

No. 08-0958

**In the
Supreme Court of Texas**

PRESIDIO INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

ROBERT SCOTT, AS COMMISSIONER OF EDUCATION,
Respondent.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

RESPONSE TO THE PETITION FOR REVIEW

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STATEMENT OF THE CASE

- Nature of the Case:* This interlocutory appeal arises from the denial of the Commissioner’s plea to the jurisdiction, TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); CR.46, based on Presidio’s failure to meet the jurisdictional requirements of Texas Education Code § 21.307. *See* CR.20-23.¹
- Trial Court:* The Honorable Scott H. Jenkins, 98th Judicial District Court, Travis County, Texas.
- Trial Court Disposition:* The trial court denied the Commissioner’s plea to the jurisdiction. CR.46.
- Parties in the Court of Appeals:* Appellant: Robert Scott, as Commissioner of Education.
Appellee: Presidio Independent School District.
- Court of Appeals:* Third Court of Appeals, at Austin, Texas.
- Court of Appeals Disposition:* The panel majority reversed the order denying the Commissioner’s plea to the jurisdiction, *Scott v. Presidio I.S.D.*, 266 S.W.3d 531, 533-39 (Tex. App.—Austin 2008, pet. filed) (Pemberton, J., joined by Puryear, J.); Justice Patterson filed a dissenting opinion, *id.* at 539-44.

1. The Clerk’s Record is referenced as “CR.[page number]”; the Reporter’s Record is referenced as “RR.[page number].”

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RESPONSE TO THE PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Presidio's petition is not remotely worthy of review. The first question presented—asking whether the action implicates the Commissioner's sovereign immunity—is not actually presented at all. The appellate court's opinion was premised on the notion that the Education Code's venue requirement was *jurisdictional*—not only because it implicated sovereign immunity, but also because the Legislature declared such requirements jurisdictional, as a purely *statutory* matter, in the 2005 amendment to Government Code § 311.034. It therefore hardly matters whether immunity would *also independently* bar this action. Since the court's ruling thus stands on independent grounds, the outcome will be the same no matter how the Court answers the first question presented. It should not waste its resources deciding an issue that, in the end, is irrelevant to the ultimate disposition of this matter.

In any event, Presidio’s immunity argument is premised on a demonstrable misreading of the controlling cases. If its position were adopted, the Court would have to repudiate the entire doctrine of official-capacity suits (it would no longer serve any purpose), overturn scores of cases holding that immunity from *suit* (apart from immunity from *liability*) applies for reasons other than protecting the public fisc from money judgments, and to do so without any compelling reason.

Presidio’s second question—asking whether the Commissioner’s consent is required for suit in Travis County—is no more worthy of the Court’s attention. Presidio ignores the controlling provision’s plain text and statutory purpose: if the Commissioner must be a “party” to the suit, and “all parties” must consent to Travis County venue, it inexorably follows that the Commissioner’s consent matters. Presidio nonetheless assumes the opposite position based predominantly on its reading of two errant sentences in a single bill analysis that fail to confront the question presented in any meaningful way (and, indeed, fail to support Presidio’s understanding of the statute in any event). A proper understanding of the plain language and statutory purpose compels a finding that the Commissioner is not the only party without any say over where a suit against him is filed. Because the decision below was correct and otherwise not worthy of review, the petition should be denied.

STATEMENT OF FACTS

Under Texas Education Code § 21.307, the Legislature provided a statutory waiver of immunity that authorizes parties to seek judicial review of adverse decisions by the

Commissioner of Education. As relevant here, § 21.307 imposes two critical restrictions on this statutory cause of action: first, as the suit challenges the Commissioner’s decision, “[t]he commissioner . . . must be made a party to an appeal under this section,” *id.* § 21.307(c); and second, the venue of suit is restricted to “(1) a district court in the county in which the [school] district’s central administrative offices are located; or (2) *if agreed by all parties*, a district court in Travis County,” *id.* § 21.307(a) (emphasis added). In this case, Presidio, whose “central administrative offices” are not located within Travis County, CR.21-22; RR.30, nevertheless brought suit in Travis County without first seeking or obtaining the Commissioner’s consent, CR.3; RR.5.

