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.

ALVARADO INTERVENORS' BRIEF ON THE MERITS

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RESPONDENTS' ISSUES

ISSUE ONE: Petitioners were not entitled to an opportunity to replead.

ISSUE TWO: The court of appeals properly required Petitioners to plead that they could not provide an accredited education in order to state a valid claim.

STATEMENT OF FACTS

The Constitution places the duty on the Legislature to make suitable provision for the general diffusion of knowledge through a system of free public schools. TEX. CONST. art. VII, § 1. As part of this constitutional duty, the Legislature has enacted Chapter 39 of the Texas Education Code, which sets out criteria for accrediting school districts in this state. It has also enacted Chapter 41, which governs most aspects of school finance for Petitioners. At the time this Court upheld the current financing scheme, Petitioners were entitled to access only $280,000 of wealth per weighted student for all purposes. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 728 (Tex. 1995) (*Edgewood IV*). In 1997, the Legislature removed the cap on taxes to repay debt, thus freeing up additional revenue for Petitioners.[1] In 1999, the Legislature increased the cap from $280,000 to $295,000.[2] In 2001, the Legislature increased the cap from $295,000 to $300,000, and, starting September 1, 2002, the cap was raised to $305,000.[3] Despite these increases in Petitioners access to revenues, they now come to this Court asking it to enact new accreditation standards that they say will cost more to achieve than they can raise on $305,000 of wealth per weighted student for

[1] *See* Act of May 31, 1997, 75th Leg., R.S., ch. 592, § 1.02, 1997 Tex. Gen. Laws 2061, 2062.
[2] *See* Act of May 30, 1999, 76th Leg., R.S., ch. 396, § 1.02, 1999 Tex. Gen. Laws 2471, 2472.
[3] *See* Act of May 28, 2001, 77th Leg., R.S., ch. 1187, § 2.02, .03, 2001 Tex. Gen. Laws 2667, 2678.

maintenance and operations and unlimited access to their wealth for debt repayment.

SUMMARY OF THE ARGUMENT

Petitioners ask this Court, rather than the Legislature, to be the branch of government responsible for setting accreditation standards and determining the cost to achieve those standards. Petitioners' claims can go forward only if the Court adopts this position and, unless it does so, Petitioners have no right to amend their pleadings because they cannot plead that they are unable to meet the standards set by the Legislature with the tax revenue available to them. Because this is the only claim open to them and they are unable to plead the necessary elements, the court of appeals correctly affirmed the trial court's dismissal of Petitioners' suit.

ARGUMENT AND AUTHORITIES

ISSUE ONE (RESTATED): Petitioners were not entitled to an opportunity to replead.

As to Petitioners' right to replead, they are correct that ordinarily a party must be given a chance to replead, if it can do so, upon the granting of a special exception. As the court of appeals correctly noted, however, an opportunity to replead is unnecessary when the plaintiff cannot plead anything to overcome the special exception. *See, e.g.*, *Williams v. Muse*, 369 S.W.2d 467, 470-71 (Tex. Civ. App.—Eastland, writ ref'd n.r.e.) (holding that where the plaintiff could not factually plead that a written contract existed, which fact was necessary to state a

cognizable claim, the trial court did not err by sustaining the defendant's special exceptions without giving the plaintiff an opportunity to amend).

Petitioners argue that they should have the opportunity to amend their pleadings by claiming that they cannot meet the State's accreditation standards at $1.50, but their own brief shows that such a claim is frivolous. As they state, "only one district in the entire State was deemed unaccredited in 2001" while at the same time only 12% of the districts were utilizing all available state and local funds. *Pet'rs Br.* at 23, 34.[4] As the trial court stated, "[i]f the test is accreditation standards, the plaintiffs have no wrong because the districts are satisfying those standards on less than $1.50." (CR 252). Petitioners do not claim that if they lowered their tax rates that they would become unaccredited districts. Rather, they merely state the obvious proposition that their budgets are constrained by state and federal mandates that they fund things such as special education and information collecting and reporting. The 88% of school districts that are not

[4] Petitioners argue that any part of the local tax base that they have discretion to exempt from taxation must be treated as if it is legally unavailable when determining if they have meaningful discretion to set their own tax rates in meeting the State's accreditation standards. This argument, however, borders on the absurd because it would mean that the Legislature must set a tax rate cap that would allow every district in the State to exempt all homestead taxes for anyone that is disabled or over 65, as well as 20 percent of all homestead taxes for every homeowner in the district and still meet accreditation standards. *See* TEX. CONST. art. VIII, § 1-b(b), (e); TEX. EDUC. CODE ANN. § 11.13(d), (e), (n) (Vernon 2001). This could require a preposterously high tax rate cap statewide simply to accommodate those few districts that are comprised primarily of older residents with little or no commercial property. The framers of the Constitution could never be said to have required such a bizarre result. Under Petitioners' argument, they could contend that the Legislature has enacted a state property tax because they could not meet accreditation standards if they chose to enact every optional exemption available to them, even though they could currently meet accreditation standards. This is an untenable position and should be rejected.

maximizing their education funds have these same requirements, and all but one are accredited at less than a $1.50 tax rate on their entire tax base.

