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.

EDGEWOOD INTERVENORS' RESPONSE TO PETITIONERS' BRIEF ON THE MERITS

MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, INC.

Nina Perales
State Bar No. 24005046
Joseph P. Berra
State Bar No. 24027144
Leticia M. Saucedo
State Bar No. 00797381
Selena N. Solis
State Bar No. 00797471
140 E. Houston Street, Suite 300
San Antonio, TX 78201
Telephone: (210) 224-5476
Telecopier: (210) 224-5382

ATTORNEYS FOR EDGEWOOD INTERVENORS

TABLE OF CONTENTS

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iv

ISSUES PRESENTED 1

PRELIMINARY STATEMENT 2

STATEMENT OF FACTS 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. The Court of Appeals Defined the Correct Pleading Threshold for a Cause of Action Challenging the Current Public School Financing System Under Article VIII § 1–e of the State Constitution 5

A. The Court of Appeals correctly concluded that the article VIII, section 1–e admonition by the Court in *Edgewood IV* does not apply here. 5

B. The Court of Appeals articulated correctly the conditions precedent to an article VIII, section 1–e cause of action. 7

C. Petitioners have not brought a cause of action under Article VII of the State Constitution regarding the State's duty to provide for a "general diffusion of knowledge." 8

II. The Court of Appeals Correctly Affirmed Dismissal of Petitioners' Cause of Action on Special Exception for Failure to Plead a Cause of Action. 11

A. Petitioners failed to plead an element of their cause of action under Article VIII, section 1-e. 11

B. Petitioners cannot plead that they are in danger of falling below the State's accreditation standard. 13

C. Petitioners cannot claim a lack of meaningful discretion in the setting of the tax rate while maintaining a homestead exemption. 13

III. The Court of Appeals Correctly Affirmed Dismissal of Petitioners'

Cause of Action as Unripe 14

A. Petitioners cannot yet show that the educational cost floor and the revenue ceiling have converged due to state action. 14

B. Petitioners cannot show that an injury is sufficiently likely to occur. 16

CONCLUSION AND PRAYER FOR RELIEF 18

INDEX OF AUTHORITIES

CASES

Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547 (Tex. 2000) 13

Carrollton-Farmers Branch ISD v. Edgewood ISD, 826 S.W.2d 489
(Tex. 1992) (*"Edgewood III"*) . . . . . *passim*

Del Rio v. Perry, 53 S.W.3d 818 (Tex. App. – Austin 2001),
aff'd 66 S.W.3d 239 (Tex. 2001) 16, 17

Edgewood ISD v. Kirby, 777 S.W.2d 391 (Tex. 1989) (*"Edgewood I")* 2, 10

Edgewood ISD v. Kirby, 804 S.W.2d 491 (Tex. 1991) (*"Edgewood II"*) 2

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

Fireman's Ins. Co. v. Board of Regents, 909 S.W.2d. 540, 542
(Tex. App. -- Austin 1995, writ denied) 13

Waco I.S.D. v. Gibson, 22 S.W.3d 849, 852 (Tex. 2000) 16

West-Orange Cove Consol. ISD v. Alanis, 78 S.W.3d 529, 536-37
(Tex. App.–Austin 2002) . . . . . *passim*

CONSTITUTIONAL PROVISIONS

Texas Constitution, Article VII, section 1 . . . . . *passim*

Texas Constitution, Article VIII . . . . . *passim*

STATUTES

Texas Tax Code § 11.13(n) 15

Texas Education Code § 46.003 18

ISSUES PRESENTED

I. Did the Court of Appeals define the correct pleading threshold for a challenge to the public school finance system under Article VIII § 1–e of the State Constitution?

A. Did the Court of Appeals correctly conclude that the article VIII, section 1–e admonition by the Court in *Edgewood IV* does not apply here?

B. Did the Court of Appeals articulate correctly the conditions precedent to an article VIII, section 1–e cause of action?

C. Did Petitioners properly bring a cause of action under Article VII of the State Constitution?

II. Did the Court of Appeals correctly dismiss Petitioners' cause of action on special exception for failure to plead a cause of action?

A. Did Petitioners fail to plead an element of their cause of action under Article VIII, section 1-e?

B. Can Petitioners properly plead that they are in danger of falling below the State's accreditation standard?

C. Did Petitioners properly claim a lack of meaningful discretion in the setting of the tax rate if they still maintain a homestead exemption?