The Commissioner filed a plea to the jurisdiction, asserting that Presidio’s failure to obtain the Commissioner’s consent to a Travis County venue undermined the trial court’s jurisdiction. CR.20-23. The court denied the plea without explanation, CR.46; RR.38, and the Commissioner appealed, CR.47-48.

The panel denied oral argument on February 29, 2008, and issued an initial opinion on May 7, 2008. Writing for the panel, Justice Patterson affirmed the trial court’s order on the understanding that “section 21.307 is not a jurisdictional statutory prerequisite.” Slip op. at 1. The panel assumed, without deciding, that the Commissioner’s consent was required for venue to lie in Travis County. *Id.* at 4 & n.2. Based on that assumption, the panel reasoned that the Legislature must not have intended § 21.307(a)(2)’s prerequisites to be jurisdictional, because such a determination would “contravene th[e] well-established

principle” that “subject-matter jurisdiction ‘exists by operation of law only, and cannot be conferred upon any court by consent or waiver.’” *Id.* at 4 (quoting *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943)). The panel accordingly held that § 21.307(a)(2)’s “requirement to obtain the parties’ agreement to file suit in Travis County is not a jurisdictional statutory prerequisite within the meaning of section 311.034.” *Id.*

The panel, however, later granted rehearing and issued a new opinion dismissing Presidio’s suit for lack of jurisdiction. *Scott v. Presidio I.S.D.*, 266 S.W.3d 531, 539 (Tex. App.—Austin 2008, pet. filed). It rejected its initial rationale that the “jurisdiction by consent” rule applied in this context. Because the rule forbidding jurisdiction by consent applies only where jurisdiction is *not* authorized by the controlling law, the rule has no application where the statute itself authorizes jurisdiction upon consent. *Id.* at 537. The panel also concluded that the consent requirement for Travis County venue was jurisdictional for two separate reasons: first, the Legislature has the power to condition waivers of immunity (and hence a court’s jurisdiction) on “whatever conditions and limitations” it deems appropriate, including the conditions in subsection (a)(2), *id.* at 534-35; and, second, the Legislature “[a]dditionally” amended the Code Construction Act to designate “statutory prerequisites” as “jurisdictional requirements” in all suits against the government, *id.* at 535, and the venue requirement here was a clear prerequisite to suit, *id.* at 536-37 (so concluding for two independent reasons). Because the panel then concluded that, under the Education Code’s plain text, the Commissioner’s consent was required for suits in Travis County, *id.*

at 538-39, it held that Presidio’s failure to satisfy this prerequisite stripped the court of jurisdiction, *id.* at 539.

Justice Patterson dissented. *Id.* at 540 (Patterson, J., dissenting). She assumed *arguendo* that the provision at issue was jurisdictional, *id.* at 541 n.1, but concluded that the Commissioner’s consent was not required under the statute’s text, *id.* at 541-44.

SUMMARY OF THE ARGUMENT

There is nothing in Presidio’s petition that is remotely worthy of review. The Court can easily dispose of Presidio’s first issue on the simple ground that the question presented is not actually presented at all. It is beside the point whether this suit against the Commissioner implicates sovereign immunity. The question here is whether the Commissioner’s consent to a particular venue is a “statutory prerequisite” to suit under the 2005 amendment to Government Code § 311.034. If it is such a prerequisite, then the failure to satisfy it strips jurisdiction over the case. That is a *statutory* command that applies whether or not the suit implicates sovereign immunity. Because Presidio never once attempts to argue that the venue requirement (or the embedded consent requirement) falls outside the category of prerequisites to suit, the judgment below stands irrespective of whether the suit implicates the Commissioner’s immunity. This is therefore not an adequate vehicle for addressing the first question.

