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' BRIEF ON THE MERITS

HAYNES AND BOONE, LLP

George W. Bramblett, Jr.
State Bar No. 02867000
Nina Cortell
State Bar No. 04844500
Charles G. Orr
State Bar No. 00788148
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

HAYNES AND BOONE, LLP

Mark R. Trachtenberg
State Bar No. 24008169
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

ATTORNEYS FOR PETITIONERS

IDENTITY OF PARTIES AND COUNSEL

I. Plaintiffs/Appellants/Petitioners:

West Orange-Cove Consolidated I.S.D., Coppell I.S.D., La Porte I.S.D., and Port Neches-Groves I.S.D.

Counsel:
(Trial and/or Appellate)

George W. Bramblett, Jr.
Nina Cortell
Carrie L. Huff
Charles G. Orr
HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202-3789

W. Wade Porter
HAYNES AND BOONE, LLP
600 Congress Avenue, Suite 1600
Austin, Texas 78701-3236

Mark R. Trachtenberg
HAYNES AND BOONE, LLP
1000 Louisiana, Suite 4300
Houston, Texas 77002-5012

II. Defendants/Appellees/Respondents:

Felipe Alanis in his official capacity as the Commissioner of Education, the Texas Education Agency, Carol Keeton Rylander in her official capacity as Texas Comptroller of Public Accounts, and the Texas State Board of Education

Counsel:
(Trial and Appellate)

John Cornyn, Attorney General for the State of Texas
Howard Baldwin, Jr., First Assistant Attorney General
Jeffrey Boyd, Deputy Attorney General for Litigation
Julie Caruthers Parsley, Solicitor General
Toni Hunter, Chief, General Litigation Division
Office of the Attorney General for the State of Texas
Post Office Box 12548, Capital Station
Austin, Texas 78711-2548

III. Alvarado Intervenors/Appellees/Respondents:

Alvarado I.S.D., Anthony I.S.D., Aubrey I.S.D., Bangs I.S.D., Bells I.S.D., Community I.S.D., Cooper I.S.D., Covington I.S.D., Detroit I.S.D., Early I.S.D., Fannindel I.S.D., Hutto I.S.D., Karnes City I.S.D., Kaufman I.S.D., Kirbyville I.S.D., Krum I.S.D., La Joya I.S.D., Mercedes I.S.D., Meridian I.S.D., New Boston I.S.D., Nocona I.S.D., Olfen I.S.D., Orange Grove I.S.D., Poteet I.S.D., Robinson I.S.D., Rosebud-Lott I.S.D., Rusk I.S.D., Southside I.S.D., Tornillo I.S.D., Trenton I.S.D., Tulia I.S.D., Uvalde I.S.D., Venus I.S.D., and Weatherford I.S.D.

Counsel: **(Trial and Appellate)**	Randall B. Wood Doug W. Ray RAY, WOOD, FINE & BONILLA, LLP 2700 Bee Caves Road Austin, Texas 78746

IV. Edgewood Intervenors/Appellees/Respondents:

Edgewood I.S.D., Ysleta I.S.D., Laredo I.S.D, San Elizario I.S.D., Socorro I.S.D., and South San Antonio I.S.D.

Counsel: **(Trial and Appellate)**	Albert H. Kauffman (withdrew after Court of Appeals decision) Leticia M. Saucedo Nina Perales Joseph P. Berra Mexican American Legal Defense and Educational Fund, Inc. 140 E. Houston Street, Suite 300 San Antonio, Texas 78201

TABLE OF CONTENTS

Identity of Parties and Counsel i

Table of Contents iii

Index of Authorities vii

Abbreviations and Record References xi

Statement of the Case xii

Statement of Jurisdiction xiv

Issues Presented xv

Preliminary Statement 1

Statement of Facts 1

A. The Court has considered prior challenges to the school finance system 1

1. In *Edgewood III*, this Court held that the school finance system violated the constitutional prohibition on a state property tax 1

2. After *Edgewood III*, the Legislature passed Senate Bill 7, which instituted the current system 2

3. In *Edgewood IV*, this Court upheld the constitutionality of Senate Bill 7, but warned that the system could become unconstitutional if the $1.50 cap became both a floor and a ceiling for school districts 4

B. Petitioners brought suit based upon the *Edgewood IV* warning and the changed circumstances forecast by this Court in *Edgewood IV* 5

C. The trial court dismissed Petitioners' suit at the pleading stage 6

D. The court of appeals disagreed with the trial court's reasoning, but affirmed the trial court's dismissal on a ground that the trial court had explicitly stated would require an evidentiary record to resolve 8

Summary of the Argument 8

Argument and Authorities 11

I. This case is important to jurisprudence of the State 11

A. This Court's warning that many districts would be forced to tax at the cap has materialized 12

B. This Court has consistently recognized that issues relating to the constitutionality of the school finance system are important to the jurisprudence of the State 14

II. Dismissal without an opportunity to re-plead, engage in discovery, or present evidence, was wrong 15

III. Dismissal based upon the accreditation standard was wrong 18

A. In *Edgewood IV*, the Court affirmed the propriety of judicial oversight over the meaning of the constitutional phrase "general diffusion of knowledge" 18

B. In *Edgewood IV*, the Court acknowledged that the meaning of "general diffusion of knowledge" could change over time 21

C. The structure of the current accreditation system casts doubt on whether "bare accreditation" is the appropriate constitutional measure 21

1. Accreditation requirements are determined by the Commissioner of Education, not the Legislature 21

2. Accreditation requirements consistently have been set low 22

D. Evidence should be considered in determining whether current accreditation standards satisfy the constitutional general diffusion of knowledge standard 25

1. Petitioners should have been permitted to present evidence of changed circumstances since *Edgewood IV* 25

2. The evidence would have revealed a system in distress and particular districts in crisis 26

IV. The trial court's rationale for dismissal is flawed as well and was properly rejected by the court of appeals 29

A. The trial court erred by requiring Petitioners to plead a systemic injury 30

B. Even if a systemic injury is required, the trial court erred both in setting an unreasonably high threshold to show systemic injury and in excluding districts that should have counted towards the threshold 31

1. The trial court erred in holding that at least half of the school districts in the State had to tax at the $1.50 cap before the school finance system could be considered an unconstitutional state ad valorem tax 31

a. Petitioners can plead a systemic constitutional violation without showing that 50% of the districts in the "system" are affected 31

b. The operative language in *Edgewood IV* does not support a 50% threshold 32

2. The trial court erred in concluding that only those districts taxing exactly at $1.50 without providing the optional homestead exemption lacked "meaningful discretion" 34

a. In applying its pleading threshold, the trial court erred in excluding districts taxing between the rates of $1.45 and $1.49 (which would bring the percentage of injured districts up to 30% 34

b. The trial court erred in excluding districts granting a local option homestead exemption (which would bring the percentage of injured districts up to 41%) 36

3. The fact that 17% of districts are taxing at the $1.50 cap without providing an optional homestead exemption is sufficient to plead a systemic injury 37

C. The trial court erred by dismissing as unripe Petitioners' alternative claim that an actual injury was imminent 37

1. A claim is ripe if it is sufficiently likely to occur 38

2. Because a systemic injury is sufficiently likely to occur, the trial court had jurisdiction to consider Petitioners' declaratory judgment claim 39

3. There is no "legislative exception" to the ripeness test 41

Conclusion and Prayer 44

Certificate of Service 46

Appendix ..... Tabs A - F

A Court of Appeals Opinion

B Trial Court's Modified Final Order

C *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*)

D TEX. CONST. art. VIII, § 1-e

E TEX. CONST. art. VII, § 1

F Plaintiffs' First Amended Petition

INDEX OF AUTHORITIES

CASES

Alabama Coalition for Equity v. Hunt, Op. of the Justices,
624 So.2d 107 (Ala. 1993) 20

Bland Indep. Sch. Dist. v. Blue,
34 S.W.3d 547, 554-55 (Tex. 2000) 15

Campaign for Fiscal Equity v. State,
655 N.E.2d 661 (N.Y. 1995) 20

Campaign for Fiscal Equity v. State,
719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001), *rev'd on other grounds*,
744 N.Y.S.2d 130 (N.Y. App. Div. June 25, 2002). 19

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. ("Edgewood III"),
826 S.W.2d 489 (Tex. 1992) 2, 30

Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood I"),
777 S.W.2d 391 (Tex. 1989) 1, 19, 20, 42, 43

Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood II"),
804 S.W.2d 491 (Tex. 1991) 1

Edgewood Indep. Sch. Dist. v. Meno ("Edgewood IV"),
917 S.W.2d 717 (Tex. 1995) ..... *passim*

Friesenhahn v. Ryan,
960 S.W.2d 656 (Tex. 1998) 16

Harkins v. Crews,
907 S.W.2d 51 (Tex. App.—San Antonio 1995, writ denied) 40

Helena Elementary Sch. Dist. No. 1 v. State,
769 P.2d 684 (Mont. 1989); 20

Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.,
850 P.2d 724 (Idaho 1993); 20

Leandro v. State,
488 S.E.2d 249 (N.C. 1997) 20

Lelsz v. Kavanagh,
807 F.2d 1243 (5th Cir. 1987) 32, 37

Lelsz v. Kavanaugh,
783 F. Supp. 286 (N.D. Tex. 1991),
aff'd, 983 F.2d 1061 (5th Cir. 1993) 32

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 19

McCart v. Cain,
416 S.W.2d 463 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.) 40

Mestiza v. DeLeon,
8 S.W.3d 770 (Tex. App. —Corpus Christi 1999, no pet.) 16

Patterson v. Planned Parenthood of Houston and Southeast Texas, Inc.,
971 S.W.2d 439 (Tex. 1998) 38

Perry v. Del Rio,
53 S.W.3d 818 (Tex. App.—Austin 2001),
aff'd, 66 S.W.3d 239 (Tex. 2001) 38, 41, 42

Perry v. Del Rio,
66 S.W.3d 239 (Tex. 2001) 38, 42

Rolph v. State,
677 N.E.2d 733 (Ohio 1997) 20

Seattle Sch. Dist. No. 1 of King County v. State,
585 P.2d 71 (Wash. 1978) 20

State v. Johnson,
896 S.W.2d 277 (Tex. App.—Houston [1st. Dist.] 1995),
aff'd 939 S.W.2d 586 (Tex. Crim. App. 1996) 36

Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n,
27 S.W.3d 276 (Tex. App.—Austin 2000, pet. denied) 38

Texas Dep't of Pub. Safety v. Moore,
985 S.W.2d 149 (Tex. App.—Austin 1998, no pet.) 38

