages, or (2) convincing *another* court to award a judgment of damages. But the findings themselves do not require their houses to be repaired or require the SJRA to compensate them. Redressability means "that the court [would] be able to afford relief *through the exercise of its power,* not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in judgment).[5] Findings, without a judgment, are merely non-binding advisory declarations that do not redress any injury. It is only the judgment of rescission that gives this statutory scheme any real teeth. When rescission of the taking is

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order payment, and instead must simply "reinstate the [rescission] order" it had "previously withdrawn." TEX. GOV'T CODE § 2007.024(d), (e).

[5] Neither the plurality decision in *Franklin*, 505 U.S. 788, nor the holding in *Evans*, 536 U.S. 452, are to the contrary. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 n.9 (10th Cir. 2005); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 959 (8th Cir. 2015). In both cases, the Court held that apportionment-related injuries would likely be redressed by ordering the Secretary of Commerce to modify census reports, even though it was the President's duty to transmit apportionment results to Congress. Redressability existed "as a *practical* matter," the Court said, because a court could order "the Secretary to substitute a new 'report' for the old one," at which point the "consequent apportionment-related steps would be purely mechanical." *Evans*, 536 U.S. at 460, 463 (emphasis added). Said otherwise, the plaintiffs in both cases sought court-orders directing a party to actually do something in the real world, "the *practical* consequence of [which]" would be "significant increase[s] in the likelihood" that the plaintiffs' injury would be redressed. *Id*. at 464 (emphasis added). Not so in this case, where the judgment the plaintiffs seek would not require anybody to do anything, and the plaintiffs' only hope is that their victory will either (1) induce the SJRA to voluntarily pay damages or (2) serve as the legal predicate for another court's award of damages. Neither pathway amounts to redressability.

impossible, a judgment under this statute requires nothing of the defendant and redresses no injury to the plaintiff. Nor would a judgment "invalidating" the flooding of homes have any effect. A naked declaration of the taking's "invalidity" requires nothing of the SJRA and affords nothing to the plaintiffs other than a judicial precedent they hope future courts will use as a predicate for awarding damages. Courts lack jurisdiction to award such toothless, ineffectual, abstract "relief."

The plaintiffs suggest that, apart from rescission or damages, they are entitled to a standalone judicial "determination" of "whether governmental actions result in a 'taking.'" The Court seems to share that view. *See ante* at __. If the idea is that this statute authorizes a court to award a declaratory judgment unaccompanied by any other form of relief, that is mistaken. The statute dictates that a "court's judgment in favor of a private real property owner . . . that determines that a taking has occurred *shall* order the governmental entity to rescind the governmental action . . . resulting in the taking." TEX. GOV'T CODE § 2007.024 (emphasis added). In other words, the legislature has dictated the content of a Chapter 2007 judgment in favor of a plaintiff, and the judgment must be one of rescission. *See id.* § 311.016(2) ("'Shall' imposes a duty."). The preceding statutory section, which entitles a prevailing property owner to "invalidation of the governmental action . . . resulting in the taking," *id.* § 2007.023, likewise can only be applied where rescission of that action is possible. *See id.* § 311.021 ("In enacting a statute, it is presumed that . . . a result feasible of execution is intended."). To comply with the legislature's direction, a court would have to order the SJRA, on pain of contempt, to "rescind" its 2017 release of floodwaters from Lake Conroe, millions of gallons of which flowed into the San Jacinto River

years ago. Such a nonsensical judgment, with which the SJRA cannot comply, would have no practical effect on either party and would not redress the plaintiffs' injuries.[6]

To be sure, the property owners might in some way benefit from a judgment containing the "findings" they seek, since that judgment's precedential or preclusive effect might aid them in their ongoing inverse-condemnation litigation against the SJRA. But a litigant's interest in a favorable judgment's possible precedential effect has never by itself been sufficient to confer standing.[7] If the prospect of "a favorable judicial precedent on an abstract legal issue" met "the requirement of redressability," parties could reliably bootstrap their way to standing by simply pointing to that possibility, and in doing so keep courts "busy indeed issuing advisory opinions" intended solely to serve "as precedent in subsequent litigation." *Hutchinson*, 803 F.3d at 958–59.

