NO. 02-0427

In the Supreme Court of Texas

WEST ORANGE-COVE CONSOLIDATED I.S.D., ET AL.,

Petitioners,

v.

FELIPE ALANIS, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF EDUCATION, ET AL.,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS ON THE MERITS

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Respondents do not, and cannot, contest that the constitutionality of the State's public school finance system presents issues of importance to the jurisprudence of the state. How, then, do Respondents try to persuade this Court that this case should not be reviewed? They argue dismissively, and disingenuously, that this is a mere "procedural" dispute.

This is no mere procedural dispute. In *Edgewood IV*, this Court issued a prescient warning: "[i]f a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate." *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 738 (Tex. 1995). This Court's concerns have been realized. The ceiling (the $1.50 cap) and the floor (the constitutional obligation to provide a "general diffusion of knowledge") have converged to the point where "meaningful discretion" has evaporated.

But Petitioners were not permitted to proceed beyond a very preliminary pleading stage. Why? According to the court of appeals, dismissal was proper because Petitioners still have "meaningful" taxing discretion. The court of appeals reasoned that (1) this Court in *Edgewood IV* conclusively linked the constitutional "general diffusion of knowledge" standard with accreditation standards, and (2) Petitioners can still slash their budgets (and tax rates) while satisfying these accreditation standards. But the court of appeals did this without a record because the case was dismissed before a record could be developed.

The State Respondents erroneously urge this Court to affirm based on the court of appeals' rationale. That request should be rejected for two reasons. *First*, the allegedly "conclusive" link between "general diffusion of knowledge" and bare accreditation standards does not exist.[1] The position that there is a "conclusive" link is predicated on a misreading of this Court's opinion in *Edgewood IV*, which explicitly stated that the meaning of "general diffusion of knowledge" could evolve over time and remains subject to judicial review. The Court indicated that evidence of changed circumstances should be considered in determining whether the linkage between "general diffusion of knowledge" and accreditation standards is appropriate. Such evidence was neither allowed nor considered in this case because of the premature dismissal of the case.

Second, the notion that Petitioners retain "meaningful discretion" is fallacious. Do districts taxing at $1.50 that are already implementing programming and staffing cuts really have *meaningful discretion* to cut their tax rates and budgets further when they face enormous challenges, such as rising fixed costs, escalating teacher salaries, growing student populations, and more rigorous accountability standards (that will be phased in by

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[1] The alleged conclusive linkage between bare accreditation and general diffusion of knowledge was based on this Court's statement that "[i]n Senate Bill 7, the Legislature equates the provision of a 'general diffusion of knowledge' with the provision of an accredited education." *Edgewood IV*, 917 S.W.2d at 730. However, nothing supports this proposition. The only mention of the phrase "general diffusion of knowledge" in the Education Code is found in Chapter 4. TEX. EDUC. CODE § 4.001 ("That mission [of the public education system] is grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens."). That same chapter sets out goals and objectives of the education system that are incompatible with bare accreditation standards. *See* TEX. EDUC. CODE § 4.001, 4.002. For example, section 4.002 sets a goal that students "will demonstrate exemplary performance in the understanding of science," when students' science acumen does not even factor into accreditation ratings. This inconsistency demonstrates that the Legislature never explicitly equated the provision of an accredited education with the constitutional measure.

2005)? Again, no such evidence was allowed or considered because of the premature dismissal of the case.

Unlike the State Respondents, the Alvarado and Edgewood Respondents (the "Intervenors") agree with Petitioners that the allegedly "conclusive" linkage between "general diffusion of knowledge" and accreditation standards is not supported by *Edgewood IV*. But the Intervenors ask this Court to deny the petition for review on the different but equally mistaken contention that the linkage can only be challenged in the context of an "adequacy suit," not a "tax suit" like the one brought by Petitioners. While the nature of these suits may differ, the meaning of "general diffusion of knowledge" (the baseline measure of a constitutionally sufficient education) is properly at issue in either context for Texas's students. Further, the Intervenors offer no reasonable explanation and no authority to support their argument that such issues may not be raised in a tax suit.

Finally, Respondents resort to scare tactics and mischaracterizations of Petitioners' arguments in an effort to persuade the Court that this case will require the judiciary to wade into legislative waters. Not so. Petitioners simply stated a claim based on the changed circumstances under which this Court said "future legal challenges may be brought," *Edgewood IV*, 917 S.W.2d at 731 n.10, namely, when school districts have lost meaningful discretion in setting tax rates. In addition, asking the courts to consider the meaning of a constitutional phrase such as "general diffusion of knowledge" is entirely consistent with the judiciary's long-acknowledged and well-established role.