Presidio’s second question—one of statutory construction—is also unworthy of review and, in any event, was correctly decided below. The plain text of the statute controls

the proper resolution of this question. The statute provides that “all parties”—not simply the teacher and school district—must consent to venue in Travis County, and unequivocally designates the Commissioner as a “party” to the suit. Presidio has no answer for the clear and obvious implication of the Legislature’s chosen text. It is therefore telling that Presidio focuses, first and foremost, on legislative history, and then on statutory purpose. Yet Presidio’s legislative history is limited to two ambiguous snippets from a single document (one snippet of which is demonstrably wrong on its face); and its understanding of the statutory purpose ignores the plain anti-forum-shopping objective advanced by the statute (notwithstanding the fact that the Commissioner repeatedly pressed the point below).

In any event, Presidio is also incorrect that this issue is sufficiently important to warrant the Court’s attention. The statutory language at issue is plain. There is no conflict among any courts over its actual meaning. Parties have been on notice of its requirements long before the opinion below was issued on this matter. And now that the opinion is on the books, there is simply no basis for any party to mistake the statute’s requirements. With a clear baseline indisputably set, all future parties have every opportunity to conform their conduct accordingly. There is no need or use for any future guidance. The petition should be summarily denied.

ARGUMENT

- I. THIS CASE DOES NOT PRESENT THE QUESTION WHETHER SOVEREIGN IMMUNITY BARS SUITS FOR NON-MONETARY RELIEF—THE “STATUTORY PREREQUISITE” AT ISSUE IS “JURISDICTIONAL” UNDER THE CONTROLLING STATUTE EVEN IF THE COMMISSIONER’S IMMUNITY WOULD NOT INDEPENDENTLY BAR THIS ACTION.**

A. Because the Prerequisite at Issue is Jurisdictional—as a Purely Statutory Matter—It Makes No Difference to the Outcome of This Case If Immunity Would Also Independently Bar the Action.

1. In 2005, the Legislature specifically reaffirmed that “[s]tatutory prerequisites” are jurisdictional in suits against the government. Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783 (current version at TEX. GOV’T CODE § 311.034). Presidio brought this suit against the government, and it did so without satisfying a critical statutory prerequisite: it did not obtain the Commissioner’s consent before filing suit in Travis County. *See* TEX. EDUC. CODE § 21.307(a)(2) (authorizing venue in Travis County only “if agreed by all parties”). Under the Legislature’s straightforward command, this unsatisfied prerequisite is fatal to the court’s jurisdiction.

Presidio has wholly ignored this controlling question on appeal. The court below acknowledged two bases supporting its decision: the Legislature’s ability to attach conditions on a waiver of immunity, and, “[a]dditionally,” the statutory command that “statutory prerequisites to suit” are jurisdictional in actions against the government. 266 S.W.3d at 535 (emphasis added). Because the statutory ground holds even if the immunity ground does not, Presidio’s first question is not properly presented at all.

2. Presidio is also plainly wrong (at 4-5) that § 311.034 is limited to actions implicating sovereign immunity. We are unaware of any court that has ever endorsed such a rule, and this Court should not do so now. As an initial matter, the statute’s plain text refutes this notion: it textually applies to “*all* suits against a governmental entity,” not some

subset of actions implicating immunity. TEX. GOV'T CODE § 311.034 (emphasis added). It also serves its purpose whether or not immunity is in play: because governmental entities must expend resources and devote time to defending suits, the Legislature quite reasonably determined that parties may only sue those entities if they adhere strictly to the statutory requirements (many of which exist for the governmental entity's protection). The categorical rule protecting all governmental entities from "all" defective suits advances the same objectives whether or not immunity is in play. *See, e.g., Scott*, 266 S.W.3d at 535.²

B. In Any Event, Sovereign Immunity Plainly Applies to This Suit Against the State Irrespective of Whether It Seeks Monetary Relief.