West-Orange Cove Consol. Indep. Sch. Dist. et al. v. Alanis et al.,
78 S.W.3d 529 (Tex. App.—Austin 2002, pet. filed).....8, 15, 16, 18, 30

CONSTITUTION AND STATUTES

Tex. Const. art. IV, § 8..... 42

Tex. Const. art. VII, § 1 ..... 4, 19

Tex. Const. art. VIII, § 1-e 2, 30

Tex. Const. art. VIII, § 1-b (e)..... 36

19 Tex. Admin. Code § 97.3 (2002)..... 22

Tex. Educ. Code § 4.002 (Vernon 1996)..... 23

Act of June 8, 1999, 76th Leg., R.S., ch. 397, 1999 Gen. Laws 2502
(codified as amended in Tex. Educ. Code §§ 39.022-39.051)..... 24

Tex. Educ. Code § 39.023(a), (c) (Vernon Supp. 2002) 24

Tex. Educ. Code § 39.072(a) (Vernon Supp. 2002) 22

Tex. Educ. Code § 41.002 (Vernon Supp. 2002) 3

Tex. Educ. Code § 41.003 (Vernon Supp. 2002) 3

Tex. Educ. Code § 42.101 (Vernon Supp. 2002) 3

Tex. Educ. Code §§ 42.151-.158 (Vernon 1996 & Supp. 2002)..... 3

Tex. Educ. Code § 42.252 (Vernon Supp. 2002) 3

Tex. Educ. Code §§ 42.301-.303 (Vernon Supp. 2002) 3

Tex. Educ. Code § 45.003(d) (Vernon Supp. 2002)..... 4, 5

Tex. Tax. Code § 11.13(n) (Vernon 2001) 36

SECONDARY SOURCES

ACHIEVE, INC., AIMING HIGHER: MEETING THE CHALLENGES OF EDUCATION REFORM IN TEXAS 21 (June 2002)
http://www.tea.state.tx.us/curriculu/aimhitexas.pdf 24

DEPARTMENT OF ACCOUNTABILITY REPORTING AND RESEARCH, TEXAS EDUCATION AGENCY, 2002 ACCOUNTABILITY MANUAL (Apr. 2002),
http://www.tea.state.tx.us/perfreport/account/ 2002/manual/manual.pdf 23, 24

TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS/TEXAS ASSOCIATION OF SCHOOL BOARDS, REPORT ON SCHOOL DISTRICT MANDATES, 1-20 (Sept. 2002)
http://www.tasanet.org/despserv/govrelations/mandates02.pdf..... 17, 18

TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, A REPORT CARD ON TEXAS EDUCATION (2002)
http://www.tasanet.org/depserv/govrelations/pledge/pledge.html .. 9, 13, 14, 28, 29, 39, 40

Testimony of Lynn Moak, *Before the Joint Select Committee on Public School Finance*, 77th Leg., Interim (Feb. 7, 2002)..... 13, 14

ABBREVIATIONS AND RECORD REFERENCES

Abbreviations

• West Orange-Cove Consolidated I.S.D., Coppell I.S.D., La Porte I.S.D., and Port Neches-Groves I.S.D.	"Petitioners"
• Felipe Alanis in his official capacity as the Commissioner of Education, the Texas Education Agency, Carol Keeton Rylander in her official capacity as Texas Comptroller of Public Accounts, and the Texas State Board of Education	"State Respondents"
• Alvarado I.S.D., Anthony I.S.D., Aubrey I.S.D., Bangs I.S.D., Bells I.S.D., Community I.S.D., Cooper I.S.D., Covington I.S.D., Detroit I.S.D., Early I.S.D., Fannindel I.S.D., Hutto I.S.D., Karnes City I.S.D., Kaufman I.S.D., Kirbyville I.S.D., Krum I.S.D., La Joya I.S.D., Mercedes I.S.D., Meridian I.S.D., New Boston I.S.D., Nocona I.S.D., Olfen I.S.D., Orange Grove I.S.D., Poteet I.S.D., Robinson I.S.D., Rosebud-Lott I.S.D., Rusk I.S.D., Southside I.S.D., Tornillo I.S.D., Trenton I.S.D., Tulia I.S.D., Uvalde I.S.D., Venus I.S.D., and Weatherford I.S.D.	"Alvarado Respondents"
• Edgewood I.S.D., Ysleta I.S.D., Laredo I.S.D, San Elizario I.S.D., Socorro I.S.D., and South San Antonio I.S.D.	"Edgewood Respondents"

Record references

Petitioners will cite to the record as follows:

- Clerk's record: "CR (page)";
- Reporter's record: "RR (page)";
- References to the attached Appendix: "Tab (letter) at (page)".

STATEMENT OF THE CASE

Nature of the case:	Petitioners sued State Respondents seeking a declaration that the $1.50 cap on a school district's tax rate for "maintenance and operations" (Texas Education Code § 45.003(d)) imposes a state ad valorem tax in violation of article VIII, section 1-e of the Texas Constitution because of the districts' lack of meaningful discretion in setting tax rates.
Trial court:	The Honorable Scott McCown, 345th Judicial District Court, Travis County.
Disposition in trial court:	The trial court dismissed Petitioners' lawsuit at the pleading stage. Based upon the pleadings, the court determined that "only" 12% of the districts were taxing at the $1.50 cap and held that, "[f]or the legislative design to be an unconstitutional state ad valorem tax, the design must require a significant number of districts to tax at the cap, something approaching or exceeding half the districts." (CR 245) (Tab B.)
Parties in court of appeals:	All parties in the trial court were parties to the appeal. While the case was on appeal, Felipe Alanis, the current Commissioner of Education, was substituted for Jim Nelson, the former Commissioner of Education, pursuant to Rule 7.2(a) of the Texas Rules of Appellate Procedure.
Court of Appeals opinion:	*West-Orange Cove Consol. Indep. Sch. Dist. et al. v. Alanis et al.*, 78 S.W.3d 529 (Tex. App.—Austin 2002, pet. filed) (opinion by Justice Smith, joined by Chief Justice Aboussie and Justice Puryear). (Tab A.)

Disposition in Court of Appeals: The court of appeals affirmed the trial court's dismissal of Petitioners' lawsuit, but on a different ground.

The court of appeals rejected the "numbers" approach advanced by the trial court, holding that the issue was whether a single district had been forced to "tax at the highest allowable rate to provide the bare, accredited education." 78 S.W.3d at 539.

The court of appeals nevertheless affirmed dismissal, but on a ground deemed insufficient by the trial court: that Petitioners had not pled that they were required to "tax at the highest allowable rate to provide the bare, accredited education." The court of appeals dismissed *without allowing Petitioners an opportunity to re-plead or present evidence, even though the trial court had assumed the sufficiency of Petitioners' pleadings on this ground.* (From the trial court opinion: "Naturally, the court has assumed on special exceptions that if a district is at the cap, the district must be at the cap." CR 244; Tab B.)

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction of this appeal pursuant to section 22.001(a)(6) of the Texas Government Code. This case presents important issues regarding the constitutionality of Texas' public school finance system, the resolution of which impacts every student, school district, and property taxpayer in the state. In particular, this appeal raises the question of whether, under this Court's opinion in *Edgewood IV*, Petitioners have stated a ripe claim. Petitioners assert that Texas school districts no longer have constitutionally sufficient discretion in setting their tax rates. Despite the clear significance of this issue, this case was not permitted to proceed beyond the initial pleading stage.

ISSUES PRESENTED

1. In a case involving important and unsettled questions of constitutional law concerning the public school finance system in the State of Texas, did the court of appeals err in affirming the dismissal of Petitioners' claims at the pleading stage?

    a. Should Petitioners have been given an opportunity to amend their pleadings, conduct discovery and/or present evidence?

    b. Were Petitioners required to plead that they were "forced to tax at the highest allowable rate to provide the bare, accredited education" when that standard is not contained in the Texas Constitution?

    c. Should there be a linkage between the constitutional "general diffusion of knowledge" standard and legislative accreditation standards, and if so, should it be subject to judicial oversight and/or evidentiary review based upon changed circumstances?

2. Was dismissal proper on the grounds that underlie the trial court's opinion?

    a. Have Petitioners stated an actual injury?

    Under the court of appeals holding, a single district that meets the pleading threshold can state a cognizable claim. Thus, the court of appeals rejected the trial court's conclusion that at least half the districts have to be taxing at the $1.50 cap in order for Petitioners to state a claim and did not reach the issues of whether the trial court should have included in its calculation (1) the districts taxing near the cap (which would now bring the percentage of injured districts to 30%), and (2) districts that had granted constitutionally-authorized optional homestead exemptions (which would now bring the percentage of injured districts to 41%). The following issues are presented in the event that the Court finds that the court of appeals' opinion is not dispositive:

        i. Must a certain percentage of school districts in the State be taxing at or near the $1.50 "maintenance and operations" cap (the "$1.50 cap") before Petitioners can proceed with their claim that the $1.50 cap results in an unconstitutional state ad valorem tax?

ii. How much taxing discretion must a district have in order to have "meaningful discretion" within the meaning of *Edgewood III* and *Edgewood IV*? For example, does a district have to be taxing exactly at the $1.50 cap without providing an optional homestead exemption before it lacks "meaningful discretion" within the meaning of *Edgewood III* and *Edgewood IV*?

b. Have Petitioners stated an injury that is sufficiently likely to occur?

PRELIMINARY STATEMENT

Despite the serious and unsettled constitutional issues raised by this lawsuit concerning Texas' public school finance system, the Petitioner school districts' claims were dismissed with prejudice without the allowance of an opportunity to re-plead and before discovery was undertaken or evidence presented. The trial court dismissed based upon its finding that Petitioners did not state a ripe claim because, at that time, "only" 12% of the districts were taxing at the statutory cap. The court of appeals did not adopt this argument and acknowledged that a claim could be stated if even a single district is forced to tax at the cap. The court of appeals instead dismissed on the ground that no district had alleged or could allege that it was taxing at the cap in order to satisfy legislated accreditation standards. The standard imposed by the court of appeals is flawed; in any event, as recognized by this Court and the trial court, the touchstone of the court of appeal's opinion requires resolution by the evidence and not by a pleading technicality. Petitioners have been improperly denied their day in court.

STATEMENT OF FACTS

A. The Court has considered prior challenges to the school finance system.

1. In *Edgewood III*, this Court held that the school finance system violated the constitutional prohibition on a state property tax.

The Texas Supreme Court has considered challenges to the constitutionality of Texas' public school finance system on four occasions over the past thirteen years. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (*Edgewood II*);

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) (*Edgewood III*); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*).

