IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-68

THE COUNTY COMMISSION OF FAYETTE COUNTY

Petitioner, Plaintiff in Underlying Action.

v.

PARDEE AND CURTIN REALTY LLC,

Respondent, Defendant in Underlying Action.

BRIEF OF RESPONDENT PARDEE AND CURTIN REALTY LLC

On Order of Certification dated January 22, 2025
in the United States District Court for the Southern District of West Virginia
(The Honorable Thomas E. Johnston)

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STATEMENT OF THE CASE

The underlying case is a sweeping environmental lawsuit brought by the Petitioner County Commission of Fayette County, West Virginia (the "County"). (JA001-196.) On May 18, 2021, the County sued Respondent Pardee and Curtin Realty LLC ("Pardee") and a number of other entities in federal court under federal statutes, state statutes, common law, and county ordinance. (JA002-4.) The lawsuit alleges that five (5) sites in the Johnson Fork-Loop Creek watershed where a historical coal operator allegedly dumped refuse in the 1920s to 1950s constitutes an actionable environmental hazard. Among the County's causes of action is a RCRA citizen suit claiming that the alleged refuse sites may present an imminent and substantial endangerment to health or the environment. (JA121-132.)

In its prayer for relief, the County requested an award of its attorney's fees and costs under RCRA's fee shifting provision against all defendants, including Pardee. (JA188-189 at ¶ I.) The statute provides that a presiding court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party whenever the court determines an award is appropriate." 42 U.S.C. § 6972(e).

RCRA's fee-shifting provision is discretionary and can justify an award of attorney fees and costs to any prevailing party—including prevailing defendants. Prevailing defendants are not entitled to an award of their attorney fees "simply because [the plaintiff] did not prevail." *Abdelhalim v. Lewis*, 90 F.4th 265, 272, 274 (4th Cir. 2024). Rather, prevailing defendants may recover when the "plaintiff's action was frivolous, unreasonable, or without foundation," or if the plaintiff "continued to litigate after it clearly became so." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-422 (1978). By providing potential fee recovery to prevailing defendants, "Congress desired to protect defendants from burdensome litigation having no legal or factual basis," thus "deter[ing] frivolous lawsuits." *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 517 (4th

Cir. 2012). Whether to assess fees or not is a "careful" analysis of the "plaintiff's legal claim, the evidence in support of that claim, and when the plaintiff should have realized that the claim was groundless." *Hunt v. Lee*, 116 F. App'x 669, 671 (4th Cir. 2006) (unpublished).

In this case, the County never alleged that Pardee dumped any refuse. (JA045-46 at ¶¶ 71-74.) Rather, the County's sole allegation was that Pardee passively owned the alleged refuse sites from 2003 to 2013 (decades after mining ceased) without remediating them. (*Id.*) Therefore, the County surmised, Pardee is jointly and severally liable for any remediation and cleanup costs, including the County's attorney fees. (JA185-190.)

However, it quickly came to light that Pardee never owned the refuse sites. Pardee's source deed excepted and reserved the legacy coal mining sites. (JA198-199; JA201.) The excepted sites were retained by the grantor—and the grantor later conveyed them to another entity, a nonparty. By August of 2021, the chain of title had been disclosed to the County and it was clear that the County's sole allegation against Pardee—that it passively owned the refuse sites from 2003 to 2013—was simply untrue. There was no basis for Pardee's continued involvement in the case.

However, the County declined to dismiss its claims against Pardee. Instead, the County argued that the source deed's reservation of the refuse sites was void, and that Pardee and its successors-in-interest accidentally took ownership of the refuse sites. (JA202-205.) In practical terms, the County's argument reflected an attempt by a stranger-to-the-deed to unwind two decades of property ownership amongst four different parties and across three conveyances. (JA205.) Under West Virginia property law, the argument was without merit. (JA203-204.)

Pardee filed a motion for summary judgment on ownership in February of 2022. (JA199.) In the pendency of the motion, Pardee was forced to engage in other motions practice and to muster

a full-throated defense to the County's allegations—including retaining expert witnesses to opine about (i) the boundaries to Pardee's former property and (ii) the environmental merits of the case.