III. Did the Court of Appeals correctly dismiss Petitioners' cause of action as unripe?

A. Can Petitioners show that the educational cost floor and the revenue ceiling have converged due to state action?

B. Can Petitioners show that an injury is sufficiently likely to occur?

PRELIMINARY STATEMENT

Through this lawsuit, Petitioners attempt to resurrect already settled constitutional issues surrounding the State's school financing system. Petitioners, Chapter 41 school districts, challenge the current system as constituting a state imposed ad valorem tax on property, in violation of article VIII, section 1–e of the Constitution. Petitioners bring no new or changed facts or legal circumstances, however, that would merit additional review of a school financing system which this Court held constitutional in 1995. Petitioners cannot and should not be allowed to attack the adequacy of the legislatively defined educational standards set pursuant to Article VII of the Texas Constitution through a lawsuit attacking the constitutionality of the school tax system under Article VIII of the Texas Constitution. Petitioners have failed to allege that they or other school districts are forced to tax at the maximum allowable tax rate in order to provide the legislatively required accredited educational standards. Moreover, because Petitioners are unable to allege such facts, their claim is unripe.

STATEMENT OF FACTS

The *Edgewood* cases,[1] and the remedy implemented by the 73rd Legislature through Senate Bill 7, are fundamentally about equity, or about remedying a system that was so inequitable so as to render it constitutionally inefficient under article VII, section 1. The school finance scheme set up by Senate Bill 7 was found constitutionally sound, in spite of challenges from property poor and property rich districts. Equalization has always been the primary feature of the scheme, and the cap

---

[1] *Edgewood ISD v. Kirby,* 777 S.W.2d 391 (Tex. 1989) ("*Edgewood I*"); *Edgewood ISD v. Kirby,* 804 S.W.2d 491 (Tex. 1991) ("*Edgewood II*"); *Carrollton-Farmers Branch ISD v. Edgewood ISD,* 826 S.W.2d 489 (Tex. 1992) ("*Edgewood III*"); *Edgewood ISD v. Meno,* 917 S.W.2d 717 (Tex. 1995) ("*Edgewood IV*").

on the allowable tax rate for maintenance and operation ("M&O") is an element of the equitable goals of that scheme. Without it, the gap that occurs in funding between property rich and property poor districts as they approach the cap would continue to grow and create once again an inefficient system.

In *Edgewood IV*, property poor districts continued to challenge the structural inequity that remained within the scheme, including the $600.00 gap per weighted student that occurs between property rich and property poor districts when taxing at the maximum rate. On the other hand, property rich districts reached to various constitutional provisions, among others the same article VIII, section 1–e invoked by Petitioners here, in an effort to have the court strike down the scheme. It is clear that the opposition of the property rich districts has always been focused on their opposition to equalization, and there is no reason to believe otherwise here. Petitioners frame their alleged financial dilemma as in part due to their having to send to the State "significant" portions of their M&O tax collections, and complain in general of an "overreliance" on local property taxes in the State school financing scheme, even though this Court in *Edgewood IV* specifically found both recapture and the relative reliance on local property taxes in the scheme constitutional. Plaintiffs' First Amended Petition, ¶¶ 19 and 24; *Edgewood IV*, 917 S.W.2d at 734-740.

We note that Petitioners specifically ask the court in their complaint not to order a raising of the cap, the most logical and efficient remedy arising from the terms of their complaint. Instead, they ask the court to declare the current financing scheme unconstitutional so as to "end [the State's] overreliance on the local property tax." Plaintiffs' First Amended Petition, ¶ 24. Not only does such an order require this Court to overturn its previous decision holding the current system constitutionally sound, it would throw the task of revamping the school financing architecture back to the Legislature once again, inviting a free-for-all which Petitioners no doubt see favorable to their

interests, armed as they would be with an order from the court wiping out the current scheme and with the hope of finding the 78th Legislature more amenable to their interests than the 73rd.