In the last two challenges, the Court considered claims that the finance system relied on state ad valorem taxes in violation of article VIII, section 1-e, of the Texas Constitution, which provides that "[n]o State ad valorem taxes shall be levied upon any property within this State." TEX. CONST. art. VIII, § 1-e. (Tab D.) The finance system at issue in *Edgewood III* was based on the concept of tax base consolidation, whereby all the school districts in a particular county would relinquish their authority to raise and distribute local property taxes to a single taxing entity called a County Education District ("CED"). *See Edgewood III*, 826 S.W.2d at 498-99. The Court held that this finance system violated article VIII, section 1-e, because the State had set the tax rates of the CEDs by statute. *See Edgewood III*, 826 S.W.2d at 500. The Court found that "[a]n ad valorem tax is a state tax . . . when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." *Id.* at 502.

2. After *Edgewood III*, the Legislature passed Senate Bill 7, which instituted the current system.

In response to the Court's ruling, the Legislature in 1993 passed Senate Bill 7, which instituted the basic architecture of the current school finance system. This system

relies on a two-tiered finance structure known as the Foundation School Program.[1] Under Tier 1, school districts taxing at a rate of $0.86 per $100 of assessed property valuation are entitled to a basic allotment of $2,537 for each student in average daily attendance, subject to various adjustments and special allotments to reflect variations in actual cost. *See* TEX. EDUC. CODE ANN. §§ 42.101, 42.252 (Vernon Supp. 2002). To the extent that an $0.86 effective tax rate fails to produce the adjusted allotment from the district's own tax base, the State makes up the difference. *See Edgewood IV*, 917 S.W.2d at 727.

Tier 2 is often referred to as the "Guaranteed Yield Program." For every cent of additional tax effort beyond the $0.86 required for Tier One, up to the $1.50 cap on the "maintenance and operations" ("M&O") tax rate, the State guarantees a yield of $27.14 per weighted student.[2] *See* TEX. EDUC. CODE ANN. §§ 42.301-.303 (Vernon Supp. 2002). As with Tier 1, to the extent that an additional cent of tax effort fails to yield the guaranteed amount from the district's own tax base, the State makes up the difference. *See id.* § 42.302.[3]

---

[1] Legislative action in 1997 and 1999 resulted in the creation of a third tier of state financing designed to assist districts with certain debt service payments.

[2] Student counts are "weighted" to reflect the varying cost of education by pupil characteristic (e.g., special education student) or instructional arrangement (e.g., bilingual education), enabling the State to direct more aid to districts whose students are more expensive to educate. *See* TEX. EDUC. CODE ANN. §§ 42.151-.158 (Vernon 1996 & Supp. 2002).

[3] The system also imposes a cap on the value of a school district's taxable property at a level of $305,000 per student. *See* TEX. EDUC. CODE ANN. § 41.002 (Vernon Supp. 2002). Any district exceeding the $305,000 cap must elect one of five choices to bring its taxable property value under the cap. *See id.* § 41.003 (Vernon Supp. 2002). These choices include (1) consolidating with another district; (2) detaching commercial property from a district and annexing it to another; (3) purchasing average daily attendance credits (i.e., sending money to the State); (4) contracting for the education of nonresident students; and (5) consolidating its tax base with other districts. *Id.*

A key feature of the system, and the one at issue in this case, is the $1.50 cap on M&O tax rates that is imposed on all school districts (the "$1.50 cap" or the "cap"). *See id.* § 45.003(d).

3. In *Edgewood IV*, this Court upheld the constitutionality of Senate Bill 7, but warned that the system could become unconstitutional if the $1.50 cap became both a floor and a ceiling for school districts.

In *Edgewood IV*, Texas Supreme Court upheld the constitutionality of Senate Bill 7. *See Edgewood IV*, 917 S.W.2d at 717. (Tab C.) The Court recognized that districts' discretion in setting tax rates was constrained from above by the $1.50 cap (the "ceiling") and from below by their constitutional obligation to provide their students with a "general diffusion of knowledge" (the "floor").[4] But because the Court found that the districts still had sufficient and meaningful discretion in setting their local property tax rates between the floor and the ceiling, the Court concluded that Senate Bill 7 did not result in a state ad valorem tax in violation of article VIII, section 1-e of the Texas Constitution.[5] *See id.* at 737-38. However, the Court issued a warning:

> [I]f the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. If 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

[4] The Texas Constitution provides: "A *general diffusion of knowledge* being essential to the preservation of liberties and rights of the people, it shall be the duty of the Legislature to establish and make suitable for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1 (emphasis added). (Tab E.)

[5] According to the Court, at the time of *Edgewood IV*, the property-rich districts had the discretion to tax between $1.22 and $1.50 and the property-poor districts had the discretion to tax between $1.31 and $1.50. *See Edgewood IV*, 917 S.W.2d at 731.

> appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.

Edgewood IV, 917 S.W.2d at 738.

B. Petitioners brought suit based upon the *Edgewood IV* warning and the changed circumstances forecast by this Court in *Edgewood IV*.

Claiming that the Court's warning had materialized and that the $1.50 cap had become both a floor and ceiling for many districts, Petitioners brought suit against the State Respondents in April 2001. (CR 2.) Petitioners sought a declaration that the $1.50 cap on a school district's M&O tax rate, set forth in Section 45.003(d) of the Texas Education Code, had resulted in the imposition of *de facto* state ad valorem taxes in violation of article VIII, section 1-e of the Texas Constitution, on the grounds that the districts no longer had meaningful discretion in setting their local property tax rates as a result of state-imposed constraints. (CR 103-11; Tab F.) During the current fiscal year, Petitioners West Orange-Cove Consolidated I.S.D., Coppell I.S.D., Port Neches-Groves I.S.D., and La Porte I.S.D., are taxing at M&O rates of $1.50, $1.495, $1.50, and $1.50, respectively.[6]

[6] Tax rates are typically set in the fall at the beginning of fiscal year, but the data is not collected by the Comptroller's Office until the following spring. The trial court rendered its decision in July 2001, based on the 2000-01 tax rate data. The districts subsequently set their 2001-02 tax rates in the fall of 2001. Contemporaneously with the filing of this brief, Petitioners have moved the Court to take judicial notice of the 2001-02 tax rates. (The official data was not available in time to present to the court of appeals). School districts have recently set their 2002-03 tax rates, but this data will not be collected by the Comptroller's Office until early 2003. Obviously, Petitioners are aware of their own 2002-03 tax rates. Petitioners will provide the Court with other districts' 2002-03 tax rates as soon as this new data becomes available.

C. The trial court dismissed Petitioners' suit at the pleading stage.

The State Respondents filed a Plea to the Jurisdiction and Special Exception on May 7, 2001 ("the State Respondents' Pleading"), asserting that the trial court lacked subject-matter jurisdiction because Petitioners' claim was not ripe for adjudication. (CR 11-23.) The State Respondents argued that Petitioners could assert a ripe constitutional claim only if *all* districts in Texas were required to tax at the $1.50 cap in order to provide a general diffusion of knowledge. (CR 15.)

Two sets of school districts, the Alvarado Respondents and the Edgewood Respondents, intervened in the lawsuit and joined in the State Respondents' Pleading. (CR 94, 185.) The Alvarado Respondents also filed a special exception alleging that Petitioners had failed to state a cause of action because Petitioners "omitted that they were required to adopt a $1.50 tax rate in order to provide the constitutionally-required general diffusion of knowledge to their students."

Petitioners' First Amended Petition, which was filed before the Alvarado Respondents' special exception, (1) cited the "general diffusion of knowledge" standard urged by the Alvarado Respondents, (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; Tab F.)

After a hearing, the trial court dismissed Petitioners' suit without an opportunity to re-plead. The trial court's ruling was based upon its conclusion that "a single number decides this case on special exceptions – the percentage of districts that are at the cap of $1.50." (CR 245.) The trial court held that "[f]or the legislative design to be an unconstitutional state ad valorem tax, the design must require a significant number of districts to tax at the cap, something approaching or exceeding *half the districts*." (CR 245 (emphasis added).) Because the trial court ascertained that "only" 12% of the districts were taxing exactly at the $1.50 cap without providing an optional homestead exemption, the court determined that the Petitioners "cannot state a claim upon which relief can be granted because a constitutionally insignificant number of districts are at the cap of $1.50."[7] (CR 245.) The trial court assumed for the purposes of its analysis that all districts taxing at the $1.50 cap were being forced to do so in order to provide a "general diffusion of knowledge." (CR 244 (emphasis added).)

The trial court also dismissed any "future claims" on the ground that they were not ripe for adjudication. The court noted that the tax "might become unconstitutional in the future," but that since legislative intervention was a possibility, the court lacked jurisdiction until such time that "[t]he fruit has fallen from the tree, meaning that the tax has become unconstitutional." (CR 246-49.)

[7] The trial court's decision was based on the districts' 2000-01 tax rates. School districts subsequently set their 2001-02 tax rates in the fall of 2001. Under the 2001-02 count, 17% of the districts are taxing exactly at $1.50 without providing an optional homestead exemption; these districts educate 881,536 students, or 21% of Texas' student population. A broader examination of the 2001-02 data reveals that 41% of school districts are now taxing at or within five cents of the $1.50 cap; these districts educate 2,654,400 students, or 65% of Texas' student population. *See generally* Petitioners' Motion to Take Judicial Notice, filed contemporaneously herewith.

D. The court of appeals disagreed with the trial court's reasoning, but affirmed the trial court's dismissal on a ground that the trial court had explicitly stated would require an evidentiary record to resolve.

The court of appeals affirmed the trial court's decision, but criticized the trial court's rationale, reasoning that "the controlling factor in reviewing a challenge to an alleged ad valorem tax is the State's involvement in the levy." *West-Orange Cove Consol. Indep. Sch. Dist. v. Alanis*, 78 S.W.3d 529, 542 (Tex. App.—Austin 2002, pet. filed). "Whether the effect of the tax is experienced '*statewide*' or by a majority of districts in the state does not determine whether a tax is a state tax." *Id.* The court concluded that "the allegation that *a district* is forced to tax at the highest allowable rate to provide the bare, accredited education is a necessary element of a cause of action," and Petitioners' failure to plead this specific element required dismissal even though (1) Petitioners had not been given an opportunity to re-plead or produce evidence in response to this pleading threshold (judicially adopted for the first time on appeal), and (2) the trial court assumed that Petitioners had satisfied this pleading threshold and treated the inquiry as one requiring discovery and evidence. *Id.* at 539 (emphasis added). (CR 244-45.) Using the same rationale, the court of appeals also concluded that Petitioners' claims were not ripe. 78 S.W.3d at 542.