Given the critical issues presented by this case and the wholesale lack of an evidentiary record, dismissal at the preliminary pleading stage was clearly improper. The

issue of whether Petitioners retain any meaningful discretion in setting their M&O tax rates requires an evidentiary record and certainly should not have been disposed of by special exceptions. Petitioners stated a claim made cognizable under *Edgewood IV* and the premature dismissal of their suit runs completely afoul of the Court's opinion in that case. If *Edgewood IV*'s "changed circumstances" warning is to have any meaning and viability, then review and reversal is necessary in this case.

ARGUMENT AND AUTHORITIES

I. *Edgewood IV* contemplated and allowed for Petitioners' claims.

A. Since 1995, Texas's public school finance system has deteriorated to the crisis point.

The Texas public school finance system is in crisis. In their Brief on the Merits, Petitioners referenced many articles and reports from various sources across the State illustrating the budget crisis now facing Texas's schools. (*See* Petitioners' Brief at 26-29 & n.21). As another recent article indicates, this budget crunch is having a devastating effect in the Court's own backyard, where Austin I.S.D., facing a $41 million shortfall despite its $1.50 M&O tax rate, likely will be forced to eliminate 500 teaching positions in the next few years. *See* Michelle Martinez, *Budget Crunch at Austin Schools*, AUSTIN AM.-STATESMAN, Nov. 17, 2002, at B1, 2002 WL 101145813.[2]

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[2] Respondents argue that the Legislature has acted on several occasions to increase the amount of funds available to Petitioners and other districts. (State Respondents' Brief at 9-11, 40-42; Alvarado Respondents' Brief at 2-3; Edgewood Respondents' Brief at 18.) However, these legislative adjustments to the financing formulas have not kept pace with inflation, as evidenced by the fact that the State's share of education spending has dropped to 40%, its lowest level since World War II. *See* Clay Robison, *State Paying Fewer School Costs Despite Bush's Goal*, HOUS. CHRON., June 28, 2001 at 25, 2001 WL 23610923. The Legislature's failures are further confirmed by a study that found that during the 2001-02 school year (1) major urban school districts in Texas tapped 99.5% of the maximum amount of state and local money available to them under the current school financing formula, compared to just 82.5% at the

Tellingly, neither the court of appeals nor the Respondents deny that the State's school finance system is in crisis. Indeed, how could the Respondents deny this, when they themselves have acknowledged that the situation has become "bleak," when they themselves have referred to districts like the Petitioners as "circling the drain," and when prominent consultants like Lynn Moak and Dan Casey have stated that the system simply "cannot handle growth" and "has run out of gas?" *See* Cindy Horswell, *Schools Struggle with Tax Caps; State Districts Seek Legislature to Help Avoid Budget Cuts*, HOUS. CHRON., Sept. 22, 2002, at 35, 2002 WL 23225210.; Lucy Hood, *Perry, Sanchez Avoid School Funding Specifics*, SAN ANTONIO EXPRESS-NEWS, Sept. 30, 2002 at 1B, 2002 WL 100209194; Jim Suydam, *School Finance Cloud Hangs Over Lawmakers*, AUSTIN AM.-STATESMAN, Oct. 22, 2002, at A1.

B. Petitioners stated a claim under the "changed circumstances" language in *Edgewood IV*.

Responding to the increasingly critical condition of the school finance situation, Petitioners brought this lawsuit based on the "changed circumstances" warning in *Edgewood IV*. The *Edgewood IV* court warned that if the ceiling on a district's taxing discretion (i.e., the $1.50 cap) and the floor on a district's taxing discretion (i.e., the constitutional obligation to provide a "general diffusion of knowledge") converged to the point where the district no longer had "*meaningful* discretion," the constitutional

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time of *Edgewood IV*, and (2) overall, Texas districts were utilizing 97.7% of the revenue capacity available to them, a huge leap from the 83.3% figure that was in effect in 1994-95. *See* Mike Norman, *Robin Hood Rules by Default*, FT. WORTH STAR TELEGRAM, Sept. 22, 2002 at E1, 2002 WL 100523194; Testimony of Lynn Moak, *Before the Joint Select Committee on Public School Finance*, 77th Leg., Interim (Feb. 7, 2002) (slide 4 of prepared materials).

provision prohibiting the levying of state ad valorem taxes would be violated. 917 S.W.2d 717, 738 (Tex. 1995) (emphasis added) (citing TEX. CONST. art. VIII, § 1-e). In other words, *Edgewood IV* recognized that while the State could place some constraints on a school district's discretion to set tax rates, these constraints could not reach the point where the district is denied "*meaningful* discretion" in setting its own tax rate. *Id.* at 737-38 (emphasis added).