On March 21, 2023, the District Court granted summary judgment in Pardee's favor on ownership. (JA197-209.) The District Court found that Pardee (and its successors) never took ownership of the excepted property under the plain language of the source deed. (JA201.) The District Court found the County's factual assertions to the contrary were "mistaken[] or deceptive," (JA206), and that "[t]he meritless allegations, assertions, and arguments the County has made in connection with its claims against [Pardee] nearly put them on a perilous course with Rule 11" of the Federal Rules of Civil Procedure. (JA208 at n.2.)

After Pardee prevailed on ownership, the District Court granted summary judgment in favor of a remaining defendant on the environmental merits of the case. *See Cnty. Comm'n of Fayette Cnty, W. Va. v. Nat'l Grid NE Holdings 2 LLC*, Case No. 2:21-cv-307, 2024 WL 1207061 (S.D. W. Va. Mar. 20, 2024). The District Court ultimately held that the County mustered no evidence that the alleged refuse areas were harming anybody. *Id.* at **7-11.

After the District Court entered its final order, Pardee filed a Motion for Attorney's Fees and Costs pursuant to the RCRA citizen suit provision. (*See* January 22, 2025, Certification Order at 3.) Under applicable federal law, Pardee is entitled to recover the attorney fees and costs it incurred due to the County's baseless litigation conduct. *Supra* at 1-2. The County opposed Pardee's fee petition, among other reasons, on the grounds that the Tort Claims Act immunizes political subdivisions from liability stemming from "judicial, quasi-judicial or prosecutorial functions" and "other fees or charges imposed by law." W. Va. Code § 29-12A-5(a)(2). Finding this may be dispositive to its discretion to award fees to Pardee, the District Court thereafter certified the Certified Question to this Court.

SUMMARY OF THE ARGUMENT

The United States District Court for the Southern District of West Virginia asks the following question (the "Certified Question"):

> Is a West Virginia political subdivision that brings a citizen suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, entitled to prosecutorial immunity from being assessed a prevailing opponent's attorney fees and costs?

There are three good reasons why this Court should answer the Certified Question in the negative. **First**, voluntarily bringing a claim under a fee-shifting statute constitutes a waiver of any immunity a plaintiff government may enjoy. By bringing a claim, a political subdivision acquiesces to the claim's adjudication under the terms of the governing statute—irrespective of selective attempts to invoke immunity to obtain a litigation advantage. **Second**, the Tort Claims Act does not immunize political subdivisions from attorney fee awards. West Virginia law does not immunize political subdivisions from a congressionally authorized award of attorney fees to a prevailing adversary. **Third**, bringing a citizen suit under RCRA is not a "prosecutorial function" of West Virginia political subdivisions. Anyone can file a RCRA citizen suit. RCRA citizen suits are fundamentally unlike—and, in fact, mutually exclusive with—a county commission's properly understood role in legislating and adjudicating public nuisances.

For all these reasons, this Court should answer the Certified Question in the negative: a West Virginia political subdivision that brings a RCRA citizen suit is not entitled to prosecutorial immunity from being assessed a prevailing opponent's attorney fees and costs.

ARGUMENT

A By voluntarily bringing a RCRA citizen suit, a West Virginia political subdivision waives any immunity it may enjoy with respect to the adjudication of the claim under the terms of the statute.

1. Political subdivisions waive immunity by bringing a claim.

A West Virginia political subdivision voluntarily bringing a RCRA citizen suit waives any immunity it may enjoy regarding an award of attorney fees and costs under the statute. "[W]aiver is the intentional relinquishment of a known right." *Smith v. Bell*, 129 W. Va. 749, 760 (1947). Waiver "is a voluntary act, and implies an election by the party to give up something of value, or to forego some advantage which he might, at his option, have insisted on and demanded." *Id.* Waiver applies "to all rights or privileges to which a person is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution." *Id.*

Rights can be waived (and limitations can be assented) by a party's course of conduct. *See, e.g., Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 699 (2017); *Citizens Tel. Co. of W. Va. v. Sheridan*, 239 W. Va. 67, 74-75 (2017); *New v. Gamestop, Inc.*, 232 W. Va. 564, 572-573 (2013). Government bodies waive their immunity by voluntarily appearing and/or acquiescing to a court's jurisdiction. *See Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002); *Gardner v. New Jersey*, 329 U.S. 565 (1947); *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273 (1906); *Clark v. Banard*, 108 U.S. 436 (1883). After all, it "would generate seriously unfair results" for a government to both "invoke" and "deny" a court's authority to decide a controversy depending on what serves the government's litigation interests. *Lapides*, 535 U.S. at 619.