Petitioners filed a complaint claiming that the $1.50 M&O tax rate cap enforced under the Texas Education Code violated the state ad valorem tax prohibition of the Texas Constitution. As part of their claim, Petitioners have attempted to bring into question the constitutional standard of "general diffusion of knowledge" under article VII, section 1 of the Texas Constitution, suggesting their own amorphous interpretation and calling into question the adequacy of the State's definition. The trial court, focusing on the legal standard for determining whether a tax was a statewide ad valorem tax, found that the Petitioners could not bring a ripe claim until 50% of the state's school districts were forced to tax at the maximum tax rate. The Court of Appeals affirmed on different grounds, holding that Petitioners failed to allege that they were forced to tax at the maximum rate in order to provide an accredited education. Petitioners appealed to this Court and continue to press the argument that this Court must determine the constitutional standard for a "general diffusion of knowledge" in order to decide whether the school district property tax is a statewide ad valorem tax. We disagree.

SUMMARY OF THE ARGUMENT

Although the Edgewood Intervenors may agree that the State should increase its contribution to school financing, Intervenors do not agree that Petitioners have properly pled a claim that merits a wholesale elimination of the current system which has been carefully crafted over more than a decade in response to constitutional challenges to the previous system's inequities. The standards for determining whether a tax is a statewide ad valorem tax should not include a judicial review of how the State defines a "general diffusion of knowledge" under Art. VII, §1 of the Texas

Constitution. Because Petitioners want this Court to reach the issue, they failed to plead the necessary elements for a challenge to a statewide ad valorem tax, namely that Petitioners are forced to tax at the maximum allowable rate in order to provide an accredited education, as it has been defined by the Legislature. Moreover, Petitioners brought an unripe case to the courts because they have not reached the point at which the educational cost floor and revenue ceiling converge, a point which would eliminate local authorities' meaningful discretion to set their own rates.

ARGUMENT

I. The Court of Appeals Defined the Correct Pleading Threshold for a Cause of Action Challenging the Current Public School Financing System Under Article VIII § 1–e of the State Constitution.

Petitioner school districts have unsuccessfully sought to plead a cause of action under a theory that the cost of providing the educational "floor" required by the State has met the revenue generating "ceiling" imposed by the State through a cap on the districts' taxing authority for M&O. The occurrence of these conditions would allegedly convert the cap into a state ad valorem tax, in violation of article VIII, section 1-e of the State Constitution. In order to state a cause of action, Petitioners must allege that they are forced to tax at the maximum rate in order to meet the State's accreditation standards. The Court of Appeals correctly defined this pleading threshold for Petitioners' tax challenge under article VIII, section 1-e.

A. The Court of Appeals correctly concluded that the article VIII, section 1–e admonition by the Court in *Edgewood IV* does not apply here.

In *Edgewood III,* the Court determined that a tax was a state ad valorem tax when "it is imposed directly by the State or 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." *Edgewood III,* 826 S.W.2d at 502. Petitioners' theory is drawn from *dicta* in the Court's

decision in *Edgewood IV*, 917 S.W.2d at 738, discussing a similar article VIII, section 1–e claim brought by property rich districts. There the Court, applying the *Edgewood III* standard to the current school financing scheme, speculated as to the conditions that would possibly give rise to a prospective article VIII, section 1–e claim:

> [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.

The Court here was using the legislatively defined standard for what constitutes a "general diffusion of knowledge," as it did for purposes of analysis elsewhere in the opinion.[2] That standard is defined in terms of the State mandated accredited education. The Court of Appeals below correctly decided that under this theory Petitioners must be able to plead that they are forced to tax at the maximum rate to provide an accredited education.[3]

Petitioners want to contest the meaning of what constitutes the "floor" in this theory, in spite of it being clear from the context that the Court was referring to the legislatively defined general diffusion of knowledge standard. Notwithstanding their arguments, Petitioners cannot escape the fact

---

[2]*See Edgewood IV,* 917 S.W.2d at 730-733. By the time the Court reached its analysis of the property rich districts' challenge under article VIII, section 1–e, it had already established that it was using the minimum accredited education standard defined by the Legislature when referring analytically to the districts' provision of a "general diffusion of knowledge." The distinction between the constitutional standard and the legislative standard was discussed by the Court in footnotes which Edgewood Intervenors will discuss below in section I.C of this brief.