For similar reasons, a litigant's interest in a favorable judgment's possible preclusive effect, standing alone, has never been considered a cognizable interest for standing purposes. Since a dismissal for lack of standing is "a dismissal for lack of jurisdiction, and a court that has no jurisdiction cannot enter a judgment with preclusive effect . . . except on the issue of jurisdiction itself, it is circular to argue" that a plaintiff has standing by virtue of a favorable judgment's

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[6] The statute's ineffectiveness when brought to bear against a taking that cannot be rescinded certainly limits its utility to property owners. But this result is plainly dictated by the text chosen by the legislature. Perhaps the statute's unusual structure—which gives government defendants the option to choose rescission or damages—reflects a legislative compromise between property-rights advocates seeking increased protection against takings and government agencies concerned about large damages awards. Whatever the reason, the statute says what it says, and we are not at liberty to depart from its plain language to vindicate what we perceive to be its "purpose." *See BankDirect Capital Fin.*, 519 S.W.3d at 86–87.

[7] *See Hutchinson*, 803 F.3d at 958–59; *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("[M]ere precedential effect . . . is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation."); *Milton v. Donovan*, 762 F.2d 1009 (6th Cir. 1985) (similar); *see also United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (noting that the prospect that "a favorable decision in this case might serve as a useful precedent . . . in a [subsequent] lawsuit . . . . cannot save this case from mootness.").

"preclusive effect, when it can have preclusive effect only if" the plaintiff has standing. *Commodity Futures Trading Comm'n v. Bd. of Trade of City of Chi.*, 701 F.2d 653, 656 (7th Cir. 1983); *see also United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 863–64 (Tex. 1965) (explaining that courts need jurisdiction in order to render judgment with preclusive effect).[8]

Nor could a court alleviate the constitutional defects in the plaintiffs' claims by issuing a judgment claiming to "rescind" or "invalidate" the taking despite the impossibility of that action. It is as much a principle of common sense as it is of constitutional law that a plaintiff has no standing to seek a judicial decree "to enjoin an event that has already fully occurred." *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 48 F.3d 618, 621 (1st Cir. 1995). Redressability cannot be established where, as a practical matter, it is "impossible for the courts to redress the injury through the exercise of their remedial powers." *Fund for Animals v. Babbitt*, 89 F.3d 128, 133 (2d Cir. 1996). Here, "[n]o mandate that [a court] might issue can turn back the pages of the calendar and either stop" the SJRA's release of water from Lake Conroe "or fully palliate its effects." *CMM Cable*, 48 F.3d at 621. "There is no prospective remedy that can unring that bell." *Opala v. Watt*, 454 F.3d 1154, 1160 (10th Cir. 2006). Because an order to "rescind" or "invalidate" the purported taking in this case "would be ineffectual" and "could not possibly remedy" the property owners' "alleged harm," they "lack[] standing to seek such relief." *Meyers*, 548 S.W.3d at 488. The bottom line is that damages are the only relief that provides meaningful redress for these plaintiffs, and damages are simply unavailable under this statute.

[8] It is no answer to say that the property owners would have standing to seek damages (if the statute allowed for it) and thus must have all-purpose standing to seek declaratory or other remedies for their claims. On the contrary, a plaintiff "must demonstrate standing separately for each form of relief sought." *Heckman*, 369 S.W.3d at 155 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)).

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The plaintiffs nevertheless pin their hopes on the election-of-remedies provision, under which the government may choose to pay damages if it prefers that route to rescission of the taking. The plaintiffs "suspect [that] the prospect of public outcry and political fallout" from a court's finding that the 2017 release of water was an unlawful taking might pressure the SJRA into paying damages, even in the absence of a judgment making it do so. Respondent's Brief on the Merits at 37. Such optimistic speculation cannot establish redressability. "[I]t must be likely, as opposed to merely speculative, that the [plaintiff's] injury will be redressed by a favorable decision." *Heckman*, 369 S.W.3d at 154–55 (quoting *Lujan*, 504 U.S. at 561). The SJRA, far from signaling even the slightest willingness to pay compensation, condemns the plaintiffs' speculation about "political fallout" as "simply a threat that political pressure will compel . . . a political subdivision to pay damages the Legislature prohibited." Reply Brief on the Merits at 32–33. "This veiled threat," says the SJRA, "ought not to be tolerated." *Id.* at 33. Hardly the words of a defendant in a generous mood.