For that reason, more than a century ago, the Supreme Court of the United States held that a state's "voluntary appearance" in federal court constitutes a waiver of the state's Eleventh Amendment immunity. *Clark*, 108 U.S. 436. Thereafter, the Court held more generally that when "a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it

will be bound thereby and cannot escape the results of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter*, 200 U.S. at 284. And then, the Court held that "[w]hen the State becomes the actor and files a claim . . . it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Gardner*, 329 U.S. at 574. Consistent with that precedent, courts find that a host of other voluntary litigation—like removing a case to federal court—constitutes a waiver of immunity. *Lapides*, 535 U.S. at 620. Ultimately, were it any other way, governments could "selective[ly] use . . . immunity to achieve litigation advantages." *Id.*

The Certified Question should be answered "no" under these same principles.[1] A West Virginia political subdivision that brings a RCRA citizen suit waives any immunity it may enjoy with respect to the adjudication of the claim—including the assessment of a prevailing opponent's attorney's fees under 42 U.S.C. § 6972(e). RCRA's fee-shifting provision goes both ways—and a prevailing government plaintiff would be entitled to request its own attorney fees and costs if the facts were different. Indeed, in the underlying operative pleading, the County demanded an award of its own attorney fees and costs from Pardee under this same RCRA provision. (JA188-189.) By bringing a lawsuit, a plaintiff subjects itself to how a claim is adjudicated under the terms of the governing statute—not by "selective" attempts to invoke immunity to secure "litigation advantages." *Lapides*, 535 U.S. at 620.

2. Public policy and judicial economy support waiver.

Urging a "yes" to the Certified Question, the County asks this Court to immunize political subdivisions from the statutory consequences of their voluntary litigation conduct—consequences

[1] The above-cited cases generally pertain to a State's Eleventh Amendment immunity, not a political subdivision's immunity under the Tort Claims Act. But that makes no difference for waiver purposes. "[A]ll rights"—"whether secured by contract, conferred by statute, or guaranteed by the constitution"—can be waived. *Smith*, 129 W. Va. at 760.

that exist for every other litigant. Doing so would grant West Virginia political subdivisions perverse litigation advantages and incentives.

Under RCRA's citizen suit provision, courts only assess fees against a losing plaintiff when the "action was frivolous, unreasonable, or without foundation" or the plaintiff "continued to litigate after it clearly became so." *Abdelhalim*, 90 F.4th at 272, 274 (internal quotation omitted). No public policy supports immunizing a party from statutory consequences of frivolous lawsuits. Indeed, potential exposure to an attorney fee award is an "important and well-recognized tool used to restrain the behavior of parties during litigation"—and, in that regard, governments are treated "as any other litigant." *Hutto v. Finney*, 437 U.S. 678, 696 at n.24 (1978); *see infra* at Argument B. Immunizing West Virginia political subdivisions from attorney fee awards only shifts the costs of frivolous lawsuits to the defense and the court system—thwarting Congress's goal of "protect[ing] defendants from burdensome lawsuits having no legal or factual basis" and "deter[ring]" plaintiffs from filing and maintaining them. *Great Steaks*, 667 F.3d at 517.

If anything, government plaintiffs are held to a higher standard of litigation conduct than private plaintiffs (particularly unsophisticated ones). Government bodies have the unique ability to "exact . . . high costs on a private [entity] throughout the investigative process and potential subsequent litigation." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). Likewise, a plaintiff that chooses to "dedicat[e itself] to litigation" (like a government that brings a citizen suit) has a "higher duty to conduct a proper and reasonable pre-suit filing inquiry" than an individual and personally aggrieved plaintiff. *Goldstein v. Costco Wholesale Corp.*, 322 F. Supp. 2d 660, 665-66 (E.D. Va. 2004).

The County tries to spin the public policy in the opposite direction by claiming that exposure to attorney fees would carry a "chilling effect" that "would hinder the ability of

government entities to fulfill their public role." (Br. at 15-16.) Not so: a political subdivision facing potential fee exposure under the scenario contemplated by the Certified Question has brought a frivolous RCRA citizen suit. "When a court imposes fees on a plaintiff who has pressed a frivolous claim, it chills nothing that is worth encouraging." *Hutchison v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993).