[3]"A state ad valorem tax issue would only arise, the [*Edgewood IV*] court opined, if districts were forced to tax at the maximum rate to fulfill the state-mandated requirement of providing an accredited education, or, in the parlance of *Edgewood IV*, a general diffusion of knowledge." *West-Orange Cove Consol. ISD v. Alanis*, 78 S.W.3d 529, 536-37 (Tex. App.–Austin 2002).

that their obligation derives from the State accreditation requirements, and that these constitute the legislatively defined standard for achieving a general diffusion of knowledge. Petitioners cannot allege they are ***forced*** to provide an education beyond that required to meet the State's accreditation standards. Petitioners may question whether those standards are adequate to meet what ***they*** consider to be necessary elements of an education designed to achieve a "general diffusion of knowledge." But Petitioners have not pled a direct challenge to the adequacy of the State's provision for the general diffusion of knowledge under article VII, section 1. Therefore the ***Constitutional*** standard for the general diffusion of knowledge is not at issue.

B. The Court of Appeals articulated correctly the conditions precedent to an article VIII, section 1–e cause of action.

Under the theory implied by the *Edgewood IV* Court for a tax challenge to the current school financing scheme, Petitioners must be able to plead that 1) they are taxing at the maximum allowable rate, and 2) they are ***forced*** to tax at the maximum allowable rate in order to provide a State mandated accredited education.

The Court of Appeals below correctly found that in order to state a cause of action framed as a tax challenge under article VIII, section 1–e, Petitioners must allege that they are unable to meet their state obligation to provide an accredited education while taxing at the statutory cap of $1.50 for M&O. *West-Orange Cove Consol. ISD v. Alanis*, 78 S.W.3d 529, 538 (Tex. App.–Austin 2002). Any effective elimination of the discretion exercised by the district in setting the tax rate must derive from State imposed obligations. *Id.* at 537, 539. Petitioners refused to state their claim in terms of their State obligation to provide an accredited education, and in fact could not do so. *Id.* at 538-540; CR 225. Instead, Petitioners urged the Court of Appeals, as they do now this Court, to allow them the opportunity to litigate the meaning of "general diffusion of knowledge" found in article VII,

section 1 of the Constitution. *West-Orange Cove ISD v. Alanis,* 78 S.W.3d at 538; Petitioners' Brief on the Merits at 18-21.

Petitioners are mistaken as to the relevant inquiry under an article VIII, section 1–e challenge to the school financing system. The Court of Appeals correctly stated the relevant inquiry in this suit to be the "relationship between the tax and the districts' obligations to provide an accredited education." *West-Orange Cove Consol. ISD v. Alanis*, 78 S.W.3d at 539. Petitioners suggest that the relevant inquiry in their tax challenge is the relationship between the tax and the ***State's*** obligation under article VII, section 1 to provide for the "general diffusion of knowledge." Petitioners' Brief on the Merits at 18. However, the districts cannot make out a cause of action under article VIII, section 1–e by alleging a direct obligation under article VII to provide for a "general diffusion of knowledge." That is the State's obligation. The obligation runs to the districts in so far as the State has established minimum educational requirements to provide for a general diffusion of knowledge. It is compliance with those standards that districts must fairly allege have forced them to tax at the maximum allowable rate if they are to successfully make out a cause of action under article VIII, section 1–e. The accreditation standards are the source of the districts' obligation, and the reason they may be ***forced*** by the State to tax at the maximum rate. This is the pleading threshold correctly ascertained by the court below.

C. Petitioners have not brought a cause of action under Article VII of the State Constitution regarding the State's duty to provide for a "general diffusion of knowledge."

Petitioners ask the Court to allow this case to go forward under an as yet to be determined "general diffusion of knowledge" standard. In this way, they believe they have met their pleading burden by alleging that they are forced to tax at or near the $1.50 cap to "educate students in their

districts," and that barring relief they will have to continue to take cost saving measures such as "cutting programs, eliminating teaching positions and/or increasing class size." Plaintiffs' First Amended Petition, ¶ 23. As noted above, this clearly does not state the potential challenge this Court foresaw under article VIII, section 1–e in its decision in *Edgewood IV*.