SUMMARY OF THE ARGUMENT

In the years since *Edgewood IV* and especially in recent years, hundreds of school districts have been forced to tax at the $1.50 cap, requiring them to enact painful budget cuts and leaving them without access to additional revenue to respond to rising costs, unexpected fiscal emergencies, and unfunded mandates from the State. The situation has

grown so dire that two leading education organizations have warned that the public school finance system is "perilously close" to the point of collapse.[8]

Faced with the "changed circumstances" that this Court acknowledged in *Edgewood IV* could allow a new challenge to the school finance system, and justifiably believing that things are only going to get worse, Petitioners brought this suit. However, due to inconsistent and erroneous adverse rulings by the trial court and the court of appeals, Petitioners have yet to receive their day in court.

Although the court of appeals correctly recognized that a single district could state a ripe claim if it were subject to an unconstitutional state property tax, the court 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." This holding is both procedurally and substantively flawed. It is procedurally flawed because Petitioners were never given an opportunity to re-plead or present evidence. It is substantively flawed because it improperly assumes that (1) the linkage between the constitutional general diffusion of knowledge standard and legislative accreditation standards is irrevocable and not subject to judicial oversight; and (2) evidence of changed circumstances cannot be considered.

In fact, *Edgewood IV* explicitly acknowledged that judicial oversight over the linkage between accreditation standards and the constitutional mandate is proper.

---

[8] *See* TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, A REPORT CARD ON TEXAS EDUCATION, Att. 1, at p. 1 (2002), *available at* http://www.tasanet.org/depserv/govrelations/pledge/pledge.html.

Edgewood IV also recognized that the "general diffusion of knowledge" standard was not static but could evolve over time, reflecting "changing times, needs, and public expectations." 917 S.W.2d at 732 n.14. The court of appeals ignored *Edgewood IV*'s clear instruction to consider evidence of changed circumstances.

The court of appeals properly rejected the trial court's basis for dismissal, which need not be revisited here. However, in the event this Court chooses to examine the trial court's reasoning, it should reject it as well. The trial court erred by requiring a showing that 50% of districts were taxing at the cap, based on the false notion that a constitutional injury cannot be "systemic" until it affects at least half of the participants in the "system." The adoption of this 50% threshold was also inconsistent with the operative language of *Edgewood IV*.

The trial court further erred in excluding districts that should have been counted towards its pleading threshold. The trial court should have included districts taxing between $1.45 and $1.49. Those districts taxing at rates between $1.45 and $1.49 do not have meaningful discretion in setting their rates; the trial court's opposite conclusion was based on the false premise that such districts are "spending all they want to spend." The exclusion of districts granting an optional homestead exemption was also improper because any discretion a district has to repeal the constitutionally-provided homestead exemption (which stands on its own merits) is not "meaningful" discretion. Finally, even if the trial court properly excluded districts taxing between $1.45 and $1.49 and granting a homestead exemption, Petitioners still should have been permitted to proceed with their

claim, because the fact that 17% of districts are now taxing at $1.50 without an optional homestead exemption is sufficient to state a claim of systemic injury.

Finally, the trial court erred in dismissing as unripe Petitioners' alternative claim that, if they had not yet shown actual systemic injury, they were sufficiently likely to show a systemic injury in the near future. The trial court relied on the possibility of legislative intervention, a possibility belied by the history of the school finance litigation and by recent public statements of key state officials. In light of the inexorable movement of districts towards $1.50 cap since the *Edgewood IV* decision, Petitioners are entitled to declaratory relief to forestall an injury that is "sufficiently likely" to occur.

Under *Edgewood IV*, the court of appeals opinion should be reversed and Petitioners allowed their day in court.

ARGUMENT AND AUTHORITIES

I. This case is important to jurisprudence of the State.

The constitutionality of the school finance system is undoubtedly an issue of importance to the jurisprudence of the state. This Court has recognized the significance of this issue by issuing four opinions in the last 13 years on it, the most recent in 1995. Indeed, the 1995 opinion (*Edgewood IV*), although upholding the constitutionality of the system, prophetically warned that changed circumstances could force reconsideration of the issue. But even though Petitioners alleged just such a change in circumstances, the trial court dismissed their claim at the pleading stage and the court of appeals affirmed that dismissal. There was no basis for the important issues raised by Petitioners to have

been resolved before they could conduct discovery and develop evidence to support their claim.

A. This Court's warning that many districts would be forced to tax at the cap has materialized.

This case presents for determination the issue of whether, due to the changed circumstances, the tax structure blessed by a bare majority of the Court in *Edgewood IV* now constitutes a statewide property tax prohibited by the Texas Constitution. Though it upheld the school finance system in 1995, this Court warned that "[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." 917 S.W.2d at 738.

In recent years, the Court's warning has proven prophetic. Hundreds of districts across the State, including Petitioners, are now being squeezed by the cap, forced to make critical cuts to their programming and staff. Because this case was improperly dismissed at the pleading stage, Petitioners were not permitted to introduce evidence of the budgetary and program cuts that they and other districts have been forced to enact. The devastating impact that these cuts are having, while not in the record as a result of the trial court's premature dismissal, are well-documented elsewhere. *See infra* Section III.D.2.

In the 2001-02 fiscal year, 41% of school districts were taxing at or within five cents of the $1.50 cap.[9] These districts educate over 2.6 million students, or 65% of Texas' overall student population. Twenty-four percent of the school districts were taxing exactly at the $1.50 cap. These districts educate over 1.2 million students, or 30% of Texas' student population. It is projected that approximately 400 districts (or 38%), with more than half of Texas' 4.1 million student population, will have hit the $1.50 cap by the fall of 2003. *See* TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, A REPORT CARD ON TEXAS EDUCATION, Att. 1, at p. 2 (2002), *available at* http://www.tasanet.org/ depserv/govrelations/pledge/pledge.html.[10]

These stark figures are a clear indication that the system has reached the breaking point. A study conducted by the prominent school finance consulting firm, Moak, Casey & Associates, found that 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

---

[9] *See* Petitioners' Motion to Take Judicial Notice, filed contemporaneously herewith. School districts already have set their tax rates for the fiscal 2002-03 year, although this data will not be collected by the Comptroller's Office until early 2003. This data almost certainly will reveal that many more districts are now taxing at the $1.50 cap. Petitioners will provide the Court with this new data as soon as it becomes available.

[10] Petitioners were precluded from conducting discovery and developing an evidentiary record when their suit was dismissed at the pleading stage. Because the situation has grown so dire, Petitioners must resort to citing newspaper articles and other publicly available information to illustrate the predicament facing school districts.

prepared materials) (hereinafter "Moak Testimony").[11] Major suburban districts were close behind, exhausting 99% of the system's revenue capacity, compared to 88.4% in 1994-95. Moak Testimony at slide 4. Overall, all Texas districts are utilizing 97.7% of the revenue capacity available to them, a huge leap from the 83.3% figure that was in effect at the time of *Edgewood IV*. *See* Moak Testimony at slide 4.

Having used all of their revenue capacity, districts are being forced to cut programs and staff, and lack the means to keep up with rising costs. *See infra* Section III.D.2. The number of districts facing this predicament prompted a warning from the Texas Association of School Administrators and the Texas Association of School Boards that the school finance system is "perilously close" to the point of collapse and that it is "running headlong towards disaster." TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, *supra*, at Att. 1, pp. 1, 3.[12]

B. This Court has consistently recognized that issues relating to the constitutionality of the school finance system are important to the jurisprudence of the State.

The court of appeals foreclosed Petitioners' claim <u>at the pleading stage</u> by holding that no cognizable claim has been stated because Petitioners did not claim that taxation at the cap was required in order to meet legislative accreditation standards. The threshold

---

[11] 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.

[12] Other prominent education experts agree that the situation is urgent. A former education commissioner, Mike Moses, stated: "There's got to be additional capacity and this is something we can't wait three or four more years to do." *Quoted in* Lucy Hood, *Perry, Sanchez Avoid School Funding Specifics*, SAN ANTONIO EXPRESS-NEWS, Sept. 30, 2002 at 1B, 2002 WL 100209194. Prominent finance consultants Moak and Casey have said the system simply "cannot handle growth" and "has run out of gas." *See id.*; Jim Suydam, *School Finance Cloud Hangs Over Lawmakers*, AUSTIN AM.-STATESMAN, Oct. 22, 2002, at A1.

issue is whether the court of appeals acted properly in light of the appellate court's failure to allow an opportunity to re-plead, engage in discovery, or present evidence. Beyond this threshold issue, there is the question of whether, and under what circumstances, the judiciary should provide oversight of whether the accreditation standards satisfy the "general diffusion of knowledge" requirement set forth in the Texas Constitution.[13] This Court has consistently recognized that these issues are significant to the jurisprudence of the State. They are at least as significant today as when the Court issued its warning in *Edgewood IV*.

II. Dismissal without an opportunity to re-plead, engage in discovery, or present evidence, was wrong.

Although the court of appeals affirmed the trial court's dismissal, it did not rely on the trial court's reasoning or analysis. Instead, relying upon a cross-point raised by the Alvarado Respondents, the court of appeals held that Petitioners' claims warranted dismissal based upon its conclusion that 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." 78 S.W.3d at 539.[14] However, the trial court had assumed the sufficiency of the pleadings on this ground. (CR 244 ("Naturally, the court has assumed on special exceptions that, if a district is at the cap, the district must be at the cap.").)

---

[13] *See Edgewood IV*, 917 S.W.2d at 730 n.8, 731 n.10.

[14] The court of appeals conflated ripeness and sufficiency of the pleadings, concluding that Petitioners' claim was not ripe because Petitioners did not meet the proper pleading threshold. 78 S.W.3d at 542. Petitioners question whether this was proper; in any event, the arguments Petitioners make in this brief apply equally to the court of appeals' ripeness and "failure to state a claim" analyses. Moreover, in light of the trial court's refusal to allow the parties to present evidence necessary to resolve any jurisdictional issue, the court of appeals erred in relying upon a ripeness theory. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000).

Given this procedural history, the court of appeals erred by not allowing Petitioners an opportunity to re-plead and to present evidence. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 658-59 (Tex. 1998) (pleader should have opportunity to amend to respond to a sustained special exception); *Mestiza v. DeLeon*, 8 S.W.3d 770, 774 (Tex. App.—Corpus Christi 1999, no pet.) (reversing and remanding case after trial court dismissed on a special exception without giving plaintiff an opportunity to amend). 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 <u>not</u> 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.) Even counsel for the Alvarado Respondents anticipated that Petitioners would have an opportunity to re-plead upon the granting of their special exception. (RR 34, 86.)

The court of appeals misunderstood the sequence of events. The court found that Petitioners had responded to the Alvarado Respondents' special exception, but had failed to cure by adding an "allegation that [they were] forced to tax at or near the maximum rate to provide an accredited education." 78 S.W.3d at 537-38. Aside and apart from the fact that the Alvarado Respondents' special exception did not reference legislative accreditation standards, Petitioners First Amended Petition (the pleading considered at the trial court hearing) was in fact filed *before* the filing of the Alvarado Respondents' exception.