Moreover, an award of fees to a prevailing defendant is discretionary. Any losing RCRA plaintiff—political subdivision or not—can dispute a prevailing defendant's entitlement to fees by citing facts and law that justify the underlying litigation conduct. *See Hunt*, 166 F. App'x at 671 (unpublished). Fees are not awarded "simply because [the plaintiff] did not prevail," but rather because the "action was frivolous" or the plaintiff "continued to litigate" after it became clear. *Abdelhalim*, 90 F.4th at 272, 274. As such, the County's "chilling effect" argument is better directed to trial courts that are tasked with carefully analyzing the circumstances before entering an actual award of attorney fees in favor of a prevailing defendant. But here, the County seeks a blanket immunity from the statutory consequence of bringing and maintaining a baseless lawsuit. The County does not (and cannot) offer a real public policy reason in support of its proposed answer to the Certified Question.

The County also contends that answering "no" to the Certified Question will "motivate[]" private plaintiffs "to pursue cases against public agencies"—"[o]pening the floodgates" for a "rise in litigation designed to exploit the government's financial vulnerabilities." (Br. at 15-18.) This parade of horribles ignores that West Virginia political subdivisions are already subject to attorney fee awards when statute affords them, regardless of how this Court answers the Certified Question. *See infra* at 12 (citing examples). Moreover, the County's claim mischaracterizes the Certified Question yet again. Because the Certified Question presumes a *plaintiff* government, there is no

answer to the question that would incentivize private parties to "pursue cases against public agencies." (Br. at 16.) Properly understood, the Certified Question only effectuates a statutory deterrent against frivolous lawsuits and ensures that it applies to all parties, regardless of governmental status.

At bottom, a political subdivision that brings a RCRA citizen suit waives any claim to immunity it may enjoy with respect to the adjudication of the claim—and there is no public policy that supports immunizing political subdivisions from statutory consequences of frivolous litigation conduct. The Certified Question should be answered "no" on waiver grounds.

B The Tort Claims Act does not grant immunity from attorney fee awards.

In a series of decisions in the 1970s and early 1980s, this Court abolished common law immunity for West Virginia political subdivisions. *See, e.g.*, Syl. Pt. 10, *Long v. City of Weirton*, 158 W. Va. 741 (1975) (municipalities); Syl. Pt. 2, *Gooden v. County Comm'n of Webster Cnty.*, 171 W. Va. 130 (1982) (county commissions); *Ohio Valley Contractors v. Bd. of Educ.*, 170 W. Va. 240 (1982) (county boards of education). After all, political subdivisions are creatures of statute and enjoy only the rights and immunities granted by the Legislature. Syl. Pt. 3, *T. Weston, Inc. v. Mineral Cnty.*, 219 W. Va. 564 (2006) (quoting Syl. Pt. 3, *Barbor v. Cnty. Ct. of Mercer Cnty.*, 85 W. Va. 359 (1920)). This Court noted that "it would seem preferable for the Legislature" act on the question of immunity for political subdivisions. *Long*, 158 W. Va. at 783.

In 1986, the Legislature did so by enacting the Tort Claims Act. The enactment of the Tort Claims Act also coincided with the insurance crisis of the mid-1980s. The Legislature found that "political subdivisions of this state are unable to procure adequate liability insurance coverage at reasonable cost due to [t]he high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage." W. Va. Code § 29-12A-2. The Tort Claims Act is therefore not a

grant of absolute immunity to political subdivisions: rather, the Legislature chose to confer immunity only "in certain circumstances" and primarily to "regulate the costs and coverage of insurance." W. Va. Code § 29-12A-1.

Given the underlying purposes of the Tort Claims Act, West Virginia courts apply a "general rule of construction" that narrowly reads the immunities conferred by the Act. Syl. Pt. 2, *Marlin v. Bill Rich Const. Inc.*, 198 W. Va. 635 (1996). Courts construe the Tort Claims Act to "favor[] liability, not immunity." *Id.* In fact, courts will not recognize immunity for a West Virginia political subdivision "unless the legislature has clearly provided [it] under the circumstances." *Id.*[2]

The Tort Claims Act does not expressly grant immunity from attorney fee awards. In fact, the Act does not mention attorney fees at all. Instead, the Act grants political subdivisions certain immunities from monetary damages. W. Va. Code § 29-12A-4(b)(1) (damages in a civil action); W. Va. Code § 29-12A-7(a)-(b) (punitive and economic loss damages). In particular, section 4 of the Act provides that political subdivisions are "liable in damages in a civil action" "[s]ubject to" the immunities identified in section 5 and 6—which, in turn, confer immunity for losses and claims arising from certain circumstances, including a political subdivision's "prosecutorial functions." W. Va. Code § 29-12A-4(b)-(c); W. Va. Code § 29-12A-5(a)(2).