In any event, Presidio is mistaken that immunity applies only in damages actions. *See, e.g., Pet. 4*. Sovereign immunity serves many purposes, including to protect the Legislature's discretion to channel litigation against the government to the right forum for adjudication under appropriate rules. *See, e.g., Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003). Presidio is wrong to invite the Court to revisit this foundational rule of law.

1. Presidio's contrary understanding arises from a plain misreading of this Court's precedent. Presidio relies exclusively on cases that involved requests for money damages. *See Pet. 4*. In those cases, the Court described the State's immunity as blocking the request

2. Presidio claims that, should immunity apply, it would "effectively deny judicial review of the commissioner's decision despite Presidio's timely appeal." *Pet. 2*. This argument is misplaced. Under the court of appeals' analysis, any party adhering to the Legislature's requirements is afforded a right of judicial review. The fact that a party cannot invoke a statutory right while flouting the same statute's controlling requirements is hardly a remarkable result. Indeed, had Presidio properly obtained the Commissioner's consent but filed an *untimely* appeal, it surely would have no grounds to complain. Presidio has offered no basis for favoring one statutory requirement over another.

for relief—in other words, it held that the State’s immunity was *sufficient* to bar the lawsuit. The Court did not, however, at any point imply that it was also limiting the scope of immunity to the contours of the suits in question. *E.g.*, *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). And, indeed, this Court’s precedent on its face disproves any such contention. In *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401 (Tex. 1997), for example, the Court favorably cited cases (in support of its rationale that immunity barred the suit in question) that arose in the context of suits seeking only declaratory or injunctive relief. *See* 951 S.W.2d at 401, 405. It is simply implausible to assume that the Court intended to overrule those cases, *sub silentio*, in the course of affirmatively relying on them for support.

2. Presidio’s understanding would also work a dramatic unsettling of the law. The entire doctrine of official-capacity suits, for example, would be rendered meaningless: since any suit seeking injunctive or declaratory relief (under Presidio’s theory) could be asserted directly against the State itself, there would no longer be any point to invoking the mechanism of suing an individual in their “official capacity.” Moreover, Presidio’s theory would require a direct repudiation of decades of precedent—including the cases noted above that invoked immunity from suit notwithstanding the lack of any request for monetary relief. Presidio has not justified its efforts to undo so much law for so little reason.

3. In sum, sovereign immunity from *suit* (as distinct from *liability*) means what it says. And for good reason: Lawsuits demand the time and attention of public officials who

are then distracted from discharging their public duties. Lawsuits also cost the taxpayers money in litigation defense—a cost this Court has acknowledged (and that Presidio ignores). *See, e.g., Reata*, 197 S.W.3d at 375. And lawsuits inject the judiciary into the discretionary decisions of public officials performing their official duties. Immunity from suit recognizes the separation of powers between the judiciary and other branches of government, preserving the ability of other officials to make decisions and set policy as determined by the political branches. *See Friedman v. Am. Sur. Co. of N.Y.*, 151 S.W.2d 570, 580 (1941); *see also* TEX. CONST. art. II, §1 (mandating the constitutional separation of powers). Presidio is wrong to ask the Court to overrule this bedrock doctrine of Texas law.³

II. THERE IS NO NEED FOR THE COURT TO DEVOTE ITS LIMITED RESOURCES TO REVIEWING THE LOWER COURT’S CORRECT CONSTRUCTION OF THE EDUCATION CODE’S VENUE PROVISION.

A. The Court of Appeals’ Construction of the Statute Is Plainly Correct.

Presidio acknowledges that the Commissioner is a mandatory party to its lawsuit, yet still concludes that every litigant *except* the Commissioner has a say about where this suit can be filed. Its argument is irreconcilable with the statutory text, misreads the (limited) legislative history, and flatly ignores the statutory purpose.

1. A straightforward review of the operative statutory language is sufficient to hold that the Commissioner’s consent is required. Under settled law, the “plain meaning” of a statute controls, *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 865 (Tex.

3. This suit does not fit within the narrow exception for *ultra vires* actions. No one claims the Commissioner lacked the power to adjudicate administrative disputes or defend its decisions under § 21.307.