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. (CR 224-25, 245.) The court of appeals erroneously seized upon the trial court's refusal to allow a re-pleading, 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.

Respondents answer this by saying 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. (*See, e.g.*, State Respondents' Response to Petition for Review, at 8-9.) In other words, Respondents assert that Petitioners could slash their budgets and still meet accreditation standards, thereby retaining "meaningful" discretion to lower their tax rates. But that is nothing more than empty rhetoric. For example, districts are not free to slash any part of their budgets not directly related to the teaching of reading, writing and arithmetic, the subjects upon which accreditation has been based. *See infra* Section III.C. On the contrary, the federal and state governments impose a wide variety of unfunded and partially funded mandates on school districts, including mandates relating to curriculum requirements, special education instruction, district and school governance, information collecting and reporting, and employee relations, among others. *See generally* TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS/TEXAS ASSOCIATION OF SCHOOL BOARDS, REPORT ON SCHOOL DISTRICT MANDATES, 1-20 (Sept. 2002), *available at* http://www.tasanet.org/depserv/govrelations/mandates02.pdf. Since 1995, more than 60 unfunded or partially

funded mandates have been placed on school districts. *See id.* at 20. Districts must devote a substantial portion of their budget to comply with these mandates. Moreover, districts must also reserve a significant portion of their budgets to prepare their students for the more rigorous accountability system that is being phased in beginning in 2003. *See infra* note 20.

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.

III. Dismissal based upon the accreditation standard was wrong.

The court of appeals' opinion erroneously assumes that the constitutional "general diffusion of knowledge" standard is irrevocably tied to legislated accreditation standards and that there is no place for judicial oversight or consideration of evidence of developments since *Edgewood IV*. 78 S.W.3d at 539-40. These assumptions are wrong.

A. In *Edgewood IV*, the Court affirmed the propriety of judicial oversight over the meaning of the constitutional phrase "general diffusion of knowledge."

The court of appeals mistakenly concluded that the constitutional "general diffusion of knowledge" standard is irrevocably tied to accreditation standards, and therefore Petitioners were required to plead that they were taxing at the $1.50 cap just to provide "a bare, accredited education." 78 S.W.3d at 539. However, the *Edgewood IV* court itself emphasized that any linkage between the general diffusion of knowledge requirement and accreditation standards was subject to judicial review. This Court 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). This statement recognizes a constitutionally-mandated minimal level of adequacy apart from the legislatively-defined level.[15]

Even assuming the Legislature is entitled to define the substantive contours of the "general diffusion of knowledge" requirement in the first instance, it is still the job of the judiciary to determine whether the legislatively-adopted guidelines comport with Texas' constitutional requirements. *See Edgewood I*, 777 S.W.2d at 394; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).

In *Edgewood I*, the focus of the litigation was on the meaning of the word "efficient" in the Texas Constitution's education clause. TEX. CONST. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of liberties and rights of the people, it shall be the duty of the Legislature to establish and make suitable for the support and maintenance of an *efficient* system of public free schools.") (emphasis added). The court of appeals had concluded that the definition of "efficient" was a

---

[15] A New York court recently observed:

> it would [be] tempting to use the Regents Learning Standards to provide content for the sound basic education standards as the plaintiffs urge. The Standards' specificity would probably help the court take the measure of the education provided New York City public school students, just as they help the Regents do the same. However, this approach would essentially define the ambit of a constitutional right by whatever a state agency says it is. This approach fails to give due deference to the State Constitution and to courts' final authority to "say what the law is."

Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 484 (N.Y. Sup. Ct. 2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803)), *rev'd on other grounds*, 744 N.Y.S.2d 130 (N.Y. App. Div. June 25, 2002).

political question that should be left to the Legislature. 777 S.W.2d at 394. This Court emphatically rejected that approach, holding that "[t]his is not an area in which the Constitution vests exclusive discretion in the legislature." *Id.* Instead, the Court recognized that the Constitution imposed upon the Legislature an affirmative duty that is "not committed unconditionally to the legislature's discretion, but instead is accompanied by standards." *Id.*

Acknowledging its own obligation to interpret the Texas Constitution, the Court further 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. . . . If the system is not "efficient" or not "suitable," the legislature has not discharged its constitutional duty and it is our duty to say so.

Id.

What is true for the word "efficient" is also true for the phrase "general diffusion of knowledge." The accreditation standards are not automatically coterminous with the constitution's requirements, as the court of appeals assumed.[16]

---

[16] Courts in other states have recognized the importance of judicial role in reviewing the constitutionality of educational standards. *See, e.g.*, *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 666 (N.Y. 1995); *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 850 P.2d 724, 734-35 (Idaho 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 691-92 (Mont. 1989); *Seattle Sch. Dist. No. 1 of King County v. State*, 585 P.2d 71, 95-96 (Wash. 1978); *Leandro v. State*, 488 S.E.2d 249, 259-260 (N.C. 1997); *Alabama Coalition for Equity v. Hunt*, *Op. of the Justices*, 624 So.2d 107, 144 (Ala. 1993); *cf. Rolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997).

B. In *Edgewood IV*, the Court acknowledged that the meaning of "general diffusion of knowledge" could change over time.

In *Edgewood IV*, this Court recognized that the "general diffusion of knowledge" standard was not static but could change over time. The Court expressly cautioned that what the Legislature today considers to be "supplementation may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge." *Edgewood IV*, 917 S.W.2d at 732. The Court explained 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).

Petitioners should have been permitted to proceed with their claim that the State's accreditation requirements have not kept up with changing times, needs and public expectations, and that the Petitioners lacked meaningful discretion to drop below this adjusted "floor." Petitioners do not believe that the wholesale elimination of courses and programs such as pre-kindergarten, kindergarten, fine arts, technology, foreign language, and athletics is consistent with the public's current expectations for the school system. *See infra* Section III.D.2.

C. The structure of the current accreditation system casts doubt on whether "bare accreditation" is the appropriate constitutional measure.

1. Accreditation requirements are determined by the Commissioner of Education, not the Legislature.

Despite the court of appeals' determination that the Legislature has conclusively linked the accreditation standards it adopted with its constitutional duty to provide a "general diffusion of knowledge," it has never explicitly done so. Chapter 39 of the

Texas Education Code, which implements the legislative accountability regime, never uses the phrase "general diffusion of knowledge."

Nor does the Legislature articulate the substantive guidelines for determining whether or not a district is accredited. Rather, the Legislature sets out four different categories for how a district can be classified under the accountability regime: (1) exemplary; (2) recognized; (3) academically acceptable; or (4) academically unacceptable. *See* TEX. EDUC. CODE § 39.072(a) (Vernon Supp. 2002). A district falling into one of the first three categories is considered accredited. The Legislature leaves it to the State Board of Education to determine the performance standards for each rating category, within certain statutory parameters. *Id.* The State Board, in turn, defers to the Commissioner of Education to determine the performance standards for these accreditation ratings. *See* 19 TEX. ADMIN. CODE § 97.3 (2002) (Texas Education Agency; Types of Accreditation Status). Accordingly, under the court of appeals' theory, the Commissioner of Education has been defining the scope of the State's constitutional obligations to its students over the last seven years.

2. Accreditation standards consistently have been set low.

The standard for determining whether a district is academically acceptable (and thus accredited) has varied considerably since the implementation of the accountability regime. In 1995, a district was academically acceptable as long as 25% of its students, and each subgroup of students, passed TAAS (Texas Assessment of Academic Skills)

tests in reading, writing and arithmetic.[17] *See* DEPARTMENT OF ACCOUNTABILITY REPORTING AND RESEARCH, TEXAS EDUCATION AGENCY, 2002 ACCOUNTABILITY MANUAL 151 (Apr. 2002), available at http://www.tea.state.tx.us/perfreport/account/2002/manual/manual.pdf (hereinafter "TEA ACCOUNTABILITY MANUAL"). That percentage climbed to 50% in 2001 (when this suit was filed) and 55% in 2002.[18] *Id.*

Nevertheless, the standards for accreditation consistently have been set low, as evidenced by the fact that only one district in the entire State was deemed unaccredited in 2001. *Id.* at 154. *First*, from 1995 through 2001, accountability ratings did not take into account student performance in science or social studies. *Id.* at 151. This omission is conspicuous, in light of the fact that two of the Legislature's four explicit goals for the public school system relate to student performance in these subjects. *See* TEX. EDUC. CODE § 4.002 (Vernon 1996) (calling for exemplary performance in English, mathematics, science and social studies).[19]

Second, a district can be deemed academically acceptable despite having "low-performing campuses"—campuses which failed to meet the bare accreditation threshold. *See* TEA ACCOUNTABILITY MANUAL at 26. (A campus is "low-performing" in 2002 if less than 55% of its students, or of any student subgroup, pass the TAAS tests, just as a district is "academically unacceptable" under the same measure.) In contrast, a district

---

[17] These subgroups are: African-American, White, Hispanic, and Economically Disadvantaged. *See* TEA ACCOUNTABILITY MANUAL at 11.

[18] Dropout rates also play a role in determining a district's accreditation status. *See* TEA ACCOUNTABILITY MANUAL at 151.

[19] A social studies component finally was added in 2002 at the eighth-grade level. *See* TEA ACCOUNTABILITY MANUAL at 10.

cannot be classified as recognized or exemplary, even if it otherwise qualifies, if it has a low-performing campus within its borders. *See id.* at 26.

Third, the TAAS standardized test, upon which districts' accreditation ratings are presently based, "is no longer seen as a rigorous assessment" when compared to current benchmarks, according to a study commissioned by the Commissioner of Education and the TEA. *See* ACHIEVE, INC., AIMING HIGHER: MEETING THE CHALLENGES OF EDUCATION REFORM IN TEXAS 21 (June 2002), *available at* http://www.tea.state.tx.us/curriculum/aimhitexas.pdf. Instead, the "high school exit TAAS is widely considered to measure *eighth-grade skills and knowledge.*" *Id.* (emphasis added).

In other words, the court of appeals concluded that in 2001 (when this suit was filed), a district satisfied its constitutional obligation to provide a general diffusion of knowledge if just 50% of its high-school graduates demonstrated an eighth-grade level aptitude in reading, writing and arithmetic, regardless of their aptitude in other important subjects and regardless of whether some of those students were trapped in low-performing campuses.[20]

---

[20] The Legislature recently exacerbated the budgetary problems districts now face by setting in motion significant changes to the accountability regime without significantly altering the tax regime. *See* Act of June 8, 1999, 76th Leg., R.S., ch. 397, 1999 Gen. Laws 2502 (codified as amended in TEX. EDUC. CODE §§ 39.022-39.051). These changes will increase school districts' budgetary pressures, who must now prepare for a more rigorous assessment on a broader curriculum.