At any rate, even if the SJRA could reasonably be expected to voluntarily pay damages should the property owners prevail, redressability would still be lacking. Again, redressability means "that the court [would] be able to afford relief *through the exercise of its power,* not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Franklin*, 505 U.S. at 825 (Scalia, J., concurring in part and concurring in judgment). The federal courts of appeals have consistently so held.[9] Otherwise, "[i]f courts [could] simply assume that

[9] *See, e.g.*, *Gandy*, 416 F.3d at 1159 ("it must be the effect of the court's judgment on the defendant"—not merely its persuasive power as a statement of law—"that redresses the plaintiff's injury."); *Lewis v. Gov. of Alabama*,

everyone . . . will honor the legal rationales that underlie their decrees, then redressability [would] *always* exist." *Id.* That logic cannot be squared with the "unvarying practice" of American courts "to render no judgments not binding . . . on the parties." *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948).

As the U.S. Supreme Court explained in 1864, courts are without power to decide disputes in which they are not "authorized by law . . . to carry into effect the[ir] judgment[s]." *Gordon*, 69 U.S. 561. A court in such a case "could merely express an opinion, which . . . binds no one, is no judgment in the legal sense of the term," and is therefore not within the "judicial power . . . granted by the Constitution." *Id.*[10] This Court has similarly remarked that standing requires a "non-abstract question of law that, if decided, would have *a binding effect on the parties*." *Heckman*, 369 S.W.3d at 147 (emphasis added). A dispute "is not a judicial question" if a court's "judgment would only amount to a declaration" that an unlawful act had taken place—which "might result incidentally in benefit . . . to some citizen, but it is not . . . enforced by any process issued from the court." *Owens*, 63 Tex. at 266 (1885).

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944 F.3d 1287, 1305 n.19 (11th Cir. 2019) (en banc); *Hutchinson*, 803 F.3d at 958–59; *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1202 (D.C. Cir. 1996); *Newdow v. Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010).

[10] *Accord Hayburn's Case*, 2 U.S. 408, 410 n* (1792) (for a court to render a decision subject to "revision and control . . . . by an officer in [another] department" would be "radically inconsistent with . . . that judicial power" conferred "by the constitution"); *McNulty*, 51 U.S. at 79; *In re Pac. Ry. Comm'n*, 32 F. 241, 256 (C.C.N.D. Cal. 1887) (Field, J.) (For a dispute "[t]o come within th[e] description" of "judicial" power, "[t]here must be parties to come into court, who can be reached by its process, and *bound by its power*; whose rights admit of ultimate decision by a tribunal *to which they are bound to submit*.") (emphasis added) (quoting 10 ANNALS OF CONG. 606 (1800) (statement of Rep. Marshall)); *Underwood v. McDuffee*, 15 Mich. 361, 368 (1867) ("The judicial power . . . involves the power to '*hear and determine*' the matters to be disposed of; and this can only be done by some order . . . which needs no additional sanction . . . to be enforced. No action which is merely preparatory to an order . . . rendered by some different body, can be properly termed judicial . . . . It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power.").

Here, a court's estimate of damages suffered by the property owners would amount, at most, to a *recommendation* that the SJRA compensate them. The case law on that point is clear: a recommendation, no matter how persuasive or well-reasoned, does not partake of the "judicial power." That the SJRA would be free to "completely disregard [a] judgment" that the property owners are owed compensation demonstrates that "the courts [a]re not authorized to render" such judgment in the first place. *Waterman*, 333 U.S. at 113–14. To do so would be to "decid[e] a question . . . abstract in its nature, because not enforced by [the courts], . . . simply to be taken notice of and observed by all officers and citizens." *Towles*, 48 Tex. at 436 (1877). This sort of "extra-judicial question" is not properly "a subject of legal adjudication." *Id.* at 437.