1999), and Education Code § 21.307(a)(2) plainly requires the Commissioner’s consent before an action may be filed in Travis County. The statute requires that (1) “[t]he commissioner . . . must be made a party to an appeal under this section,” *id.* § 21.307(c), and (2) venue in Travis County is authorized only “if agreed by *all* parties,” *id.* § 21.307(a)(2) (emphasis added). This language is not susceptible of multiple meanings: because “all parties” must consent to suit in Travis County, and because the Commissioner is expressly required as “a party to an appeal under this section,” the Commissioner’s consent is required by § 21.307’s plain text. The statute therefore means what it says: “All parties” means *all parties*, including the Commissioner.

Moreover, this reading is confirmed by what the Legislature did *not* say in subsection (a)(2). Had the Legislature wished to exclude the Commissioner, it would have authorized “either party” to sue in Travis County “if agreed by *the other* party” (since the plaintiff will always agree with his own venue choice) *or* “if agreed by *both* parties” (since the appropriate grammatical pairing for “either party” is “both parties,” not “all parties”). *See also Scott*, 266 S.W.3d at 538. The Legislature’s decision to demand the consent of “all parties”—after designating the Commissioner a “party”—leaves no room for debate about legislative intent. *See also, e.g., Pet. 10* (“every word excluded from a statute must also be presumed to have been excluded for a purpose”).

Presidio’s single attempt to address this clear command misses its mark. Presidio argues that “[w]hen the commissioner is mentioned in Section 21.307(c), the Legislature

chose to use the phrase “[t]he commissioner and each party”—and so, Presidio believes, the Legislature intentionally “distinguish[ed]” the Commissioner from the “parties” in subsection (a). Pet. 12. But Presidio’s conclusion is based on its improper truncation of the statutory text. The full quotation—including the following omitted language (in italics)—reveals Presidio’s error: “The commissioner and each party *to the appeal to the commissioner must be made a party to an appeal under this section.*” TEX. EDUC. CODE § 21.307(c) (emphases added). Subsection (c) therefore sets forth two categories of “parties” in suits “under this section”: (1) “[t]he commissioner” and (2) “each party to the appeal to the commissioner.” Each is equally required before jurisdiction vests in a § 21.307 suit, and each is clearly a “party to an appeal under this section.”⁴

2. Nor can Presidio undermine the plain language with an appeal to legislative history. Presidio suggests (at 7-8) that the legislative history trumps the statutory text, but it is wrong. The cited legislative history—two isolated sentences in a single report spanning dozens of pages and addressing a host of issues and topics having nothing to do with the issue here—lacks anything even approaching the clarity required to compel a decision ignoring the actual statutory text. *See, e.g.*, Pet. 9 (“If the statute is clear and unambiguous,

4. Presidio also cites other sections of the Education Code in an effort to show that the term “parties” often means “only the teacher and school district.” Pet. 12. But Presidio ignores that these other sections apply exclusively in proceedings at the administrative level, where the Commissioner stands in an entirely different posture than he does here. At the administrative stage, the teacher and school district *are* the only parties. But once the administrative proceeding ends and the judicial stage begins, the Commissioner is no longer a neutral adjudicator and instead becomes an active litigant. Presidio fails to offer any reason that the Commissioner should lack the same rights as other parties in defending the suit.

courts must apply its words according to their plain and common meaning without resort to rules of construction or extrinsic aids.”).

The first sentence Presidio cites is ambiguous at best. It says that “[e]ither party could appeal the decision of the commissioner to a district court in the county in which the school district is located or, *upon agreement*, to a Travis County district court.” Pet. 7. But it never says upon *whose* agreement. This language is just as easily read to require (as does the text) the agreement of *all parties* to the dispute—including the Commissioner.

The second sentence is even less illuminating. It provides that “either party could appeal the commissioner’s decision to a Travis County district court.” Pet. 7. This statement, of course, is not even correct: even Presidio would agree that if the teacher or school district withholds consent, “either party” could *not* file in Travis County. And, because this statement ignores the consent requirement entirely, it necessarily says nothing about limiting the consent requirement by excluding the Commissioner.