C. *Edgewood IV* did not conclusively link the general diffusion of knowledge standard to legislative accreditation standards.

Ignoring the word "meaningful," Respondents argue that Supreme Court review is unwarranted because *Edgewood IV* purportedly established a conclusive link between the constitutional "general diffusion of knowledge" standard and "bare accreditation standards." Therefore, they reason, the floor has not converged with the ceiling because Petitioners allegedly still have room to cut their budgets (and lower their tax rates) without losing their accredited status.

This position, which was endorsed by the court of appeals, is both legally unsound and utterly divorced from reality. It ignores *Edgewood IV*'s declaration that the "general diffusion of knowledge" standard was not static but could change over time. The Court expressly cautioned that what the Legislature then considered "supplementation may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge." *Edgewood IV*, 917 S.W.2d at 732. It further ignores this Court's explanation that "[t]his is simply another way of saying that the State's provision for a general diffusion of knowledge *must reflect changing times, needs, and public*

expectations." *Id.* at 732 n.14 (emphasis added). Here, Petitioners pled a claim based expressly on this language, but the trial court and the court of appeals wrongfully denied Petitioners the opportunity to conduct discovery and present for determination on a fully developed evidentiary record whether accreditation requirements have kept up with changing times, needs and public expectations.

The State Respondents in particular disregard *Edgewood IV*'s statement that any linkage between the general diffusion of knowledge requirement and accreditation standards is subject to judicial review. The Court specifically observed that:

> the Legislature may [not] define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by Article VII, section 1. While the Legislature certainly has broad discretion to make the myriad policy decisions concerning education, *that discretion is not without bounds.*

917 S.W.2d at 730 n.8 (emphasis added).

Furthermore, like the court of appeals, the State Respondents pay no heed to *Edgewood IV*'s recognition that the issue of whether the constitutional "general diffusion of knowledge" standard is met requires consideration of evidence.[3] *Edgewood IV*, 917 S.W.2d at 731 n.10; (*see also* Petitioners' Brief on the Merits at 25-26). Nor do they address Petitioners' argument (as supported by the *Edgewood IV* trial judge) that the

[3] For example, in determining the range of taxing discretion that districts had, the *Edgewood IV* Court relied on evidence of the average yield per cent of tax effort of the districts with the poorest 15% of students and the districts with the richest 15% of students. *Edgewood IV*, 917 S.W.2d at 731 n.12. Using this data, and the average spending per pupil in accredited districts, the Court calculated that poor districts had to tax at $1.22 and rich districts had to tax at $1.31, on average, to provide an accredited education. Because the case was dismissed on special exceptions before any discovery could take place, there is no updated data in the record of average yield per cent of tax effort for poor and rich districts, or of the tax rates necessary to generate the funds needed to provide an accredited education. Even using the lax accreditation standards as the baseline, Petitioners expect that this data would show that the range of taxing discretion has been seriously circumscribed since the time of *Edgewood IV*.

original linkage between "general diffusion of knowledge" and accreditation standards was neither litigated, nor supported by the evidence elicited, in the *Edgewood IV* trial. (*See* Petitioners' Brief on the Merits at 25-26.)

Finally, the State Respondents fail to address Petitioners' argument that accreditation standards have been defined so low as to render the "general diffusion of knowledge" standard almost meaningless. (*See* Petitioners' Brief on the Merits at 22-24.) At the *Edgewood IV* trial, the Commissioner of Education testified that "'our present accreditation criteria at the acceptable level . . . does not match up with what the real world requirements are.'" 917 S.W.2d at 768 (Spector, J., dissenting) (quoting testimony of the Commissioner). That testimony is as true today as it was then.

Edgewood IV expressly contemplated a challenge like the one Petitioners have brought if circumstances changed. *Edgewood IV*, 917 S.W.2d at 731 n.10. ("[F]uture legal challenges may be brought if a general diffusion of knowledge can no longer be provided within the equalized system because of changed legal or factual circumstances."). Petitioners' claim, that the State's accreditation requirements have not kept up with changing times, needs and public expectations, and that the Petitioners lack meaningful discretion to drop below this adjusted "floor," is actionable under *Edgewood IV* and should be permitted to proceed beyond the pleading stage. Consideration of evidence now, nearly eight years after *Edgewood IV*, is appropriate for determining whether Petitioners' claims fall within the changed circumstances warning of *Edgewood IV*.