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The Court's principal response to these concerns is to observe that "the Legislature . . . has waived immunity to suit and liability for statutory takings" and so the fact "[t]hat [the SJRA] might decline to pay damages is no reason to dismiss the pending suits on jurisdictional grounds." *Ante* at __. The first statement is true but irrelevant; the second is relevant but not true. As for the former, the State's consent to suit eliminates sovereign-immunity obstacles to the property owners' claims, but that has nothing to do with whether their claims meet the entirely separate constitutional requirement of standing, which the legislature cannot waive. *See Morrow*, 62 S.W.2d at 646 ("Since advisory jurisdiction . . . is not given" to courts "under the Constitution," it "cannot be conferred by the Legislature").

The Court's other assertion—"[t]hat [the SJRA] might decline to pay damages is no reason to dismiss the pending suits on jurisdictional grounds"—is simply wrong, for the reasons already explained. The fact that a judgment for the property owners would leave it entirely up to the SJRA

whether to take the only action (paying damages) capable of remedying the plaintiffs' injuries is *absolutely* a "reason to dismiss the[se] . . . suits on jurisdictional grounds." The nonbinding nature of such a "judgment" means redressability is lacking, which means the courts lack jurisdiction.

The Court also points to the legislature's ability to waive immunity from *suit*, but not from *liability*, thereby allowing a party to obtain a damages judgment against the government but not to collect on it unless the legislature appropriates money to pay it. *See Fed. Sign v. Tex. So. Univ.*, 951 S.W.2d 401, 414 (Tex. 1997) (Hecht, J., concurring). The Court warns that my position "would nullify" these "many legislative grants of permission to sue, as any resulting suit against the government would fail the . . . redressability test if the government retains immunity from liability." *Ante* at __.[11]

The Court's warning is misplaced. There is a critical difference between money judgments against the government that require appropriation before they can be collected and any "judgment" a court might render for the property owners under Chapter 2007. The former adjusts the parties' legal rights, while the latter does not. The difference is tied to a provision of the Texas Constitution that prohibits the legislature from "grant[ing], by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same

[11] The Court also worries that a "suit against the government would fail" my conception of the "redressability test if the government" merely "*limits* collectability or enforcement of a judgment" rather than foreclosing collection or enforcement altogether. *Ante* at __ (emphasis added). True, the legislature sometimes limits the damages that may be awarded to plaintiffs suing governmental entities. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 101.023 (Texas Tort Claims Act). But the fact that such limited damages may not *fully* redress a plaintiff's injuries does not deprive him of standing to sue to recover them. A court's ability "to effectuate a partial remedy" satisfies the redressability requirement. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)). The difference here is that Chapter 2007, unlike the Tort Claims Act, does not afford partial redress to these plaintiffs. It affords them no meaningful redress at all.

shall not have been provided for by pre-existing law." Art. III, § 44. This provision has been "interpret[ed] . . . to mean that the Legislature cannot appropriate state money to 'any individual' unless . . . there is already in force . . . a legal and valid obligation of the state . . . . as would form the basis of a judgment against [it] . . . in the event it should permit itself to be sued." *Austin Nat. Bank of Austin v. Sheppard*, 71 S.W.2d 242, 245 (Tex. 1934). A "mere moral obligation," on the other hand, will *not* "support an appropriation of state money to an individual." *Id*.[12]

Thus, when immunity from suit is waived but immunity from liability is not, a court's judgment for a plaintiff, even if uncollectable without an appropriation, nonetheless establishes the government's legal obligation to pay the plaintiff, which in turn enables the legislature to make an otherwise constitutionally forbidden appropriation to the plaintiff.[13] By contrast, a judgment under Chapter 2007—which would put the SJRA to the false "choice" of "rescinding" a flood or paying damages—imposes no legal obligations and would change nothing about the parties' legal status. By its own terms, the judgment would be entirely incapable of execution. It would amount at most to a *moral* obligation on the SJRA, which stands in contrast to the *legal* obligation imposed on the government by money judgments.

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[12] *See also State v. Wilson*, 9 S.W. 155, 157 (Tex. 1888); *Lindsey v. State*, 811 S.W.2d 731, 734 (Tex. App.—Austin 1991, writ denied) (plaintiffs' "claim [wa]s not one 'provided for by pre-existing law' within the meaning of article III, section 44" because "[a]lthough the relevant [statutes] imposed certain duties on the State, they did not expressly obligate the State to pay the [plaintiffs'] claim for damages"); 67 TEX. JUR. *State of Texas* § 69 (3d ed. 2021 update).