Accordingly, Petitioners can make no non-frivolous claim that lowering their tax rates would cost them their accreditation. As such, under the court of appeal's holding, Petitioners have no right to replead because they simply cannot plead that they are unable to achieve accreditation at any tax rate less than $1.50.

ISSUE TWO (RESTATED): The court of appeals properly required Petitioners to plead that they could not provide an accredited education in order to state a valid claim.

Knowing that they cannot plead a valid claim, Petitioners strongly urge this Court to supplant the Legislature as the branch of government responsible for setting accreditation standards and to determine the precise dollar figure necessary to achieve these judicially-defined benchmarks. Petitioners tacitly admit, as they must, that they have a cognizable claim only if the judiciary ignores the floor established by the Legislature and mandates its own floor. Such a holding would not only depart from this Court's long-held precedents, but is a completely unnecessary option to consider in a tax dispute and is best left for deliberation when and if a party brings a true adequacy claim under the "suitable provision" clause of Article VII, section 1.

The primary focus in any case under Article VIII, section 1-e is not educational policy, but whether or not the Legislature has imposed an ad

valorem tax on property in this State. One way for the Legislature to impose such a tax is to have a local governmental entity actually impose and collect the tax, but then give that entity no discretion in setting the tax rate. This could be accomplished by setting a maximum tax rate that raises insufficient revenue to accomplish the mandates imposed by the Legislature, such that the entity would always have to tax at the maximum rate. This is essentially what Petitioners claim is occurring in this case. However, they want to ignore the accreditation standards actually imposed on them by the Legislature and instead have this Court determine the accreditation standards the Legislature should have enacted. Petitioners realize that they can meet the mandates imposed on them by the Legislature at a tax rate below the maximum prescribed by state law. It is for this reason that they want the judiciary to declare new benchmarks that the Legislature should have adopted and assign a specific dollar figure to those accreditation levels that would require a tax rate in excess of the current legal maximum. It is precisely this type of inquiry that this Court has long refused to engage in.

In *Mumme v. Marrs*, 120 Tex. 383, 40 S.W.2d 31, 36 (1931), this Court first enunciated its rule that it was the Legislature that had "the mandatory duty to make suitable provision" for a state educational system and that the Legislature could use whatever "methods, restrictions, and regulations" it desired so long as

they were not "so arbitrary as to be violative of the constitutional rights of the citizen." This Court reiterated its limited supervisory role in *Edgewood IV* by stating that the Legislature would violate the "suitable provision" clause only if it "substantially defaulted on its responsibility such that Texas school children were denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas." *Edgewood IV* at 736. Indeed, this Court has consistently refused to tell the Legislature how to comply with its constitutional duties, but instead has taken the position that if the Legislature violates the "efficient" or "suitable provision" clauses, this Court's only duty is "to say so." *Edgewood Ind. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) (*Edgewood I*); *accord Edgewood IV*, 917 S.W.2d at 726 ("Our responsibility is to decide whether the standard has been satisfied, not to judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing.").

If this Court is going to overrule these precedents and say not only that the Legislature has failed to make suitable provision for a general diffusion of knowledge, but that a general diffusion of knowledge costs a certain dollar amount per student, this is not the case to take such a dramatic step. If the Legislature has enacted a state property tax, then the focus should be on what the Legislature has actually done and not on what Petitioners claim it should have

done. This more limited inquiry bypasses the immensely complex process of having the judiciary formulate accreditation standards and instead looks to the simple fact that all but one of the districts in the State met the Legislature's accreditation standards in 2001, and that district was not one of the Petitioners.

