

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

RESPONDENT'S BRIEF ON THE MERITS

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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, which was 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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RESPONDENT’S BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

Presidio’s petition is not worthy of review. The first question presented—asking whether the action implicates the Commissioner’s sovereign immunity—cannot have any conceivable effect on the outcome of the appeal. The court below held 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 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 these proceedings.

Presidio’s attempt to avoid § 311.034’s independent bar is meritless. In a point not raised at any stage below, Presidio presses (for the first time) the novel theory that

Government Code § 311.034 applies only to suits where sovereign immunity is implicated. In support of its theory, Presidio cites—nothing. And there is good reason that Presidio did not locate even a single precedent (from any court at any level) to support its argument. The Legislature chose deliberate and sweeping language in defining the scope of § 311.034: it commanded that the provision apply categorically to “*all* suits” against the government. Presidio’s attempt to rewrite the text so it applies only to a *subset* of actions (“*some* suits”) cannot be squared with what § 311.034 actually says. What’s more, if adopted, Presidio’s approach would also defeat the statutory purpose: the Legislature attached jurisdictional conditions to suits against the government to protect State entities (and taxpayer dollars) from the many costs of defective filings. This purpose is accomplished—and the taxpayers’ dollars are saved—whether or not immunity is in play. Presidio’s counter-textual argument, if accepted, would undo the Legislature’s work and re-introduce the very confusion in this area that the Legislature sought to eliminate with the 2005 amendment.

Although Presidio’s suit fails under a plain-text reading of the operative statute, Presidio is wrong (in any event) that its suit does not implicate the State’s sovereign immunity. Presidio’s argument on this score is premised on a demonstrable misreading of the controlling cases—as this Court’s decision in *City of El Paso v. Heinrich*, No. 06-0778, 2009 WL 1165306 (Tex. May 1, 2009), has now definitively confirmed. If Presidio’s 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* (as distinct from *liability*) applies for reasons other than protecting the public fisc from money judgments, and to do so without any compelling reason. The Court resolved this question (correctly) in *Heinrich*; there is no point in revisiting it now.

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 reaches the opposite conclusion based predominantly on its reading of two stray comments 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 (avoiding forum-shopping) compels a finding that the Commissioner is not the only party without a say over where a suit against him is filed. Because the decision below is 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 panel found, 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). Contrary to Presidio’s contentions before this Court, 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 worthy of review. Perhaps recognizing that fact, Presidio turns to rhetoric and suggests the court below was so clearly wrong under settled law that a “per curiam” opinion is appropriate. But rhetoric alone cannot save the obvious and fundamental weaknesses in Presidio’s arguments. Presidio’s novel theories conflict with established case law, cannot be reconciled with the plain text of the main statutes at issue, and, if adopted, would be truly unprecedented—not only has Presidio failed to support the bulk of its argument with *any* precedent, but Presidio even failed to *raise* many of its arguments at any stage below. The only appropriate “per curiam” opinion in this case would be one *affirming* the judgment.

The Court can easily dispose of Presidio’s first issue—asking if sovereign immunity applies—on the simple ground that the question presented is entirely irrelevant to the outcome of this appeal. 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 stripped the trial court of 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 Education Code’s venue requirement (or its 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 Presidio’s first question.

Presidio’s newfound attempt to circumvent § 311.034’s clear jurisdictional bar is unavailing. For the first time, Presidio suggests that § 311.034 is limited to suits implicating sovereign immunity, but that is plainly wrong. Presidio’s novel theory cannot be squared with § 311.034’s plain text or statutory purpose—which, perhaps, is why Presidio did not press this point below. And Presidio’s theory is indeed novel: it has apparently never been addressed (much less adopted) by any court, trial or appellate, anywhere in Texas. This is the wrong forum to try (for the first time) to convince the judiciary to rewrite the specific language that the Legislature chose for this important statute.

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 Presidio’s own view of the statutory purpose. Yet Presidio falls short even under these subsidiary considerations: the legislative history is limited to two ambiguous snippets from a single document (one snippet of which on its face incorrectly describes the statute); and Presidio’s understanding of the statutory purpose ignores the plain anti-forum-shopping objective advanced by the provision (notwithstanding that the Commissioner repeatedly pressed this point in multiple rounds of briefing—all met, tellingly, with Presidio’s silence and inability to confront the statutory objective).