D. Litigation of the "general diffusion of knowledge" standard is appropriate.

The Intervenors, diverging from the State's position, agree with Petitioners that the constitutional phrase "general diffusion of knowledge" is subject to judicial review and could evolve over time. (Edgewood Respondents' Brief at 10-11; Alvarado Respondents' Brief at 12-13.) However, the Intervenors incorrectly contend that litigation of the meaning of "general diffusion of knowledge" is only appropriate in the context of an "adequacy suit," not a "tax suit" like this one. The simple answer is that the "general diffusion of knowledge" standard is at issue in both suits.

An "adequacy suit" is one in which a district alleges that it cannot provide a minimally adequate education to its students at the $1.50 M&O tax rate (*i.e.*, with all of the revenue available to it under the current system). In such a suit, the plaintiffs' argument would be that the "general diffusion of knowledge" requirement cannot be satisfied with the available revenue. A "tax suit," on the other hand, is one in which a district alleges that it can provide a minimally adequate education but only if it uses up most or all of its revenue capacity, (*i.e.*, it taxes at or near the $1.50 cap), leaving it no meaningful discretion in setting its own tax rates. In such a case, the plaintiffs' argument would be that the "general diffusion of knowledge" requirement exhausts all or nearly all of the available revenue.[4]

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[4] Because of the rising costs of education, many districts taxing at the $1.50 cap may have a tax challenge today but an adequacy challenge tomorrow. In other words, a district may be able to provide a minimally adequate education today by using all revenue available to it under the system. But because that same district cannot access any additional revenue to deal with escalating costs (on account of the $1.50 cap), the district may not be able to provide a minimally adequate education tomorrow.

In both instances, the constitutional phrase "general diffusion of knowledge" is at issue and has the same meaning. The nature of the challenge to the school finance system might differ, but the "general diffusion of knowledge" standard remains the same.

E. A district's "discretion" to cut its budget to where its accredited status is jeopardized is not "*meaningful* discretion."

Whatever rationale they use, all of the Respondents assert that every district taxing at $1.50 has the discretion to cut its budget (and thereby lower its tax rate) so long as the district can maintain its accredited status in spite of the cuts. This argument begs the question of whether such "discretion" would be "meaningful" — the qualifier used by this Court in *Edgewood IV*. 917 S.W.2d at 938. Does a district taxing at $1.50 have *meaningful* discretion to cut its tax rate and enact further budget cuts when it is struggling to cope with: (1) rising teacher salaries; (2) educating a rapidly growing population of students, many of whom have special needs; (3) escalating costs of utilities, insurance, supplies, and fuel; (4) building and maintaining adequate facilities; and (5) preparing students to meet more rigorous accountability standards that will be phased in beginning in 2003? Already, districts are cutting teachers and staff, increasing class sizes, eliminating extracurricular offerings, and neglecting to build needed facilities. (*See* Petitioners' Brief at 26-29 & n.21.) The wholesale elimination of courses and programs such as pre-kindergarten, kindergarten, fine arts, technology, foreign language, and athletics is right around the corner. *See* TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, A REPORT CARD ON TEXAS EDUCATION, Att. 1, p. 2; Att. 2

(2002), *available at* http://www.tasanet.org/depserv/govrelations/pledge/pledge.html.[5] Austin I.S.D. is already planning on cutting 500 teaching positions over the next few years to survive its budgetary shortfall, despite a growing student population. *See* Martinez, *supra*, at B1. Does it really have the discretion to cut its tax rate more? If so, is this what the *Edgewood IV* Court meant by "meaningful discretion?"

Petitioners submit that, based on the large numbers of districts taxing at or near the $1.50 cap, it is self-evident that there is a lack of meaningful discretion in the system. The aggregation of districts at the $1.50 cap is hardly a chance occurrence. Rather, this aggregation can only be explained by a rise in the "floor" and an increasing number of state mandates.[6]

Respondents insist that the number of districts at the $1.50 cap reflects not a rise in the "floor" but rather financial incentives built into the system (e.g., property-poor districts have an incentive to tax at $1.50 to maximize the available state aid). (State Respondents' Brief at 29; Edgewood Respondents' Brief at 15.) This argument suffers

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[5] Using Eanes I.S.D. and Midland I.S.D. as examples, the State Respondents insinuate that many districts taxing at $1.50 are spending money on fancy sports complexes with expensive Jumbotron scoreboards. (*See* State Respondents' Brief at 30 n.18.). This argument is misleading in two respects. First, the funds for construction of these facilities would have been generated by these districts' I&S (interest & sinking fund) taxes, which are used to finance debt associated with the construction of property. The I&S taxes are not subject to the $1.50 cap, as the State Respondents acknowledge. (State Respondents' Brief at 11 n.8.) Instead, the $1.50 cap applies to a school districts' M&O (maintenance and operations) tax rate, which is used to fund all administrative and operational costs. In other words, the State Respondents are comparing apples and oranges. Second, although Petitioners were not permitted to develop evidence, they are confident the State Respondents' anecdotal evidence is not representative of most of the districts taxing at the cap.