Attorney fee awards are not "damages in a civil action." *See Roman Realty, LLC v. City of Morgantown*, Appeal No. 22-587, 2024 WL 2946675, *6 (June 11, 2024) (distinguishing "a remedy in a cause of action" from attorney fee awards reflecting "a penalty that is assessed because of the dilatory conduct of a party"). The law has long recognized that government litigants may be assessed attorney fees and court costs despite enjoying certain immunities from money

[2] The County urges this Court to construe the Tort Claims Act "broadly" in favor of immunity. (Br. at 15.) The County cites no authority for that rule of construction, and doing so would conflict with precedent.

damages. Almost a century ago, the Supreme Court of the United States noted that "[f]or many years" government bodies had been assessed court costs despite occasional pleas for immunity. *Fairmont Creamery Co. v. State of Minnesota*, 275 U.S. 70 (1927). The Supreme Court more recently described fee awards against government officials as "run-of-the-mill occurrences" in federal court. *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 738-39 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Fee awards against government entities and officials are "run-of-the-mill occurrences" in West Virginia state court, too. This Court has often affirmed attorney fee awards against county commissions, municipalities, other political subdivisions, and the state itself. *Corp. of Harpers Ferry v. Taylor*, 227 W. Va. 501 (2011) (municipality); *Alden v. Harpers Ferry Police Civil Serv. Comm'n*, 219 W. Va. 67 (2006) (municipality); *Phillip Leon M. v. Greenbrier Cnty. Bd. of Educ.*, 199 W. Va. 400 (1996) (board of education); *W. Va. Educ. Ass'n v. Consol. Public Ret. Bd.*, 194 W. Va. 501 (1995) (state); *State ex rel. Chafin v. Mingo Cnty. Comm'n*, 189 W. Va. 680 (1993) (county commission); *Meek v. Pugh*, 186 W. Va. 609 (1991); *Richardson v. Town of Kimball*, 176 W. Va. 24 (1986) (municipality). Ultimately, attorney fee awards are "an important and well-recognized tool used to restrain the behavior of parties during litigation." *Hutto v. Finney*, 437 U.S. 678, 695 at n.24 (1978). So, for purposes of assessing attorney fees, governments are treated "as any other litigant." *Id.* at 696. This is particularly true for "the power to award attorney's fees for *litigating in bad faith*," *id.* (emphasis added), like fee exposure contemplated here.

Neither party cites a single example of a government enjoying prosecutorial immunity from an award of attorney fees. Pardee is only aware of one other case where a government even tried. In that case, the United States District Court for the Middle District of Tennessee rejected the claim to immunity for reasons that the Court found "obvious"—namely, that "an application for

attorney's fees is not an action for money damages." *American Civil Liberties Union of Tennessee v. State of Tennessee*, 502 F. Supp. 388, 390 (M.D. Tn. 1980). The Court concluded that "a prosecutor's immunity from suits for money damages is ***completely irrelevant*** in determining whether his office should be required to pay attorney's fees when it loses a lawsuit." *Id.* (emphasis added).

The County claims an immunity that is unlike any immunity recognized by this Court. This Court has recognized prosecutorial immunity from monetary damages in connection with a host of civil claims against prosecutors, their office, and political subdivisions. *See, e.g., Launi v. Hampshire Cnty. Prosecuting Att'y Office*, 249 W. Va. 262 (2023) (immunity from malicious prosecution claim against prosecutor); *Mooney v. Frazier*, 225 W. Va. 358 (immunity from legal malpractice claim against prosecutor); *Hylton v. Bennett*, No. 12-0194, 2012 WL 5834621 (Tort Claims Act immunity from malicious prosecution claim against county commission). In other words, prosecutors enjoy immunity from *tort claims*, like the name of the Act suggests. To Pardee's knowledge, this Court has never found a government immune from an award of a prevailing adversary's attorney fees (under prosecutorial or any other immunity).