[13] Strictly speaking, although Article III, § 44 prohibits only appropriation "of money out of the Treasury *of the State*" to pay claims not "provided for by pre-existing law" (emphasis added), a similar prohibition has been held applicable to political subdivisions (such as the SJRA) by virtue of two other constitutional provisions prohibiting the legislature from "mak[ing] any grant or authoriz[ing] the making of any grant of public moneys to any individual, association," or "corporation[] whatsoever"; and from "authoriz[ing] any . . . political . . . subdivision of the State . . . to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." Art. III, §§ 51, 52. *See Tompkins v. Williams*, 62 S.W.2d 70, 71 (Tex. Comm'n App. 1933, judgm't adopted); *see also State v. City of Austin*, 331 S.W.2d 737, 742 (Tex. 1960).

The Court's remaining arguments for writing off redressability concerns are similarly unavailing. It points to Section 2007.006(a), which reads, "[t]he remedies provided by [Chapter 2007] are in addition to other procedures or remedies provided by law." This language, however, does not itself provide for any such "other" remedies. Instead, it merely clarifies that relief otherwise available under law is not displaced by Chapter 2007, and the plaintiffs do not cite any other provision of law that would entitle them to damages here. The Court also considers it significant that Section 2007.006(a) refers to the "remedies"—plural—"provided by [Chapter 2007]." But this phraseology is simply a recognition that the statute's election-of-remedies provision contemplates rescission as well as damages as potential remedies for a taking. Crucially, as explained above, it is only rescission that a court may *order*, while damages are available only at a government defendant's option. The statute's reference to multiple "remedies" does nothing to solve the redressability problem. The Court also points out that prevailing property owners are entitled under Subchapter B to awards of attorney fees and costs. *See* TEX. GOV'T CODE § 2007.026(a). A plaintiff's "interest" in recovering expenses incurred in litigation, however, is not sufficient to establish standing to litigate the underlying claim. As the U.S. Supreme Court has explained, "the mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself" does not give rise to standing. *Diamond v. Charles*, 476 U.S. 54, 70–71 (1986).

III.

No matter how sympathetic these property owners' predicament may be, the "doctrine of standing is a crucial and inseparable element" of the "separation of powers . . . . , whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance." Antonin

Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983). The plaintiffs cannot demonstrate that the injuries they suffered during Hurricane Harvey "will 'likely' . . . be 'redressed by a favorable decision'" on their Chapter 2007 claims. *Heckman* 369 S.W.3d at 154–55 (quoting *Lujan*, 504 U.S. at 560–61). Their statutory takings claims should be dismissed while their constitutional takings claims move forward in county court.[14] Because the Court does otherwise, I respectfully dissent.

James D. Blacklock
Justice

OPINION DELIVERED: April 16, 2021

[14] The Court speculates that because the "taking defined by [Chapter 2007] is broader than that cognizable under the constitution, . . . the remedy the statute provides may be all that is available to some of the property owners in these suits." *Ante* at __. But the possibility that some injuries might theoretically go un-redressed does not affect the standing inquiry. "The fact that there is no remedy for an injury . . . cannot justify . . . the judiciary, in overstepping the boundary of its prescribed authority, for the purpose of furnishing a remedy." *Hous. Tap & B. Ry. Co. v. Randolph*, 24 Tex. 317, 343–44 (1859); *see also United States v. Richardson*, 418 U.S. 166, 179 (1974); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 143–44 (1835) ("It is true that . . . the judicial censureship . . . exercised by the courts of justice over the legislation cannot extend to all laws . . . , in as much as some of them can never give rise to that exact species of contestation which is termed a lawsuit . . . . The Americans have often felt this disadvantage, but they have left the remedy incomplete, lest they should give it an efficacy which might in some cases prove dangerous."). While it has long been said that the law ought to afford "a remedy for every wrong," that "maxim . . . presupposes a perfection in government that has not yet been reached." *Towles*, 48 Tex. at 428–29 (1877). "If a wrong has been done, the usurpation of the power to prescribe a remedy would be a still greater wrong." *Harrell v. Lynch*, 65 Tex. 146, 151–52 (1885).