[6] The State Respondents attribute to Petitioners the argument that "the State cannot delegate state functions to a political subdivision without paying the cost of carrying out those functions." (State Respondents' Brief at 19.) This is one of many mischaracterizations of Petitioners' arguments by the State Respondents. *See also infra* note 9. Petitioners simply explained that in examining a district's budgetary discretion, the court must consider not only what is required to meet accreditation standards, but also how much money is required to comply with the many other governmental mandates.

from two flaws. *First*, it does not explain the tremendous jump, from 1994-95 to 2001-02, in the percentage of revenue capacity used by districts, despite the fact that the alleged financial incentives were in place throughout this period. During the 2001-02 school year, major urban school districts in Texas tapped 99.5% of the maximum amount of state and local money available to them under the current school financing formula, compared to just 82.5% in 1994-95. *See* Mike Norman, *Robin Hood Rules by Default*, FT. WORTH STAR TELEGRAM, Sept. 22, 2002 at E1, 2002 WL 100523194; Testimony of Lynn Moak, *Before the Joint Select Committee on Public School Finance*, 77th Leg., Interim (Feb. 7, 2002) (slide 4 of prepared materials) (hereinafter "Moak Testimony").[7] Overall, Texas districts used 97.7% of the revenue capacity available to them in 2001-02, a huge leap from the 83.3% figure that was in effect at the time of *Edgewood IV*. *See* Moak Testimony at slide 4. *Second*, Respondents' theory fails to take into account the countervailing political incentives to keep tax rates down. By pushing tax rates up to (or very close to) the cap, school boards have risked the wrath of their property-owning constituents not to maximize state aid, but because they know that they need the increased revenue to provide an adequate education for their students.

At bottom, the court of appeals committed a significant error by holding that Petitioners' suit should be dismissed because Petitioners had not pled and could not plead that they were "forced to tax at the highest allowable rate to provide the bare, accredited education." 77 S.W.3d at 539. This holding is based upon the erroneous assumption that

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[7] The written materials prepared by Mr. Moak are available at http://www.tasanet.org/depserv/govrelations/joint/moak.pdf. A video reproduction of his testimony before the committee is available at http://www.senate.state.tx.us/75r/senate/commit/c890/c890.htm#Reports, under the February 7 hyperlink.

(1) the linkage between the constitutional general diffusion of knowledge standard and legislative accreditation standards is irrevocable and not subject to judicial oversight; (2) evidence of changed circumstances cannot be considered; and (3) the word "meaningful" (in the phrase "meaningful discretion") is meaningless.

II. Petitioners are asking the Court to review the constitutionality of a statutory scheme, not to intrude on legislative functions or make tax policy.

Respondents attempt to convince the Court that a ruling favorable to the Petitioners will require the Court to intrude on legislative responsibilities. They do this both by misrepresenting the relief requested by Petitioners and by misstating how litigation involving the meaning of "general diffusion of knowledge" connects to that relief. The argument that the Court cannot decide this case without usurping the legislative function is simply inaccurate.

A. The State Respondents mischaracterize Petitioners' requested relief.

Without citing the record, the State Respondents attribute to Petitioners the argument that the "Texas Constitution requires the State to pay the majority of the total cost of education." (State Respondents' Brief at 19.) The State Respondents also insinuate that Petitioners seek a judicial involvement in fashioning the ultimate remedy, whether that remedy includes an increase in state funding, the raising of the $1.50 cap, both, or neither.