Petitioners are mistaken in their attempt to import and apply directly to their cause a standard belonging to article VII, section 1, for the simple reason that they have not pled a cause of action challenging the adequacy of the State's provision of a general diffusion of knowledge under article VII, section 1. Notwithstanding a reference to article VII, section 1, Petitioners clearly plead in their First Amended Petition, as well as their subsequent arguments in this litigation, a sole cause of action directly under article VIII, section 1–e. As the Court of Appeals correctly pointed out, this is a tax challenge. *West-Orange Cove Consol. ISD v. Alanis*, 78 S.W.3d at 540. In the jargon of the Edgewood litigation, it is not an "adequacy" or even a "suitability" challenge. *Edgewood IV,* 917 S.W.2d at 735-736 and n. 20. For that reason, the correct standard for the second factual condition that needs to occur in order for Petitioners to plead their cause of action under article VIII, section 1–e is the ability to meet the minimum accreditation standards established by the State. The districts' obligations derive from these standards, and it is only in reference to these standards that the districts can allege that they are ***forced*** to tax at the maximum allowable rate.

These standards also represent the legislatively established minimum for achieving the goal of a general diffusion of knowledge as mandated upon the State by article VII, section 1. In *Edgewood IV* the Court used the legislatively defined minimum accredited education when referring analytically to the provision of a general diffusion of knowledge. However, it does not follow from the Court's analysis that use of the legislative standard in this instance is equivocal. In a tax challenge as

presented here, there is no potential equivocation, as the State mandated accredited education forms the legal reference of the claim.

This Court has not defined the constitutional minimum of a general diffusion of knowledge under article VII, section 1, and should not allow that standard to be litigated in this case. In *Edgewood IV*, this Court made two important observations regarding the State's constitutional mandate to provide for a general diffusion of knowledge. First, the Legislature has discretion to establish a suitable regime that provides for a general diffusion of knowledge. *Edgewood IV,* 917 S.W.2d at 730 and n. 8. In that regard, the Legislature can define a level of education and implement accountability measures that it, in its discretion, believes will achieve the goal of a general diffusion of knowledge. *Id.* Second, that discretion is not without bounds. *Id.* The Legislature cannot 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." *Id.* n. 8.

Petitioners cite these same portions of the decision for the propositions that the general diffusion of knowledge standard is 1) cognizable; and 2) does not equate with the legislative definition. These conclusions are correct in reference to a direct adequacy claim under article VII, section 1. The standard for general diffusion of knowledge would come under direct review in a challenge to the adequacy of the State's regime under article VII, section 1. In the *Edgewood* cases, this Court confirmed that this type of adequacy or suitability under article VII, section 1 was a justiciable issue. *Id.* at 735-37; *Edgewood I*, 777 S.W.2d at 394. This necessarily implies potential judicial review of the standard for a general diffusion of knowledge. *Edgewood IV,* 917 S.W.2d at 730-31, nn. 8 and 10. Moreover, in *Edgewood IV* the Court also recognized that what constitutes a "general diffusion of knowledge" will evolve over time. *Id.* at 732 and n. 14. However, where

adequacy was not directly at issue, the Court was not adverse to using the legislative definition of "general diffusion of knowledge" for purposes of its analysis.[4]

The constitutional minimum *per se* is not at issue in Petitioners' article VIII, section 1–e claim. It appears as if Petitioners would like to make out a claim for inadequacy of the State's regime, but they have not so pled, and whatever the pleading standard might be for that cause of action is not at issue here. Instead, they attempt to plead a cause of action under article VIII, that is, a cause of action based on State imposed mandates that allegedly remove all meaningful discretion in their taxing authority and convert the tax levied into a state ad valorem tax, prohibited by article VIII, section 1–e. The standards in play are the minimum accreditation standards, the legislatively mandated "floor." As noted above, this is the only correct interpretation of the Court's admonition that article VIII, section 1–e might be violated if the $1.50 cap became in effect a "floor" as well as a "ceiling." The Court below correctly defined Petitioners' pleading burden. As such, Petitioners are required to plead that they are forced to tax at the maximum allowable rate in order to provide the State mandated accredited education. It derives not only from the *dicta* of the *Edgewood IV* Court, but from the actual standard set in *Edgewood III*. That standard focuses the inquiry on the obligations imposed on a district by the State and their effect on the district's relative discretion in setting the tax rate.

II. The Court of Appeals Correctly Affirmed Dismissal of Petitioners' Cause of Action on Special Exception for Failure to Plead a Cause of Action.