Beginning in spring 2003, the TAAS test will be replaced with the more difficult TAKS (Texas Assessment of Knowledge and Skills) test. Unlike the TAAS test, the TAKS test is "designed to assess a student's mastery of minimum skills necessary for high school graduation and readiness to enroll in an institution of higher learning." TEX. EDUC. CODE § 39.023(c) (Vernon Supp. 2002). Going forward, TAKS will test, and a district's accountability rating will depend on, students' aptitude in the areas of science (including biology, chemistry and physics) and social studies (including early American and United States history). *See id.* § 39.023(a), (c). While the TAKS test makes its debut in 2003, the corresponding changes to the accountability regime will not be fully phased in until 2005. *See* TEA ACCOUNTABILITY MANUAL at 139-47. But because the Legislature made no significant corresponding

D. Evidence should be considered in determining whether current accreditation standards satisfy the constitutional general diffusion of knowledge standard.

1. Petitioners should have been permitted to present evidence of changed circumstances since *Edgewood IV*.

The *Edgewood IV* court recognized that the issue of whether the constitutional "general diffusion of knowledge" standard is met requires consideration of evidence. In footnote 10, the court referred to what it characterized as an evidentiary finding by the trial court "that meeting accreditation standards, which is the legislatively defined level of efficiency that achieves a general diffusion of knowledge, requires about $3,500 per weighted student." *Edgewood IV*, 917 S.W.2d at 731 n.10. Judge Scott McCown, the trial judge who presided over both this case and *Edgewood IV* (as well as *Edgewood II* and *III*), rejected the notion that footnote 10 precluded consideration of evidence in this case. He stated that the Court's language was "dicta" and explained that the linkage between the general diffusion standard and accreditation standards "wasn't litigated [in *Edgewood IV*]. It wasn't before the trial court. It wasn't on appeal…." (RR 44.) This conclusion is further supported by the fact that, in *Edgewood IV*, the trial court had severed out adequacy issues, including the issue of "whether the legislature appropriates sufficient funds for districts to provide a constitutionally, minimally acceptable education." *Edgewood IV*, 917 S.W.2d at 736 n.20.

---

changes in the way revenue is collected and allocated, districts at the $1.50 cap will be hard-pressed to meet the challenges associated with the more rigorous accountability regime in light of their inability to raise any additional revenue.

Justice Spector also acknowledged in her *Edgewood IV* dissent that "there [was] virtually no evidence on this [adequacy] issue in the record. What little evidence that did come in indicates that Senate Bill 7's accreditation requirements do not even satisfy any previously-articulated concept of a 'minimally acceptable education.'" 917 S.W.2d at 768 (Spector, J., dissenting). Justice Spector noted that "[a]t the trial of the [*Edgewood IV*] case, the Texas Commissioner of Education testified, in regard to Senate Bill 7, that 'our present accreditation criteria at the acceptable level . . . does not match up with what the real world requirements are.'" *Id.*

In any event, consideration of evidence in 2002, seven years after *Edgewood IV*, is appropriate because, as the Court further noted in footnote 10: "future 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." *Id.* at 731 n.10.

2. The evidence would have revealed a system in distress and particular districts in crisis.

Because this case was decided on special exceptions, Petitioners were not permitted to introduce evidence of particular budgetary and program cuts that they and other districts have been forced to enact or to conduct discovery regarding the school finance system generally. However, the severity of the crunch facing school districts has been well-documented by the media.

For example, despite taxing at the $1.50 cap, the property-poor Benavides school district near Corpus Christi has been forced to fire a quarter of its employees (including one of three principals), close two buildings, curtail most purchases, and double

employees' workloads. *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. As a result of these cuts, Benavides teachers have had to mop their own floors and prisoners have been drafted to work for the district in exchange for lunch. *Id.*

The $1.50 cap has had a dramatic impact on Houston-area schools districts, including those classified as both property-poor and property-rich:

- Fort Bend I.S.D. has cut 80 employees and increased the student-teacher ratio at the secondary level;
- Dickinson I.S.D. has cut its supply budget by 30%, laid off 60 employees, and spent $1 million from reserve funds;
- La Marque I.S.D. has eliminated 40 employees, increased class sizes, and switched to a seven period day to reduce staffing and deferred maintenance;
- Texas City I.S.D. has closed its alternative learning center, reduced staffing, and used $200,000 from its emergency fund;
- Clear Creek I.S.D. has increased class sizes, cut supplies by 10% and eliminated personnel;
- Goose Creek I.S.D. rejected building a new high school, despite its rising enrollment, because it lacked the revenue capacity to operate it;
- Brazoria County I.S.D. opened four new schools to keep up with rising enrollment but is tapping a $5 million reserve fund and running budget deficits in order to operate the new campuses.

See id. Similar repercussions are being felt all across the State.[21]

---

[21] *See, e.g.*, R.A. Dyer, *Educators Say System is on the Brink*, FT. WORTH STAR TELEGRAM, Sept. 6, 2002, at B1, 2002 WL 24696620 (discussing report suggesting that school finance system is facing imminent collapse); Janet Elliot, *Group Warns of Peril in Delaying School Finance Reform*, HOUS. CHRON., Sept. 6, 2002, at 29, 2002 WL 23221317 (same); Elizabeth Campbell, *Schools Face Budget*

Districts at the $1.50 cap are unable to raise any additional revenues under the finance system to maintain valued programs, despite the demands of their constituents. They have no means to deal with an unexpected fiscal crisis (such as hurricane or flooding damage to facilities). Nor do they have means to keep up with rising costs associated with: (1) educating a growing population of students, many of whom have special needs; (2) rising teacher salaries; (3) escalating costs of utilities, insurance, supplies, and fuel; (4) building and maintaining adequate facilities; and (5) preparing students to meet tougher accountability standards that will be phased in beginning in 2003. The aggregation of so many districts at the $1.50 cap and the exhaustion of all revenue capacity is the school finance equivalent of a train wreck.

In light of these conditions and the aggregation of districts at the $1.50 cap, *see infra* Section I.A, the Texas Association of School Administrators and the Texas Association of School Boards recently warned that the school finance system is "perilously close" to the point of collapse and that it "running headlong towards disaster." TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, *supra*, at Att. 1, pp. 1, 3. Their report states that massive cuts to courses such as kindergarten, pre-

---

Crisis, FT. WORTH STAR TELEGRAM, Sept. 4, 2002, at B1, 2002 WL 24696427 (noting that rich and poor Fort Worth area districts at the cap are questioning how they will pay for rising teacher salaries, increasing utility rates, and other day-to-day needs; observing that one district has cut an after-school program designed to encourage students to stay in school); Janet Jacobs, *Travis School Tighten Belts; Districts Paying More to the State While Tax Revenue Growth Slows*, AUSTIN AM.-STATESMAN, Sept. 3, 2002 at B1, 2002 WL 24076998 (detailing budget crunch faced by Austin-area schools); Joshua Benton, *School Tax Cap Cuts Deep*, DAL. MORN. NEWS, Aug. 26, 2001, at 1A (noting the job cuts and cuts in academic and extracurricular offerings made by Dallas-area schools); Kevin Moran, *Dickinson's Schools Plan to Cut Budget*, HOUS. CHRON., Oct. 8, 2001, at A21 (quoting superintendent of district taxing at $1.50 cap as predicting district bankruptcy within a few years unless dramatic budget cuts are imposed or tax laws are changed); Marice Richter, *Carroll Drops Some Spanish Classes, Adds Fees*, DAL. MORN. NEWS, June 6, 2002, at 29A (noting that Dallas-area district eliminated Spanish program for elementary and middle school students and added fees for extracurricular activities and transportation).

kindergarten, technology, foreign language, fine arts and athletics are imminent, and that "curricula at all levels will be cut to the bare bones." *Id.* at Att. 1, p. 2; Att. 2.

Even Respondents recognize the severity of the situation. Wayne Pierce, executive director of the Equity Center, an organization affiliated with the Alvarado Respondents, conceded that the situation is "pretty bleak." *See* Horswell, *supra*, at 35. He acknowledged that districts at the $1.50 cap could not offset the rising costs associated with teacher salaries, inflation, and tougher accountability standards. *Id.* Officials from the Texas Education Agency (the "TEA") have coined the term "CTD" – circling the drain – to describe districts facing a budgetary crunch because of the cap. *Id.*

Edgewood IV left the door open for Petitioners to challenge the linkage of the constitutional mandate to the accreditation standards, based on the changed circumstances described above. The court of appeals erred by shutting this door.

IV. Trial court's rationale for dismissal is flawed as well and was properly rejected by the court of appeals.

The trial court dismissed this lawsuit based on its conclusion that at least half the districts in Texas have to be taxing at the $1.50 cap in order for Petitioners to state a claim. Holding that a single district could state a cognizable claim, the court of appeals conclusively rejected this approach. None of the Respondents have asked this Court to affirm on the ground found by the trial court and, accordingly, this Court need not reach the issue. However, in an abundance of caution, Petitioners address the flaws in the trial court's analysis in the event this Court finds that the court of appeals' holding is not dispositive.

A. The trial court erred by requiring Petitioners to plead a systemic injury.

Though its own basis for dismissal was deficient, the court of appeals properly rejected the trial court's focus on the percentage of districts at the cap, instead observing that "the controlling factor in reviewing a challenge to an alleged ad valorem tax is the State's involvement in the levy. Whether the effect of the tax is experienced '*statewide*' or by a majority of districts in the state does not determine whether a tax is a state tax." 78 S.W.3d at 542. Stated another way, the court of appeals recognized that each school district is constitutionally entitled to some meaningful discretion in setting its property tax rate. If a district is stripped of meaningful discretion in setting its tax rate as a result of legislatively-imposed and/or constitutionally-imposed requirements, the resulting taxes are essentially state-imposed property taxes. The fact that they are collected locally is irrelevant. *See Edgewood III*, 826 S.W.2d at 501.

This conclusion is bolstered by the specific constitutional language at issue. Article VIII, section 1-e, of the Texas Constitution provides: "No *State* ad valorem taxes shall be levied upon *any property* within this State." TEX. CONST. art. VIII, § 1-e (emphasis added). The constitution uses the word "state," not "statewide." Moreover, the constitution's use of the phrase "any property" suggests that if even a single district lacks meaningful discretion in setting its M&O property tax rate as a result of the $1.50 cap, then the cap is unconstitutional as applied to that district.