The record indicates otherwise, as even the Edgewood Respondents concede. (Edgewood Respondents' Brief at 3.) The only relief Petitioners are seeking is a declaration that the $1.50 cap results in a de facto state ad valorem tax in violation of

article VIII, section 1-e of the Texas Constitution. (CR 198.) When and if a judicial declaration issued, it would be up to the Legislature to decide how to rectify the constitutional deficiency.[8]

The State Respondents improperly insinuate that Petitioners seek a court order raising the $1.50 cap. (State Respondents' Brief at 18.) That is incorrect. To the limited extent that the issue of a raised cap was addressed below, Petitioners made it clear that they were only seeking the declaratory relief described above (*i.e.*, a declaration of unconstitutionality). Petitioners recognized (as an aside) that the Legislature could, as a stopgap measure, raise the cap, but pointed out that such a choice would aggravate the State's overreliance on local property taxes as a means of financing the system. (CR 197.) But Petitioners rejected the notion that the judiciary should have any role in deciding that form of relief. (CR 198.)[9]

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[8] The remedial model envisioned by Petitioners would follow the pattern set in the previous *Edgewood* cases. In *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*), the Court declared the school finance system unconstitutional under Article VII, section 1 of the Texas Constitution, but gave the Legislature seven months to correct the constitutional deficiency, "without instructing the legislature as to the specifics of the legislation it should enact." *Id.* at 399. In *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (*Edgewood II*), the Court concluded that the Legislature's attempt at addressing the constitutional deficiencies was insufficient, and gave the Legislature an opportunity to try again. The Legislature then adopted a school finance scheme based on the concept of tax-base consolidation. This scheme was then challenged on the grounds that it imposed a statewide property tax in violation of article VIII, section 1-e of the Texas Constitution. The Texas Supreme Court, for the third time, declared the Legislature's work product unconstitutional while giving the Legislature almost a year and a half to address the constitutional shortcomings. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (*Edgewood III*).

[9] Respondents speculate, based on this discussion, that what Petitioners are really after is to undo the equalization gains made over the course of the *Edgewood* litigation—although they offer no record cites in support of this proposition. (State Respondents Brief at 13, 18; Edgewood Respondents Brief at 3.) This is simply not true. First, as the State Respondents concede, many more Chapter 42 districts (districts whose property wealth is below $305,000 per student) are impacted by the $1.50 cap than Chapter 41 districts (districts whose property wealth exceeds $305,000 per student). (State Respondents' Brief at 29 n.17.) (In fact, the State Respondents overstated the number of Chapter 41 districts taxing above $1.45; there are not even 193 Chapter 41 districts in the State). Rich and poor districts are in the same boat with

B. It is wholly a judicial function to determine, following litigation on the merits, the meaning and scope of the constitutional phrase "general diffusion of knowledge."

Respondents also argue that any litigation of the measure of "general diffusion of knowledge" will necessarily require the judiciary to overstep its role and intrude on legislative prerogatives. This argument fails for several reasons.

1. The judiciary is obligated to interpret the Constitution.

Despite *Edgewood IV*'s explicit endorsement of judicial review in the education context, Respondents assert that any legislative determination of the meaning of the constitutional phrase "general diffusion of knowledge" is conclusive and that the judiciary has no role in the debate. However, the courts cannot abdicate their responsibility to determine whether the Legislature's actions comport with Texas's constitutional requirements. Courts can and should provide guidance as to the scope and parameters of constitutional requirements without usurping any legislative function.

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respect to the cap. Second, Respondents ignore the fact that the relief that Petitioners seek from the Legislature—an increase in the state's share of education financing and a decreased reliance on the local property tax—would lead to equalization gains, because the local property tax is the major source of the inequity in the system.

As a corollary to their argument that Petitioners are out to roll back the equity gains, the State Respondents attribute to Petitioners the claim that "[i]t is constitutionally acceptable, with the cap struck down, for property-rich districts to have access to much greater revenue than property-poor districts at the same tax rate." (State Respondents' Brief at 19.) Of course, Petitioners have never made that argument (as evidenced by the absence of record cites in the State Respondents' brief), nor do they seek such a result. As a legal matter, however, this proposition is correct. Under *Edgewood IV*, districts must have substantially equal access to funding up to the level necessary to provide a general diffusion of knowledge; after that point is reached, unequalized revenue is constitutionally permissible. 917 S.W.2d at 731-32 ("As long as efficiency is maintained, it is not unconstitutional for districts to supplement their programs with local funds, *even if* such funds are unmatched by state dollars . . . .).

In *Edgewood I*, this Court held:

> By express constitutional mandate, the legislature must make 'suitable' provision for an 'efficient' system for the 'essential' purpose of a 'general diffusion of knowledge.' While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions. . . .

See Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).[10]

This idea was eloquently developed by the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, a school finance case:

> To avoid deciding this case because of "legislative discretion, "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.
>
> . . . .
>
> The judiciary has the ultimate power and the duty to apply, interpret, define, and construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to do so. This duty must be exercised even when such action services as a check on the activities of another branch or when the court's view of the constitution is contrary to that of the other branches, or even that of the public.