A. Petitioners failed to plead an element of their cause of action under Article VIII, section 1-e.

The Court of Appeals correctly concluded that Petitioners failed to, and cannot, plead that they are forced to tax at the maximum rate in order to provide the accredited education mandated by the

[4] *See supra,* n. 2.

Legislature. Petitioners are, in fact, meeting the current accredited education standards without having to tax at the rate ceiling. Petitioners chose not to change their pleading to allege that they are unable to meet the accreditation standards at the tax cap presumably because they want this Court to address the issue of whether the constitutional standard of a general diffusion of knowledge is at issue in the context of a tax challenge, and whether that standard equates with the desired level of education they would like to maintain or provide (*i.e.*, "educating their students"). *See* Trial Court Modified Final Order, CR 225; *West-Orange Cove ISD v. Alanis,* 78 S.W.3d at 538. As discussed above, Petitioners have misunderstood and refused to adopt the correct pleading threshold. Thus, this is not simply a matter of repleading the petition but rather goes directly to the issue that Petitioners want this Court to address. Rather than replead, Petitioners sought to appeal the lower court's interpretation.

Petitioners cannot simply allege that they are forced to tax at the ceiling to meet their own interpretation of a general diffusion of knowledge. Because Petitioners reject the correct standard, are not interested in pleading under the correct standard, and have not pled that essential element of a tax challenge, no amount of discovery can change the Petitioners' inability to make out a claim based on their First Amended Petition. Even accepting their allegations as true, they fail to plead that they are forced to tax at the maximum allowable rate to provide an accredited education.

B. Petitioners cannot plead that they are in danger of falling below the State's accreditation standard.

Moreover, regardless of their erroneous position and steadfast refusal to plead under the correct standard, Petitioners fail to state a cause of action because they are not in danger of falling below the

accredited standard. Because they are not in danger of falling below the State's accreditation standard, Petitioners cannot meet a necessary element of their pleading burden. The lower court, therefore, correctly dismissed Petitioners' suit for failure to state a cause of action.

C. Petitioners cannot claim a lack of meaningful discretion in the setting of the tax rate while maintaining a homestead exemption.

All Petitioners maintain a homestead exemption of 20% on taxable property, the maximum amount allowable by law. On a $300,000.00 property, this translates into a revenue generating capacity of $900.00 (at a $1.50 tax rate) over its capacity of $3,600.00 without the exemption. Certainly this is a significant, and therefore meaningful, margin of discretion the Petitioners retain, even if they are currently taxing at the $1.50 rate. *See* Affidavit of James Archer, CR 58 ("Coppell I.S.D. granted 9,267 local option homestead exemptions which equaled $380,194,804 in lost taxable value; La Porte I.S.D. granted 8,520 local option homestead exemptions which equaled $137,006,710 in lost taxable value; West Orange-Cove I.S.D. granted 4,120 local option homestead exemptions which equaled $42,460,500 in lost taxable value; and Port-Neches I.S.D. granted 7,505 local option homestead exemptions which equaled $106,397,853 in lost taxable value.") Petitioners cannot allege they are taxing at the true "maximum" rate while they maintain the homestead exemption. *See Fireman's Ins. Co. v. Board of Regents*, 909 S.W.2d. 540, 542 (Tex. App. -- Austin 1995, writ denied), *overruled in part on other grounds, Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000) (stating that a court is not bound by the plaintiff's legal conclusions nor illogical factual conclusions that the plaintiff draws from the facts pleaded). Therefore, Petitioners have not reached the "ceiling" of their revenue generating capacity under the cap, and cannot plead a necessary

element of an article VIII, section 1-e tax challenge to the current system.[5] The court below, therefore, correctly dismissed Petitioners' complaint on special exception.

III. The Court of Appeals Correctly Affirmed Dismissal of Petitioners' Cause of Action as Unripe.

A. Petitioners cannot yet show that the educational cost floor and the revenue ceiling have converged due to state action.