B. Even if a systemic injury is required, the trial court erred both in setting an unreasonably high threshold to show systemic injury and in excluding districts that should have counted towards the threshold.

Even if a showing of a "systemic" injury is required, the trial court's conclusion that Petitioners failed to state a claim should be rejected. First, the trial court erred by applying an inappropriately high 50% pleading threshold (*i.e.*, preventing Petitioners from proceeding on their cause of action until the number of districts taxing at the $1.50 cap approached or exceeded 50% of the State's districts). Second, the trial court erred by excluding many districts that should have counted towards that threshold.

1. The trial court erred in holding that at least half of the school districts in the State had to tax at the $1.50 cap before the school finance system could be considered an unconstitutional state ad valorem tax.

a. Petitioners can plead a systemic constitutional violation without showing that 50% of the districts in the "system" are affected.

Underlying the trial court's adoption of a 50% threshold is the notion that a constitutional problem cannot be systemic until it affects at least half of the parties in the "system." When viewed in other contexts, the fallacy of this notion is exposed.

For example, would Texas be satisfying its obligation to provide a general diffusion of knowledge if 40% of its school districts could not provide their students with a minimally adequate education? Under the trial court's test, 40% of Texas' schoolchildren could be stuck in unaccredited or inadequate schools but still not be able to plead a systemic constitutional deprivation. If a systemic violation must be shown, the pleading threshold should be above a *de minimis* level, but significantly lower than 50%.

Other examples abound. In a Title VII "pattern and practice" case, should the plaintiff class be required to show that half of the class had faced discriminatory treatment in order to proceed on its claim? Would half the patients in Texas' schools for the mentally disabled have to be subjected to diseases, neglect, excessive medication, unsafe buildings, inadequate medical care and physical abuse from other patients and staff before the school system as an institution could be considered unconstitutional? Of course not. The plaintiffs in *Lelsz v. Kavanagh* raised these precise allegations. *See* 783 F. Supp. 286 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir. 1993). Interestingly, the district court in *Lelsz* certified a class that constituted approximately 26% of the patients in Texas' schools for the mentally retarded. *See Lelsz v. Kavanagh*, 807 F.2d 1243, 1245 (5th Cir. 1987).

Petitioners should not be forced to wait until half of the school districts lose all discretion in setting tax rates before they can raise a constitutional complaint. Clearly, the system can break down before that point is reached. The trial court's unreasonably high threshold leaves too many districts helpless to vindicate their right to retain some measure of control over their local tax rates.

b. The operative language in *Edgewood IV* does not support a 50% threshold.

The trial court's 50% pleading threshold finds no support in *Edgewood IV*. The key passage in *Edgewood IV* reads as follows:

> [I]f the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, *some* districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. If 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 IV, 917 S.W.2d at 738 (emphasis added). The fact that "some" districts had lost all meaningful discretion in setting tax rates would mean that the Legislature had effectively imposed a state property tax. This Court's deliberate choice of the word "some," rather than "half," "most" or "a majority," indicates that the if a constitutional threshold exists, it lies between some *de minimis* level and 50%.

The Court's use of the word "some" makes abundant sense because simply looking at the number of districts does not tell the whole story. Consider two hypothetical situations. In the first hypothetical, 60% of districts are at the $1.50 cap, but because most of these districts are sparsely populated, only 40% of Texas' students are affected. In the second hypothetical, 40% of districts are at the $1.50 cap, but because most of these districts have large student populations, over 60% of Texas' students are affected. The trial court would have permitted Petitioners to proceed under the first hypothetical, but not the second, despite the fact that the second presents a more compelling case for judicial intervention. Indeed, the second hypothetical is a fair description of what is happening now. As indicated *supra* in Section I.A and in Petitioners' motion to take judicial notice, 41% of Texas' districts now tax at or within five cents of the $1.50 cap, but roughly 65% of Texas schoolchildren attend schools in these districts.

2. The trial court erred in concluding that only those districts taxing exactly at $1.50 without providing the optional homestead exemption lacked "meaningful discretion."

a. In applying its pleading threshold, the trial court erred in excluding districts taxing between the rates of $1.45 and $1.49 (which would bring the percentage of injured districts up to 30%).

Having set an unreasonably high pleading threshold of 50%, the trial court dismissed this lawsuit on the grounds that "only" 12% of Texas' school districts lacked meaningful discretion in setting their tax rates. (The corresponding figure based on the 2001-02 tax rates is 17%.) Under the trial court's restrictive view, only districts taxing exactly at the $1.50 cap without providing an optional homestead exemption lack "meaningful discretion." However, the actual number of districts without "meaningful discretion" in setting tax rates is much higher.

At a minimum, the trial court erred in excluding those districts taxing at a rate between $1.45 and $1.49. The trial court relied on the false premise that these districts, by choosing to tax at a rate of $1.49 (or $1.48, etc.), were "spending all they want to spend" and thereby exercising "meaningful discretion." (CR:241.) The trial court likened a school district's predicament to that of a boy running a lemonade stand, whose father permitted him to spend up to $1.50 of his proceeds on a "balanced lunch." According to the trial court, if the boy purchased lunch for $1.49, he has exercised meaningful discretion because "he has spent all he wants to spend." (CR:241.)

The trial court's premise is faulty. The amount of budgetary discretion that districts taxing at these rates have is negligible. A district taxing at $1.49 has the

"discretion" to raise its budget by a mere 0.6% (1 cent / $1.50). A district taxing at $1.45 has the "discretion" to raise its budget by only 3.3% (5 cents / $1.50). This small amount of "discretion" does not even exceed the year-to-year variation in costs such as utilities and supplies. In other words, this "discretion" could be exhausted by ordinary price fluctuations in input costs, rather than by adding programming or staffing.

Indeed, had discovery been permitted, the evidence may have shown that districts taxing at rates between $1.45 and $1.49 effectively act as if they are at the $1.50 cap. If so, they do not "spend all they want to spend." Rather, they try to preserve the last few pennies of taxing authority as an insurance policy to guard against unforeseen events, such as (1) a sharp decline in property values; (2) a sharp rise or decline in student enrollment;[22] (3) a significant increase in fixed costs, such as utilities; (4) or an increase in the salary schedule to counteract the severe shortage of teachers in Texas. If the cap were at $1.60 instead of $1.50, these districts would most likely be taxing at $1.58 or $1.59, not the rate at which they are taxing today. By no means could such districts be said to be "spending all they want to spend" at the present time.

The "discretion" that districts in such a position would have (i.e., to reserve the last precious pennies of taxing authority for emergency spending) could hardly be considered meaningful, especially to their students who would wonder why their class sizes are growing and why many of their extracurricular programs are no longer being

[22] A sharp decline in student enrollment would result in significant reduction in state aid for a property-poor district. A decline in enrollment could also force a non-Chapter 41 district above the $305,000 cap on property wealth per student, likely leading to a significant portion of its revenue being "recaptured" by the State. It would also force a Chapter 41 district that is already subject to recapture to send even more of its local revenue into the State's coffers.

offered. At a minimum, the trial court should have counted the more than 25% of districts taxing at or above $1.45 without providing the optional homestead exemption.

b. The trial court erred in excluding districts granting a local option homestead exemption (which would bring the percentage of injured districts up to 41%).

The trial court also erred in refusing to count those districts that grant an optional homestead exemption. The homestead exemption is enshrined in both the Texas constitution and Texas statutes as a means of protecting property owners from rising property taxes on their homes and making home ownership more affordable. *See* TEX. CONST. art. VIII, § 1-b (e); TEX. TAX. CODE ANN. § 11.13(n) (Vernon 2001). The exemption was crafted for public policy reasons entirely independent from the school finance issues before this Court. To suggest that districts at or near the $1.50 cap have meaningful discretion, solely because they retain the option of repealing the homestead exemption (which stands on its own merits) is to render the exemption meaningless. Given the movement of districts to the $1.50 cap, the State Respondents' position would effectively undermine, if not repeal, the constitutional and statutory homestead protections currently provided to many Texas property owners. *Cf. State v. Johnson*, 896 S.W.2d 277, 294 (Tex. App.—Houston [1st. Dist.] 1995) (holding that the State may not do indirectly what it cannot do directly), *aff'd* 939 S.W.2d 586 (Tex. Crim. App. 1996). Including districts that provide an optional homestead exemption, 41% of school districts in Texas tax at or within five cents of the $1.50 cap, a constitutionally significant figure.

3. The fact that 17% of districts are taxing at the $1.50 cap without providing an optional homestead exemption is sufficient to plead a systemic injury.

Even if one assumes that the trial court's narrow understanding of the phrase "meaningful discretion" is correct (and it is not), the fact that 17% of school districts–one in six–lack any discretion in setting tax rates is enough to assert a systemic constitutional violation. One in six districts in Texas (those districts taxing at $1.50 without proving the optional homestead exemption) has absolutely no means of raising additional funds for the education of its students. Faced with rising input costs, these districts are being forced to cut academic and extracurricular programs, cut teacher positions, and increase class sizes to make their numbers add up. (CR:109.) The fact that one in six districts are facing these difficulties is "constitutionally significant" and indicative of a systemic problem. *Cf. Lelsz*, 807 F.2d at 1245.

C. The trial court erred by dismissing as unripe Petitioners' alternative claim that an actual injury was imminent.

The trial court also dismissed as unripe Petitioners' alternative claim that if they had not yet shown actual systemic injury, they were sufficiently likely to show a systemic injury in the near future. The trial court reasoned that because the Legislature would have an opportunity to intervene to avert the systemic injury, it had no jurisdiction to issue an opinion premised on a finding that the Legislature would fail to fulfill its constitutional obligations. (CR:247.) This assumption is flawed.

1. A claim is ripe if it is sufficiently likely to occur.

A party can demonstrate ripeness by showing either actual injury or an injury that is sufficiently likely to occur:

> In determining whether a cause is ripe for judicial consideration, we look to see whether the facts have sufficiently developed to show that an injury *has or is likely to* occur. A claimant *is not required to show that the injury has already occurred*, provided the injury is imminent or sufficiently likely. A claimant can demonstrate the existence of a concrete injury by showing that it is *likely to occur*.

Perry v. Del Rio, 53 S.W.3d 818, 824 (Tex. App.—Austin 2001), *aff'd*, 66 S.W.3d 239 (Tex. 2001) (citations omitted) (emphasis added); *see also Patterson v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 971 S.W.2d 439, 442 (Tex. 1998); *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex. App.—Austin 2000, pet. denied). In considering whether an injury is sufficiently likely to occur, a court should focus "'on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Perry*, 66 S.W.3d at 249 (quoting *Patterson*, 971 S.W.2d at 442).