790 S.W.2d 186, 208-10 (Ky. 1989); *see also Lake View School District No. 25 v. Huckabee*, No. 01-836, 2002 WL 31618995 (Ark. Nov. 21, 2002).

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[10] The Alvarado Respondents incorrectly claim that the case of *Mumme v. Marrs*, 40 S.W.2d 31 (Tex. 1931), obligates this Court to defer to the Legislature's accreditation standards unless these standards are "arbitrary." Arbitrariness is one of the tests used by Texas courts to determine whether legislation violates the equal protection clause of the Texas constitution, the claim that was at issue in *Mumme*. *See id.* at 36. As this case does not involve an equal protection challenge, *Mumme* is inapplicable. If the Alvarado Respondents were correct, one would have expected the Court in *Edgewood I* to judge the then-existing school finance system by whether it was constructed in an arbitrary manner, which it did not. *Edgewood I* also squarely rejected the notion that requirements articulated in the Texas Constitution's education clause (article VII, section 1) were "committed unconditionally to the legislature's discretion." *Edgewood I*, 777 S.W.2d at 394 (Tex. 1989).

2. This Court contemplated litigation of the meaning of "general diffusion of knowledge."

Also missing from the Respondents' analysis is the recognition that *Edgewood IV* expressly contemplated litigation of the meaning of "general diffusion of knowledge." Until *Edgewood IV*, no court had ever provided any substantive guidance as to the meaning of this constitutional phrase. The *Edgewood IV* court did, while also indicating that the standard was subject to judicial review and could evolve over time, in order to reflect "changing times, needs, and public expectations." 917 S.W.2d at 730 n.8, 732 n.14. Petitioners are only following this Court's lead.

The Alvarado Respondents warn that the Court may be required to identify a specific dollar per student figure necessary to achieving the general diffusion of knowledge. Of course, the Court already did this in *Edgewood IV*, calculating that to satisfy accreditation standards, a district needed to spend $3500 per student. 917 S.W.2d at 730 n.10. In criticizing other potential measures of "general diffusion of knowledge," Respondents overlook the inherent flaws in the calculation upon which they rely.[11] The $3500 figure was based on the average spent by all accredited districts, which combined data from rural and urban districts from all geographic regions of the State. How can $3500 be a floor for all districts (urban and rural, West Texas and South Texas, etc.) when the cost of education varies so widely from district to district, depending on district and pupil characteristics? *See* TEX. EDUC. CODE §§ 42.101-.106, 42.151-.158; *see*

[11] Using the same calculation, the State Respondents asserted that the equivalent figure for the 2000-01 school year was $4179 per student. (CR 16 n.3.)

generally Charles A. Dana Center, *A Study of Uncontrollable Variations in the Costs of Texas Public Education* (Nov. 1, 2000).

This Court rightly anticipated that it might be necessary one day for this very suit to be litigated. *Edgewood IV* left the door open for Petitioners to challenge the linkage of the constitutional mandate to the accreditation standards, based on changed circumstances. The court of appeals erred by shutting this door.

C. The obligation to provide a general diffusion of knowledge falls on the school districts, not just the Legislature.

The Intervenors argue that the constitutional obligation to provide a general diffusion of knowledge lies with the Legislature, not the school districts. Therefore, they reason, a district cannot be stripped of meaningful discretion on account of this constitutional obligation because (1) only the Legislature can impose obligations on districts and (2) the only obligation imposed on districts by the Legislature is to provide an accredited education. This argument suffers from two major flaws.

First, because the Legislature can fulfill its constitutional obligation to provide a "general diffusion of knowledge" only through the school districts, the constitutional obligation flows to them as well, as *Edgewood IV* recognized. 917 S.W.2d at 731 ("Property-poor and property-districts presently can attain the revenue necessary to provide suitably for a general diffusion of knowledge at tax rates of approximately $1.31 and $1.22, respectively.")

Second, the Legislature specifically provided that "school districts . . . have the primary responsibility for implementing the state's system of public education and

ensuring student performance in accordance with this code." TEX. EDUC. CODE § 11.002. The code further provides:

> The mission of the public education system of this state is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. That mission is grounded on the conviction that a *general diffusion of knowledge* is essential for the welfare of this state and for the preservation of the liberties and rights of citizens.