The Court of Appeals correctly affirmed dismissal of Petitioners' cause of action as unripe because, as described above, Petitioners have not alleged that they have reached the point at which they are forced to tax at the maximum rate in order to achieve an accredited education. As described in section I of this Argument, the correct analysis in a tax case requires comparing the cost of providing legislatively mandated educational standards to the revenue raised by the school district and determining whether it has meaningful discretion to set a given tax rate. *See Edgewood IV*, 917 S.W. 2d at 738 ("[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."). When the Court reviewed the tax system in 1995, it held the system constitutionally sound, stating, that "although financial incentives for property-poor districts and the desire to maintain previous levels of revenue in the property-rich districts may *encourage* districts to tax at the maximum allowable rate, the State in no way requires them to do so." *Id.* This situation remains today. If the floor and ceiling have, or are about to, converge it is likely because of the incentives the State offers districts to tax as close to the maximum rate as possible. Petitioners still cannot show that state action has

[5] This point is discussed further below, Section III.A, in relation to the failure of Petitioners' claim as unripe.

required the districts to reach the tax cap. Until they can show that the state has changed its accountability mechanisms without a corresponding change in state funding, which, in turn, forces districts to reach the tax cap, Petitioners' claim remains unripe.

In addition, Petitioners that provide homestead exemptions at the maximum tax rate continue to have unripe claims because they maintain meaningful discretion to eliminate them in order to generate revenue. If anything, Petitioners' discretion with respect to the homestead exemption is limited by local political concerns rather than by state action. Petitioners have made the political decision that the homestead exemption is off limits based on local taxpayer sentiment. The fact that they can make that decision while other districts have chosen to eliminate the exemption shows that school districts have and continue to exercise meaningful discretion in their decisions about the tax base and the revenues they seek to collect. Petitioners wrongly allege in their merits brief to the Court that they have no discretion to eliminate the homestead exemption. The Constitution allows but does not require local authorities to provide for a homestead exemption. Tex. Const. Art. VIII, § 1-b(e). The Tax Code also authorizes a local authority to provide an optional homestead upon voter approval, which is the exemption at issue here. Tex. Tax Code § 11.13(n). Local districts have ample leeway to eliminate the exemption and their discretion is limited only by local community sentiment.

Likewise, Petitioners' claim is unripe for those districts that have not reached the maximum tax cap. Petitioners cannot allege that those districts setting rates within five cents of the tax cap have lost meaningful discretion because of some state action that in effect controls the levy, assessment or disbursement of tax revenues. Petitioners themselves state in their brief to this Court that the discretion they exercise is influenced by factors other than state control over the levy, assessment or

distribution of revenue, such as property values, teacher salaries, and costs of materials. Petitioners' Brief on the Merits at 35.

B. Petitioners cannot show that an injury is sufficiently likely to occur.

In order to establish ripeness on a claim that an injury is likely to occur, the threat of the injury must be "'direct and immediate' rather than conjectural, hypothetical, or remote." *Waco I.S.D. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000). In other words, the threat must be "imminent." *Id.* at 851-852. Petitioners simply cannot show their imminent inability to provide an accredited education at the tax ceiling, especially since they have not allowed the Legislature to readjust the States' funding formulas to ensure that districts can meet their obligations. It has been the Legislature's practice since *Edgewood IV* to review and increase State funding for education every two years as part of its monitoring and assessment of its constitutional obligation to provide adequate funds on an equitable basis. The Court should allow this process to occur.

Petitioners' reliance on *Del Rio v. Perry*, 53 S.W.3d 818 (Tex. App. – Austin 2001), *aff'd* 66 S.W.3d 239 (Tex. 2001) for the proposition that this case has ripened is misplaced. The *Del Rio* litigation, which alleged malapportionment of the state's electoral districts for U.S. Congress, was initially filed before the beginning of the 2001 Texas legislative session but was subsequently consolidated with a similar case filed *after* the close of the session.

The Court of Appeals specifically held that it was *Del Rio*'s consolidation with a case filed after the close of legislative session that made it ripe, and explained "[T]he *Del Rio* case has been consolidated and merged with the *Cotera* case which when filed on May 31 was ripe on its face. . . . Our task is simply to determine whether the district court must, as a matter of law, dismiss this lawsuit *as consolidated.* When viewed in this light, our decision becomes obvious." *Id.* at 825.

In fact, the holding of *Del Rio* supports Respondents' position here. The Court of Appeals, as well as the Texas Supreme Court, developed the rule in *Del Rio* that legal challenges to issues that are properly resolved by the legislature do not ripen until the close of the legislative session. "Once the Legislature adjourned without having passed a redistricting bill, the issue was ripe for litigation." Affirming the *Del Rio* decision, the Court further explained "The district court could properly have dismissed *Del Rio* for lack of ripeness while the Legislature was still considering redistricting during the regular session, just as the United States District Courts for the Eastern and Western Districts of Texas dismissed the first three congressional redistricting cases for lack of ripeness." 66 S.W. 3d at 251.