The kind of immunity the County seeks here serves none of the underlying purposes of the Tort Claims Act, either. The purpose of the Act is to manage the cost of defense and the cost of insurance premiums. The Certified Question's contemplated scenario—a political subdivision bringing a frivolous RCRA citizen suit and then facing assessment of a prevailing opponent's attorney fees and costs—bears no resemblance. An award of attorney fees for frivolous litigation conduct is not likely to be an insured loss. Nor, one would hope, are political subdivisions pressing so many frivolous RCRA citizen suits that this kind of fee exposure would present a repeated or

substantial threat to public funds. The Tort Claims Act has no express textual basis or underlying public policy to support answering the Certified Question in the affirmative.

Claiming otherwise, the County advances a pair of arguments that lead nowhere. First, the County emphasizes that the Tort Claims Act "contains no express waiver of immunity from claims for attorney's fees." (Br. at 14.) Here, the County gets the law backwards. In West Virginia,[3] political subdivisions have no common law immunity to waive—any immunity they enjoy must instead be clearly granted by statute. *See* Syl. Pt. 2, *Marlin*, 198 W. Va. 635 (immunity does not exist "unless the legislature has clearly provided [it] under the circumstances"). Accordingly, the fact that the Tort Claims Act does not mention immunity from attorney fees awards does not favor the County's position—it means that no such immunity exists.

Second, the County claims that the Tort Claims Act confers an immunity from "fees imposed by law," which includes a blanket immunity from awards of attorney fees. (Br. at 15 (quoting W. Va. Code § 29-12A-5(a)(8)).) This argument misreads the Act. The statute provides that political subdivisions are "immune from liability if a **loss or claim results from** . . . **[a]ssessment or collection** of . . . fees or charges imposed by law." W. Va. Code § 29-12A-5(a)(8). Political subdivisions are therefore immune from liability arising from the "assessment or collection" of fees or charges—like, for example, negligence claims in connection with the collection of municipal licensure fees. *See Standard Distributing, Inc. v. City of Charleston*, 218 W. Va. 543 (2005). The County reads this to mean that political subdivisions are categorically immune from "fees or charges" themselves. A plain reading of the Act proves that

[3] The County's citation to Texas caselaw is therefore inapposite. (Br. at 12 (citing *Manbeck v. Austin Indep. Sch. Dist.*, 381 S.W.3d 528, 531 (Tex. 2012).) In Texas, political subdivisions enjoy common law immunity—so courts look to see if that immunity has been waived. *See Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429-430 (Tx. 2016) ("Political subdivisions of the state . . . share in the state's inherent immunity."). Again, the opposite is true in West Virginia.

is not true. The County's interpretation would confer absolute immunity to political subdivisions and would swallow the statute's other 16 subsections.

The Tort Claims Act does not grant political subdivisions immunity from attorney fee awards. This Court should answer the Certified Question in the negative for this reason, too.

C A RCRA citizen suit is not a "prosecutorial function."

The third reason why the Certified Question should be answered "no" is that bringing a RCRA citizen suit is not a "prosecutorial function" of West Virginia political subdivisions.[4]

The applicable section of the Tort Claims Act provides that "[a] political subdivision is immune from liability if a loss or claim results from . . . [j]udicial, quasi-judicial or prosecutorial functions." W. Va. Code § 29-12A-5(a)(2). Immunity attaches "to the functions [prosecutors] perform, not merely to the office." *Mooney v. Frazier*, 225 W. Va. 358, 371 at n.12 (2010) (quoting Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 8(c) at 213 (3d ed. 2008)). To that end, "prosecutorial functions" include "initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process." *Id.* (citing *Litigation Handbook* at § 8c).