What Presidio is left with—as its lead argument on this issue—is therefore one insolubly ambiguous remark, and another patently incorrect description of the statutory requirement. These do not reflect reasoned views of the consent requirement. Neither confronts the issue or squarely addresses whether the Commissioner’s consent is (or is not) required for a Travis County suit. Because the actual text *does* address that requirement—and does so by demanding the consent of “all parties”—Presidio’s attempt to override the statutory text with two stray sentences of a bill analysis necessarily fails.

3. Nor, finally, is Presidio correct that this outcome is the least bit “absurd.” Pet. 2-3. Specifically, Presidio argues that the Commissioner has not provided any reason for the Legislature to have required the Commissioner’s consent to suit in Travis County but not in “a distant forum.” Pet. 11. Although it is certainly true that geographic convenience is one factor in a party’s decision to favor one venue over another, it is not the only factor. Presidio’s single-minded focus on geography ignores every other reason the Commissioner and other parties might oppose a plaintiff’s effort to upset the default venue.⁵

Indeed, as explained below, the consent requirement operates (among other things) as an important anti-forum-shopping provision. The Commissioner has a strong interest in ensuring that a party does not cast aside the default forum for improper strategic reasons (whether in pursuit of more favorable precedent or a friendlier panel). If a party seeks relief in Austin because it fears the legal standard applied in its home forum (and therefore also likely applied by the Commissioner in resolving the administrative dispute), the Commissioner has a plain interest in questioning the attempt to dislodge the default venue. Presidio has ignored this rationale at each step of the briefing below. It apparently still has no answer for it here.

In any event, Presidio does not question the wisdom of granting the teacher or school district a veto on suits in Travis County. Yet the Commissioner is named a party in the

5. Indeed, Presidio’s single-minded focus on geography is especially unconvincing in light of its own choice in this very suit: Presidio itself elected a “distant” forum instead of staying in its own backyard. Geographic considerations are plainly only one factor in selecting a venue.

lawsuit; it litigates the matter just like anyone else, and it defends the decision below just like any other defendant. There is no reason that the Commissioner should be the only party without a say in where the suit is filed.⁶

B. Because the Clear Standard Established Below Provides Any Guidance Even Debatably Missing from the Statutory Text, There Is No Further Reason for This Court’s Review.

In any event, this question does not rise to the level of importance warranting this Court’s attention. All parties to cases under the Education Code are served by a clear answer to the question presented: whose consent is required in order for suits to proceed in a county outside the dispute’s origination. All parties now have clear notice that they must seek the Commissioner’s consent in order to displace a suit from its home forum and seek relief in Travis County. Where such requests are made for proper reasons, there is no reason to believe the Commissioner will withhold consent. And where such requests are improperly motivated, the Commissioner has the discretion to refuse consent—as the Legislature clearly envisioned he would.

PRAYER

The petition for review should be denied.

6. Presidio contends here, as it did below, that the Commissioner is simply attempting to “avoid judicial review of his decision.” Pet. 8, 11. That is incorrect. The Commissioner is ready and able to defend this case on the merits. But the Commissioner has the responsibility to preserve his rights under this statute. Should the Commissioner allow this suit to proceed despite its jurisdictional failing, it risks forfeiting the right to object to improper forum-shopping in subsequent actions. In any event, because Presidio’s failure to follow the statute has jurisdictional implications, the courts have their own independent duty to assess the consequences of Presidio’s jurisdictional error. *See, e.g., Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 379 (Tex. 2006) (“[s]ubject-matter jurisdiction cannot be waived or conferred by agreement, must be considered by a court *sua sponte*, and can be raised for the first time on appeal”).

Respectfully submitted,

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I certify that, on March 2, 2009, a true and correct copy of this Response was served via U.S. certified mail, return receipt requested, on the following counsel of record:

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