Petitioners argue that the judiciary should compare the ceiling set by the Legislature, which is the amount of funds available to them, not against the floor established by the Legislature, but against an adjusted floor set by the judiciary based upon the constitutional mandate for a general diffusion of knowledge. This argument results in part from Petitioners' mistaken belief that the Constitution itself imposes a duty directly upon school districts to provide a general diffusion of knowledge. This is not the case. Rather, the "Texas Constitution imposes on the Legislature a duty to make suitable provision for an efficient system of public free schools." *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996). As such, the "Constitution leaves to the legislature alone the determination of which methods, restrictions, and regulations are necessary and appropriate to carry out this duty . . . ." *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 559 (Tex. 1985). Conversely, the duties imposed upon school districts come solely from the Legislature. Pursuant to legislative directive, "independent school districts have the 'primary responsibility for implementing the [S]tate's system of public education and

ensuring student performance in accordance with [the Education] code.'" *McKinney*, 936 S.W.2d at 282 (quoting TEX. EDUC. CODE ANN. § 11.002). The trial court stated that Petitioners "are under no legal obligation to fund what they may believe necessary in their hearts for a general diffusion of knowledge. The school districts are only legally obligated to fund what the Legislature has determined in the accreditation standards is required for a general diffusion of knowledge." (CR 251-52).

Consequently, Petitioners contention that a school district can be "stripped of meaningful discretion in setting its tax rate as a result of . . . constitutionally-imposed requirements"[5] misses the mark because the Constitution imposes no requirements on school districts. The court of appeals was thus correct in requiring Petitioners to plead that they had no meaningful discretion to lower their tax rates without losing their status as accredited districts. This is true even though many of the details of accreditation are determined by administrative regulations.

Petitioners imply that the Legislature's accreditation standards are not a proper basis for determining if the Legislature has passed a state ad valorem tax, because it has delegated to administrative agencies the authority to enumerate

[5] *Pet'rs Br.* at 30.

the details of an accredited education within the framework it has established. Petitioners' argument, however, ignores the fact that "[v]alid rules and regulations promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation." *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976). Accordingly, the rules and regulations concerning accreditation are no different than if they had been passed by the Legislature and thus are the only valid criteria for determining if the Legislature has passed a state ad valorem tax.

This is true even if, as Petitioners maintain, the accreditation standards have historically been set low. This particular argument again points up Petitioners' confusion about the relationship of the accreditation standards to their claim that the Legislature has enacted a state property tax. That the accreditation standards may not necessarily be rigorous only serves to demonstrate the frivolousness of any claim that Petitioners cannot meet these standards with the full amount of funds available to them. Petitioners' real complaint about the alleged laxity of the standards is that they are not suitable for achieving a general diffusion of knowledge. However, nothing in the trial court's judgment or the court of appeals opinion would prevent Petitioners from filing a lawsuit tomorrow making that claim. Instead, as the trial court noted the Petitioners "have carefully eschewed any question of 'suitability' of program or

'adequacy' of funding to achieve a general diffusion of knowledge except as it relates to their claim that the state is imposing a state ad valorem property tax." (CR 253). Because adequacy of funding to achieve a constitutional general diffusion of knowledge is not relevant to Petitioner's stated claims, their anecdotal evidence regarding the inadequacy of funds available to certain districts to maintain a particular level of education is likewise irrelevant to this appeal.[6]

Alvarado Intervenors, however, do not wish to leave the impression that they believe that Texas' school finance system is sufficient to provide the State's youth with the type of leading educational experience one should expect from a state at the forefront of America's economic engine. Rather, Alvarado Intervenors contend that it is both unconstitutional and impractical to have this Court set the accreditation standards for the State. If the judiciary is to review whether the current finance system is suitable to provide a general diffusion of knowledge, then it must do so within the context of an "adequacy" or "suitability" suit. The result would be that the courts would simply state whether the system is "adequate" or "suitable," and not legislate an "adjusted

[6] It is also possibly misleading with respect to the effect of the $1.50 cap on school districts' opportunity to provide an education to their students. For instance, Petitioners note that despite taxing at the $1.50 cap, Benavides I.S.D. has been forced to make drastic cuts to its work force and programs. The $1.50 cap, however, was not the cause of these cuts, rather they resulted from fiscal mismanagement while the district was at a lower tax rate. *See* BENAVIDES I.S.D. DEFICIT REDUCTION/ELIMINATION PLAN (Sept. 1996).

floor" of educational standards as advocated by Petitioners. Thus, Alvarado Intervenors agree with Petitioners that what constitutes a general diffusion of knowledge is subject to judicial review, but do not agree that it is reviewable with respect to whether or not the Legislature has enacted a state property tax.

PRAYER

Based upon the foregoing, the Alvarado Intervenors respectfully request this Court to deny the petition for review. In the alternative, if the Court grants the petition for review, Alvarado Intervenors respectfully request this Court to affirm the court of appeals judgment.

Respectfully submitted,

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on the 25th day of November, 2002.

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