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 further 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 requirements in all suits against a governmental entity.” 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 ignored the importance of this controlling question on appeal. The court below acknowledged two independent grounds supporting its decision: (1) the Legislature’s ability to attach conditions on a waiver of immunity; and (2) “[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 irrelevant to the ultimate disposition of this suit.

2. Presidio is also plainly wrong (Presidio Br. 7-9) that § 311.034 is limited to actions implicating sovereign immunity—a novel theory it did not raise below. We are unaware of any court that has ever endorsed such a rule, and this Court should not be the first to 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 that happen to implicate immunity. TEX. GOV’T CODE § 311.034 (emphasis added). Because the term “all” unambiguously establishes a categorical rule, Plaintiff’s theory would require this Court to discard the clear statutory language. *Contra* Presidio Br. 13-14 (“If the statute is clear and unambiguous, courts must apply its words according to their plain and common meaning without resort to rules of construction or extrinsic aids.”).²

Moreover, the actual statutory language—“all suits,” rather than Presidio’s version (“some suits”)—advances the statutory objective whether or not immunity is in play. Because governmental entities must expend resources and devote time in 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

2. Presidio contends that immunity is necessarily intertwined with § 311.034, citing the Commissioner’s previous explanation that § 311.034 “clarified that waiver of sovereign or governmental immunity depends on the satisfaction of statutory prerequisites.” Presidio Br. 8. Presidio is incorrect as a simple matter of logic: the Legislature did reinforce § 311.034’s rule for suits implicating immunity, but that does not mean it did not also impose the same rule for suits *not* implicating immunity. One does not imply the other. And, in fact, the statute on its face resolves any such confusion—by imposing the rule across the board for “all suits.”

protection). By designating all prerequisites jurisdictional, the Legislature also provided a right of interlocutory appeal to spare both taxpayers and private parties the expense of litigating cases otherwise doomed for reversal on appeal after final judgment. *See, e.g., Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 845 & n.2 (Tex. 2007) (“Section 51.014(a)(8) was designed to reduce litigation expenses for all parties involved in suits against state entities”; “[s]upporters of the provision believed ‘incorrect rulings on [jurisdictional pleas] needlessly waste the time of the courts and can cost litigants hundreds of thousands of dollars as they defend cases which should have been dismissed’”) (citing TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8)). The categorical rule protecting governmental entities from “all” defective suits advances these objectives whether or not immunity is at issue. *See, e.g., Scott*, 266 S.W.3d at 535. Presidio cannot explain how its theory is consistent with this legislative purpose.³

Presidio’s final argument—and its only attempt to address the actual text of the operative clause—is wholly meritless. Presidio contends that its suit is “not ‘against a governmental entity’” because it is nominally against the Commissioner, not the actual agency. Presidio Br. 8. This contention conflicts with settled law. Indeed, this Court has

3. Presidio accordingly is incorrect that the Commissioner “does not explain and cannot explain how its involvement in a judicial appeal in Presidio County would limit the required investment of time and resources as compared to a judicial appeal in Travis County.” Presidio Br. 7-8. If a suit filed in the wrong forum is reversed on direct appeal after final judgment, the taxpayers surely are incurring extra cost in retrying the case in the correct venue. An interlocutory appeal (made possible by § 311.034’s designation of prerequisites as jurisdictional) solves this problem. Presidio does not—because it cannot—cite any precedent for the proposition that the Commissioner is required to forfeit its rights under the Education Code (to object to forum-shopping) if it wishes to avoid the additional expense of a second trial in the proper venue.

repeatedly explained that official-capacity suits *are* suits against the entity: “It is fundamental that a suit against a state official is merely ‘another way of pleading an action against the entity of which [the official] is an agent.’” *Koseoglu*, 233 S.W.3d at 844. Because Presidio named the Commissioner in his official capacity, this is a suit against a governmental entity. Presidio flatly errs in ignoring the controlling rule of law in this area.

3. Because Presidio’s argument conflicts with the plain text and disregards the statutory purpose, Presidio is left advancing its own sense of policy: it contends that if the venue requirement is enforced as the Legislature intended, Presidio would be unfairly deprived of its right to “judicial review . . . despite [Presidio’s] timely appeal.” Presidio Br. 3, 11-12, 13. Contrary to Presidio’s understanding, there is nothing “absurd” about denying judicial review where a party satisfies one prerequisite (filing a timely appeal) but ignores another (filing in the proper venue). 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.