It must be noted that because the *Del Rio* case involved redistricting in preparation for the November 2002 federal elections, the Texas Legislature was required to resolve the issue of malapportionment in its 2001 session. Therefore, redistricting litigation "ripened" at the close of a particular legislative session. In the case at hand, where Petitioners speculate that their alleged injury will occur at some unspecified date in the future, it cannot be said that their legal claims will ripen after the next legislative session or even the session of 2005. More importantly, Petitioners have yet to bring their requests for more funding to the Legislature for resolution. Petitioners have not even taken the issue to the Legislature or to the Governor to seek intervention before the next legislative session (which is scheduled to start in less than 2 months). This Court's jurisprudence, including *Del Rio v. Perry*, demands that the Legislature be given the opportunity to resolve any alleged impending funding crisis before the courts are allowed to determine whether the Legislature's inaction merits review. After all, in every legislative session since *Edgewood IV*, the Legislature has reviewed the school financing scheme and has made adjustments to ensure that school districts can meet their

requirements without having to reach the tax cap. Experience shows that this is, in fact, a feature of how the scheme works, with legislative adjustments every two years. The Court recognized this possibility in *Edgewood IV,* when, in response to complaints by the property poor districts, it gave the Legislature an opportunity to address in the future remaining inequities and deficiencies in the system for facilities financing. 917 S.W.2d at 746-747 and n. 37. The example is instructive, since the Court recognized that the State was near the point of having abdicated its constitutional duty to provide for an efficient school system for lack of a facilities component within the equalized system. *Id.* The Legislature subsequently included a facilities component in the school finance structure. *See* Tex. Educ. Code § 46.003. Given the Legislature's practice, therefore, Petitioners should not be allowed to bring this claim before the courts until they have sought legislative review of the current funding system.

CONCLUSION AND PRAYER FOR RELIEF

Edgewood Intervenors agree with Petitioners that the State should provide more funding for education to the State's school districts. The Court should not, however, throw the baby out with the bath water. There is no reason to dispense with a school financing system that has been carefully crafted over more than a decade. Petitioners should not be able to use the state ad valorem tax prohibition to make a broadside attack to the equitable nature of the current school financing system. Petitioners have not made out a cognizable claim under Article VIII of the Constitution, and should not be allowed to engage the courts in a debate pursuant to that claim over the meaning of a general diffusion of knowledge. Moreover, Petitioners simply cannot show that this case is ripe for adjudication under the standard that this Court set in *Edgewood III* and *Edgewood IV*. For the

reasons outlined throughout this brief, the Court should deny Petitioners' motion for review and affirm the Court of Appeals decision.

Dated: November 25, 2002

By: _____

Leticia M. Saucedo
Nina Perales
Joseph P. Berra
Selena N. Solis
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
140 E. Houston Street, Suite 300
San Antonio, TX 78205
(210) 224-5476
(210) 224-5382 Fax

ATTORNEYS FOR EDGEWOOD, ET AL. INTERVENORS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Edgewood Intervenors' Response to Petitioners' Brief on the Merits** has been sent by Certified U.S. Mail, Return Receipt Requested on this 25th day of November, 2002, to the following interested parties:

Toni Hunter
General Litigation Division
OFFICE OF THE ATTORNEY GENERAL
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548 — *Attorneys for James Nelson, et al.*

Randall B. Wood
RAY, WOOD, FINE & BONILLA, LLP
2700 Bee Caves Road
Austin, Texas 78746 — *Attorneys for the Alvarado Respondents*

George W. Bramblett, Jr.
Nina Cortell
Carrie L. Huff
HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202-3789 — *Attorneys for Petitioners, et al.*

W. Wade Porter
HAYNES AND BOONE, LLP
600 Congress Avenue, Suite 1600
Austin, Texas 78701-3236 — *Attorneys for Petitioners, et al.*

Mark R. Trachtenberg
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012 — *Attorneys for Petitioners, et al.*

_____
Leticia M. Saucedo