Furthermore, parties like the Petitioners who seek a declaratory judgment "need not have incurred actual injury; a declaratory judgment action will lie if the facts show the presence of '*ripening seeds of a controversy*.'" *Perry*, 53 S.W.3d at 825 (emphasis added) (quoting *Mount Olivet*, 27 S.W.3d at 282); *see also Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153-54 (Tex. App.—Austin 1998, no pet.).

2. Because a systemic injury is sufficiently likely to occur, the trial court had jurisdiction to consider Petitioners' declaratory judgment claim.

Petitioners' pleadings demonstrate an injury that is sufficiently likely to occur, as well as the "ripening seeds of a controversy." As members of this Court aptly predicted, there has been an inexorable movement of districts towards $1.50 since the *Edgewood IV* decision, a trend which belies any claim that Petitioners' anticipated injuries are uncertain or contingent. *See Edgewood IV*, 917 S.W.2d at 756-57 (Enoch, J., concurring and dissenting) ("There can be no question that Senate Bill 7 requires all districts to tax at $1.50. . . . [A]ll of the State's evidence at trial conceded and assumed that Senate Bill 7 would force all districts to tax at $1.50 at full implementation."); *Id.* at 765 (Hecht, J., joined by Owen, J., concurring and dissenting) (noting that the aggregation of districts at the $1.50 cap is "imminent and inexorable"). The year-to-year trend shows that the tax rates have only gone up and never gone down. In the last four fiscal years, there has been a 137% increase in the number of districts taxing at $1.50 and a 112% increase in the number of districts taxing at $1.45 or above.[23] In 2001-02, the percentage of districts taxing at $1.50 jumped to 24%. By fall of 2003, it is projected that approximately 400 districts (or 38%), with more than half of Texas' student population, will have hit the $1.50 cap. *See* TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, A REPORT CARD ON TEXAS EDUCATION, Att. 1, at p. 2 (2002), *available at*

[23] These figures were calculated by cross-referencing the data for fiscal years 1998-99 through 2000-01, identified below (*see* CR 164) with the 2001-02 tax rate data identified in Petitioners' motion to take judicial notice.

http://www.tasanet.org/depserv/govrelations/pledge/pledge.html. It is a near certainty that districts now taxing between $1.45 and $1.49 will soon be at the $1.50 cap.

The trial court's action was not only inconsistent with ripeness jurisprudence, it also violates the very purpose of the Uniform Declaratory Judgment Act, which is to "provide[] a method whereby parties may bring actions to determine their relative rights without waiting until they have suffered irreparable damage." *McCart v. Cain*, 416 S.W.2d 463, 466 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *see also Harkins v. Crews*, 907 S.W.2d 51, 56 (Tex. App.—San Antonio 1995, writ denied).

Petitioners had every right to bring a declaratory judgment action when they did to avert an educational "train wreck," as long as this train wreck is "sufficiently likely." *Perry*, 53 S.W.3d at 824. The Texas Association of School Administrators and the Texas Association of School Boards warn that by 2004:

> [N]early half of Texas' school districts will be forced to scale back or to eliminate essential programs, such as pre-kindergarten and kindergarten—early childhood intervention programs that are the foundation for strong academic achievement. By necessity, curricula at all levels will be cut to the bare bones. Most, if not all, districts will be unable to offer critical courses such as second languages in elementary grades, fine arts, vocational, sports and technology . . . .

TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, *supra*, Att. 1, at p. 2. By 2005, the "educational system will be characterized by plummeting test scores, increasing number of dropouts, severe cuts in essential curricula and massive teacher lay-offs." *Id.* It is indisputable that the actual injury required by the trial court–having 50% of Texas' school districts taxing at the $1.50 cap–would constitute a "train wreck" for

Texas' public school finance system. A judicial declaration of the type sought by Petitioners could avert this scenario.

3. There is no "legislative exception" to the ripeness test.

The trial court crafted a "legislative exception" to the ripeness doctrine, reasoning that if a plaintiff asserts an injury that is likely to occur after the next regular session of the Legislature, the court (1) is constitutionally required to presume that the Legislature will fulfill its constitutional duties (i.e., "take whatever steps are necessary to maintain the constitutionality of the tax"), and (2) has no jurisdiction to issue an opinion premised on a finding that the Legislature will fail to fulfill its constitutional obligations. (CR:247.) Under a second scenario, in which a plaintiff's injuries are likely to occur before the next regular session of the Legislature, the trial court reasoned that it lacked jurisdiction because it must presume that (1) the Legislature has adequately provided for the biennium, and (2) if it has not, that the plaintiff "can bring the problem to the attention of the Governor, the Governor can call a special session, and the Legislature can act" to avert the constitutional injury. (CR:247-48.)

The trial court's analysis is problematic for several reasons. First, this Court already has rejected the trial court's rationale for why a claim could not ripen under its second scenario (*i.e.*, where the plaintiffs' injury occurs prior to the next regularly scheduled legislative session). In *Perry v. Del Rio*, various state defendants (the governor, lieutenant governor, secretary of state, and speaker of the house, in their official capacities) asserted that a declaratory judgment action challenging congressional redistricting was not ripe because the plaintiff filed her suit before the governor

announced whether or not he would call a special legislative session.[24] *See Perry*, 53 S.W.3d at 825 n.7. The Austin court of appeals dismissed the ripeness challenge, holding that "the governor's ability to call a special session or his decision not to call such a session does not restrict a trial court's jurisdiction over redistricting claims." *Id.* at 825 n.7. On appeal, the Texas Supreme Court affirmed, holding that the redistricting claims ripened upon the adjournment of the Legislature's regular legislative session, despite the possibility that a special session might be called. *See Perry*, 66 S.W.3d at 256. If the trial court in this case were correct, the plaintiff's claim in *Perry* should have been dismissed for lack of ripeness because the court should have entertained the presumption that the Legislature would be called into special session at the request of the governor and would have corrected the alleged constitutional deficiencies. However, neither the court of appeals nor this Court entertained any such presumption in *Perry*. Nor should the Court do so in this instance.

Second, the notion that the Legislature should be entitled to a presumption that it will correct or avert constitutional shortcomings in the school finance system is belied by recent history of the *Edgewood* litigation. Prior to the Court's intervention in *Edgewood I*, the Legislature was content to continue with a system, year after year, in which (1) there was a 700-1 ratio of available taxable funds between the wealthiest and poorest school districts, (2) the 300,000 students in the poorest schools had less than 3% of the state's property wealth while the 300,000 students in the highest-wealth schools drew

[24] Article IV, section 8, of the Texas Constitution authorizes the governor to convene the legislature on "extraordinary occasions." This provision has been interpreted to permit the governor to call a special session at any time for any reason. *See Perry*, 53 S.W.3d at 825 n.7.

funds from over 25% of the state's property wealth, and (3) the wealthiest district, taxing at a fraction of the rate of poorer districts, could spend $19,333 per student while the poorest could spend $2,112. *See Edgewood I*, 777 S.W.2d at 393. These equity figures have improved dramatically after *Edgewood I* as a result of the judiciary's involvement. *See Edgewood IV*, 917 S.W.2d at 730-31.

Finally, the governor and other legislative leaders are already on record as saying that the Legislature is unlikely to provide meaningful relief to capped school districts during the 2003 session. *See* Janet Elliott, *School Funding Takes Back Seat*, HOUS. CHRON., Oct. 27, 2002 at 37, 2002 WL 23233055. Governor Perry indicated that any relief will fall prey to revenue shortfall that could range from $5 billion to $12 billion. *See* Clay Robison, *Perry: School finance change unlikely; Deficit may preclude 'Robin Hood' overhaul*, HOUS. CHRON., Sept. 27, 2002 at A27. Acting Lt. Governor Bill Ratliff questioned whether the Legislature would ever act without the threat of court action. *See* R.A. Dyer, *Educators Say System is on the Brink*, FT. WORTH STAR TELEGRAM, Sept. 6, 2002, at B1, 2002 WL 24696620. Other key legislators also have downplayed the prospect of meaningful action in the 2003 session. *Id.*; Jim Suydam, *School Finance Cloud Hangs Over Lawmakers*, AUSTIN AM.-STATESMAN, Oct. 22, 2002, at A1.

Because Petitioners have alleged injuries that are sufficiently likely to occur, and because they have demonstrated the "ripening seeds of a controversy," dismissal on ripeness grounds was improper.

CONCLUSION AND PRAYER

The court of appeals erroneously affirmed dismissal of this suit without allowing Petitioners an opportunity to re-plead, engage in discovery, or present evidence. Compounding these errors, the court of appeals premised its decision upon the mistaken assumption that the trial court was not entitled to assess, based upon post-*Edgewood IV* evidence, whether the current public school finance system satisfies the Texas Constitution's "general diffusion of knowledge" standard. 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 this case to the court of appeals for consideration of the issues not otherwise addressed by that court. Petitioners further ask for all such other relief to which they may be entitled.

Respectfully submitted,

HAYNES AND BOONE, LLP

George W. Bramblett, Jr.
State Bar No. 02867000
Nina Cortell
State Bar No. 04844500
Charles G. Orr
State Bar No. 00788148
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

Mark R. Trachtenberg
State Bar No. 24008169
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

ATTORNEYS FOR PETITIONERS,
WEST ORANGE-COVE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, COPPELL INDEPENDENT SCHOOL DISTRICT, LA PORTE INDEPENDENT SCHOOL DISTRICT, AND PORT NECHES-GROVES INDEPENDENT SCHOOL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Petition for Review* has been sent to the following counsel of record in accordance with the Texas Rules of Appellate Procedure on this 4th day of November, 2002:

Attorneys for Felipe Alanis in His Official Capacity as the Commissioner of Education, the Texas Education Agency, Carol Keeton Rylander in Her Official Capacity as Texas Comptroller of Public Accounts, and the Texas State Board of Education:

John Cornyn, Attorney General for the State of Texas ***Via Certified Mail***
Howard Baldwin, Jr., First Assistant Attorney General
Jeffrey S. Boyd, Deputy Attorney General for Litigation
Julie Caruthers Parsley, Solicitor General
Toni Hunter, Chief, General Litigation Division
Post Office Box 12548, Capital Station
Austin, Texas 78711-2548

Attorneys for the Alvarado Respondents:

Randall B. Wood ***Via Certified Mail***
Doug W. Ray
RAY, WOOD, FINE & BONILLA, LLP
2700 Bee Caves Road
Austin, Texas 78746

Attorneys for the Edgewood Respondents:

Leticia M. Saucedo ***Via Certified Mail***
Nina Perales
Joseph P. Berra
MALDEF
140 E. Houston Street, Suite 300
San Antonio, Texas 78201

_____
Mark R. Trachtenberg

H-370176.6