The right to “judicial review” is open and available to any party choosing to honor the Education Code’s simple requirements. Presidio is wrong to invoke this statutory right while refusing to follow the statute’s own terms.

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 is not implicated here. *See, e.g.*, Presidio Br. 2, 4-7 (“[t]he doctrine of sovereign immunity does not apply to all suits

involving a governmental unit or agency”; “[s]uits that seek review of a policy decision by a state agency do not require proof of waiver of sovereign immunity”; “suits that are not barred by sovereign immunity . . . include suits that do not seek to impose liability on, or seek money damages from, the governmental unit”). The Court’s landmark decision in *City of El Paso v. Heinrich*, No. 06-0778, 2009 WL 1165306 (Tex. May 1, 2009), closes the door on this argument. *See* 2009 WL 1165306, at *1, *3-*4 (squarely rejecting each of Presidio’s core contentions). 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 predominantly on cases that involved requests for money damages. *See* Presidio Br. 5-6. In those cases, the Court described the State’s immunity as blocking the request 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); *General 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 that 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.

And, indeed, *Heinrich* ends the debate over this question. The Court there reinforced that immunity applies whenever money damages are sought *or* the suit improperly attempts to control agency action. *Heinrich*, 2009 WL 1165306, at *2, *4. The Court did recognize a narrow exception to this broad rule for *ultra vires* suits, but Presidio’s suit is clearly not that. No one suggests the Commissioner lacked the *power* to adjudicate this administrative claim; indeed, the Commissioner is statutorily required to do exactly what he did—decide administrative appeals. This is the exercise of power in accordance with the governing rules, not an ““illegal or unauthorized”” act, *id.* at *2—no more than a trial court acts *illegally* when its good-faith legal rulings are reversed on appeal.

Any contrary conclusion would lead to breathtaking results. Under Presidio’s understanding, parties could readily circumvent Education Code § 21.307’s requirements by simply challenging an administrative determination in an *ultra vires* suit. There would be no need—in this or any other administrative context—to follow statutory deadlines, venue rules, notice requirements, or any other legislative limit on the right to judicial review of

administrative action. The statutory framework would become wholly optional. Presidio's theory does not admit of any limiting principle that would avoid this impermissible result.

Nor is this the only dramatic and unsettling consequence of Presidio's position. Under Presidio's view, 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.

2. In sum, Presidio's immunity argument is premised on beliefs that this Court has now squarely rejected. The ruling in *Heinrich* is not "dangerous precedent," as Presidio apparently believes (Presidio Br. 3), but rather reaffirms the settled principles in this critical area of the law. 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 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. *See, e.g., Heinrich*, No. 06-0778, 2009

WL 1165306, at *4. Immunity from suit recognizes the separation of powers between the judiciary and other branches of government, preserving the ability of 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.

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. 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., Presidio Br. 14* (“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). Presidio Br. 15-16. 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.*, Presidio Br. 13-14 (“If the statute is clear and unambiguous, 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.” Presidio Br. 10.

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.” Presidio Br. 15-16. 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 the other defendants in the suit.

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.” Presidio Br. 10-11. 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.” Presidio Br. 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.” Presidio Br. 2. 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. 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.

Furthermore, as the Commissioner explained in the court 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 likely also 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 stage of the briefing below. It apparently still has no answer for it here.⁵

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. Presidio spills much ink describing prior versions of the Act (Presidio Br. 10-11) without any hint as to how the past statutory iterations support its position. And, in fact, the legislative history only undercuts Presidio’s position. The prior versions of the Act did not require consent for venue because they authorized a judicial appeal only to a set county. There was no danger of forum-shopping because there was no real choice of forum—either the losing party appealed to the designated court or it did not appeal at all. The consent requirement appeared the first time the danger of forum-shopping appeared: where parties were for the first time authorized to upset the default venue and seek relief in a different county.

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.

6. Presidio contends here, as it did below, that the Commissioner is simply attempting to “avoid judicial review of his decision.” Presidio Br. 12. 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”).

PRAYER

The petition for review should be denied; in the alternative, the judgment of the court of appeals should be affirmed.

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