Bringing a RCRA citizen suit is not a "prosecutorial function." A RCRA citizen suit may be brought by "any person." 42 U.S.C. § 6972(a). "Any person" is defined broadly and without regard to governmental status. 42 U.S.C. § 6903(15). The fact that any person can bring a RCRA citizen suit ought to be dispositive. Here, a political subdivision invokes prosecutorial immunity for a function that can be performed by anyone—and invokes immunity because the matter was

[4] The County dedicates several pages of its brief to arguing that its relator, the Fayette County Prosecuting Attorney, enjoys absolute prosecutorial immunity at common law. (Br. at 9-12.) The Certified Question asks whether a political subdivision enjoys immunity, not individual prosecutors. Moreover, in Pardee's underlying fee petition, Pardee seeks an award of its fees and costs from the County, not its relator. So this argument is irrelevant to both the Certified Question and the underlying dispute.

litigated by private attorneys deputized as assistant prosecutors. (Br. at 13.) But immunity does not rise and fall on the *office* litigating the claim—it rises and falls on the *function* performed. And the function here could be performed by "any person."

The fact that "any person" can bring a RCRA citizen suit is not the only reason it is not a prosecutorial function. The purpose of the statute is openly non-prosecutorial. A RCRA citizen suit serves to "supplement rather than supplant government action" relating to environmental cleanup. *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). While other RCRA provisions carry criminal penalties, RCRA's citizen suit provision is not one of them. *See* 42 U.S.C. § 6928. Successful RCRA citizen suits only warrant injunctive relief (a prospective "cleanup" order or a prohibitory "stop polluting" order). *Chesapeake Bay Foundation*, 484 U.S. at 60 (quoting 42 U.S.C. § 6972(a)(1)(B)). Simply put, a RCRA citizen suit does not resemble a prosecution in any functional sense.

Contending otherwise, the County relies on state statutes authorizing county commissions to enact ordinances and litigate public nuisances in their respective jurisdictions. (Br. at 13-14, n.10 (citing W. Va. Code § 7-1-3kk, § 7-1-3ff).) The County emphasizes that its RCRA citizen suit was "among other causes of action" and the "gravamen" of the underlying action was to abate a public nuisance. (Br. at 13 (citing JA144, 149).)

This effort to shoehorn a RCRA citizen suit into a "prosecutorial function" is without merit. The fact that the Legislature has authorized county commissions to do *some* things relating to environmental cleanup does not mean that bringing a RCRA citizen suit is a prosecutorial function. In fact, properly understood, the county commission is a legislative and quasi-judicial body—but when it files a RCRA citizen suit, it abandons that role and dons the hat of a voluntary litigant.

Under state law, county commissions enjoy authority to "enact ordinances, issue orders, and take other appropriate and necessary actions . . . to abate . . . public nuisance[s]." W. Va. Code § 7-1-3kk. That includes creating "fair and equitable rules of procedure" for enforcement proceedings "brought before the county commission." W. Va. Code § 7-1-3ff(e)-(f). County commission may bring a direct civil action "in circuit court . . . against the owner or owners of the private land" in question—but those actions are to lien and recover cleanup costs that have already been incurred by the county. W. Va. Code § 7-1-3ff(h). *See Nat'l Grid Holdings 2*, 2022 WL 4459475, **17-18. Basically, county commissions can enact ordinances, issue enforcement orders, preside over enforcement hearings, and file suits to recoup costs that the county incurred.

A county commission that exercises *that* authority is beyond the need for a RCRA citizen suit. RCRA citizen suits provide injunctive relief to compel cleanup or to prohibit prospective violations, *Chesapeake*, 484 U.S. at 60, but they do not provide a mechanism to compensate "for past cleanup efforts." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996). Put another way, following the procedures outlined in West Virginia Code § 7-1-3ff and filing a RCRA citizen suit are mutually exclusive options. For the former, a county commission presides over an enforcement action and seeks court relief to recover cleanup costs. For the latter, a county commission foregoes local enforcement action and/or cleanup activities, dons the hat of a citizen suit plaintiff, and seeks injunctive relief compelling the defendant to clean up the site.

A county commission choosing the second option is not performing a prosecutorial function, but is rather performing a function that can be undertaken by "any person" under federal law. A county commission that does so frivolously is subject to the same statutory consequences as any other citizen plaintiff.

CONCLUSION

For the reasons expressed above, this Court should answer the Certified Question in the negative: a West Virginia political subdivision that brings a citizen suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, is not entitled to prosecutorial immunity from being assessed a prevailing opponent's attorney fees and costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William M. Lorensen, hereby certify that on April 30, 2025, I served the foregoing ***BRIEF OF RESPONDENT PARDEE AND REALTY LLC*** via West Virginia File & Serve Express. On that same day, I served a courtesy copy of the same via e-mail on the below-referenced counsel of record:

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