TEX. EDUC. CODE § 4.001 (emphasis added). Juxtaposing these two code sections, it appears that the Legislature has explicitly required districts to take "primary responsibility" for providing a "general diffusion of knowledge" sufficient to allow Texas children to "fully participate . . . in the social, economic, and educational opportunities of our state and nation." Stated another way, the Legislature *has* explicitly delegated its constitutional obligation to provide a general diffusion of knowledge to the school districts. A school district has the right to bring a claim under article VIII, section 1-e of the Texas Constitution when fulfilling its constitutional obligation (in compliance with the $1.50 cap) strips it of all meaningful discretion in setting its own tax rate.

III. Petitioners have been wrongfully deprived of their day in court by a procedural "Catch-22."

It is well established in Texas that when a trial court grants a defendant's special exceptions, the plaintiff must have the opportunity to replead before its claims can be dismissed. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 658-59 (Tex. 1998); *Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974). This case presents an unusual situation in that the trial court dismissed at the pleading stage on one ground and the court

of appeals affirmed on a different ground. Under these circumstances, the court of appeals should have remanded to allow Petitioners the opportunity to replead.

The Respondents fallaciously respond that Petitioners elected to stand on their pleadings and therefore the court of appeals properly affirmed the trial court's dismissal of Petitioners' claim. In support of their argument, the State Respondents cite a statement by Petitioners' counsel at a June 2001 hearing on the special exceptions, in which counsel argued that Petitioners had provided fair notice of their claims to the opposing parties. (State Respondents' Brief at 8-9, 21.) That statement was absolutely correct. Petitioners' First Amended Petition (1) cited the "general diffusion of knowledge" standard, (2) quoted the *Edgewood IV* prediction that "[e]ventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge," and (3) concluded that, "[a]s predicted in *Edgewood IV*, school districts, such as the Plaintiffs, are required to tax at or near the maximum allowable $1.50 M&O tax rate in order to educate students in their districts." (CR 109.)[12]

The only reason the trial court did not afford Petitioners the opportunity to re-plead and conduct discovery was that no re-pleading could cure the fact that less than 50% of the districts were taxing at the cap, which was the trial court's rationale for

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[12] The court of appeals justified its dismissal on the ground that Petitioners pled that they needed to tax at or near $1.50 to "educate their students," rather than to "provide a bare, accredited education." 78 S.W.3d at 539. However, given how low the Legislature (or in actuality, the Commissioner of Education) has set "bare accreditation" standards, Petitioners' phrase more accurately reflects a districts' obligation to provide a "general diffusion of knowledge," *i.e.*, an educational standard that is consistent with the needs and public expectations of today. *Edgewood IV*, 917 S.W.2d at 732 n.14. (*See also* CR 202.) Petitioners' phrase also recognizes that "[m]ere competence in the basics – reading, writing, and arithmetic – is insufficient in the [twenty-first] century to insure that this State's public school students are fully integrated into the world around them." *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997).

dismissal. (CR 224-25, 245.) The court of appeals erroneously seized upon the trial court's refusal to allow Petitioners to re-plead, which made sense within the limited context of the trial court opinion, but which made no sense within the context of the changed holding of the appellate court. If the trial court had dismissed on the grounds cited by the court of appeals, the trial court would have given Petitioners an opportunity to re-plead and conduct discovery. In fact, the trial court explicitly (and correctly) recognized that Petitioners' lawsuit could not be dismissed at the pleading stage on the theory adopted by the court of appeals because the inquiry required the consideration of an evidentiary record, including a "forensic audit of districts' costs of education." (CR 244-45.) Under these circumstances, the court of appeals should have remanded to the trial court to allow Petitioners to either proceed with their claim or re-plead. *See Friesenhahn*, 960 S.W.2d at 658-59.

The Respondents also mistakenly assert that, even though there is no factual record in this case to support such a claim, it is somehow evident to all that Petitioners could not re-plead to meet the court of appeals standard. This assertion is nothing more than empty rhetoric, unsupported by the record in this case. Indeed, there cannot be any record evidence to support the Respondents' contention, since the case was dismissed before any discovery was done. The fact is, Petitioners should have been given an opportunity to re-plead and adduce evidence and the foreclosure of this opportunity is a flat-out denial of their due process rights.

CONCLUSION AND PRAYER

For the foregoing reasons, and for the reasons outlined in their Brief on the Merits, Petitioners ask this Court to grant their petition for review, reverse the judgment of the court of appeals and remand this case to the trial court for further proceedings. In the alternative, Petitioners ask that the Court remand to the court of appeals the issues not otherwise addressed by that court. Petitioners further ask for all such other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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