No. 14-0776

In The Supreme Court of Texas

MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL CAPACITY, *ET AL.*,
Appellants/Cross-Appellees,
v.
CALHOUN COUNTY INDEPENDENT SCHOOL DISTRICT, *ET. AL.*,
Appellees/Cross-Appellants/Cross-Appellees,
v.
TEXAS CHARTER SCHOOLS ASSOCIATION, *ET. AL.*, AND
JOYCE COLEMAN, *ET AL.*,
Appellees/Cross-Appellants
v.
THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, *ET. AL.*;
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET. AL.; AND
FORT BEND INDEPENDENT SCHOOL DISTRICT, ET. AL.,
Appellees/Cross-Appellees

On Direct Appeal from the 200th Judicial District Court,
Travis County, Texas No. D-1-GN-11-003130

AMICUS CURIAE BRIEF OF
PROFESSOR DAVID R. UPHAM

IN SUPPORT OF:
APPELLANTS TEXANS FOR REAL EQUITY AND EFFICIENCY IN EDUCATION AND THE OTHER "EFFICIENCY INTERVENORS"

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TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX R. APP. P. 9.7, Amicus herein incorporates by reference the identity of parties and their counsel presented in the Brief of Appellants Texans for Real Equity and Efficiency in Education and Texas Association of Business, et al. ("Efficiency Intervenors") filed on April 13, 2015.

RULE 11 AMICUS CURIAE BRIEF REQUIRED DISCLOSURE

This brief was prepared, *pro se*, by David R. Upham, University of Dallas, Politics Dep't, 1845 E. Northgate Drive, Irving, TX 75062, at no cost, and in support of the Efficiency Intervenors.

IDENTITY AND INTEREST OF AMICUS CURIAE

Professor David R. Upham, Ph.D., J.D., is associate professor of Politics at the University of Dallas, where he regularly teaches courses in American political thought and constitutional law. His research expertise focuses on the constitutional history of liberty, especially under the Fourteenth Amendment.

Of greater to interest to him, Upham is the married father of five school-aged Texans.

SUMMARY OF ARGUMENT

Our Texas Constitution requires the legislature to establish and maintain "an efficient system of public free schools" for the express purpose of promoting that "general diffusion of knowledge" that is "essential to the preservation of the

liberties and rights of the people." TEXAS CONST. art. VII, § 1. Not only this plain text, but also the original understanding of this provision, strongly indicate that in assessing the requisite *efficiency* of the school system, the most important consideration is its effect on liberty, and especially the liberty of parents to direct the education of their children.

Amicus submits that the current school system, with its combination of burdensome taxation and limited parental choice, is unconstitutionally inefficient because it serves to impair rather than assist the liberty of parents to direct the education of their offspring.

ARGUMENT

I. Under our Texas and national constitutions, a cardinal liberty is the right of parents to direct the education of their offspring or adopted children.

Parents have, as a matter of natural and constitutional liberty, the duty-based right to the care, custody, and education of their offspring. This parental authority has long been recognized by the American legal tradition as an essential natural duty and right. Our national Supreme Court, in accord with ancient precedent, has held, that under the Fourteenth Amendment, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This right

arises from the parents' "natural duty" and is incorporated into the liberty secured by that Amendment's Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).[1]

Texas law likewise recognizes this fundamental right and duty. The "decisions in Texas uniformly recognize and declare that both parents are charged with a natural and a legal duty to support their children during minority." *Gulley v. Gulley*, 111 Tex. 233, 237; 231 S.W. 97 (1921). *See also*, *e.g.*, TEX FAM. CODE §§ 151.001(a)(3), 151.001(a)(10) (defining parental duties and rights to include the provision and direction of "education"); § 161.001(1)(J)(i) (stating that the non-performance of this educational duty can terminate parental authority).

Consistent with this principle, our law has long understood our school system's proper role as the parents' *helpmate* and not their *rival*. Rather than interfering with parents' educational authority, "[t]he law merely says to them:

[1] For earlier state cases affirming the same understanding of due process, *see, e.g.*, *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 284–88 (1870) (holding that to coercively transfer a child from his father's custody to a reform school would violate due process absent a finding of the child's criminal liability or the father's "gross misconduct or almost total unfitness"); *Milwaukee Indus. Sch. v. Supervisor of Milwaukee County*, 40 Wis. 328, 338–39 (1876) (holding that a Wisconsin statute depriving a parent of custody did not violate due process, because the deprivation required proof of a "total failure of the parent to provide for the child" and the parent, after a temporary failure, could recover custody upon showing he was "able and willing to resume the nurture and education of the child"); *Nugent v. Powell*, 33 P. 23, 48 (Wyo. 1893) (holding that adoption proceedings that permanently transferred a child were satisfied because they required proof of both the mother's consensual relinquishment and the non-consenting father's "abandonment"); *Kennedy v. Meara*, 56 S.E. 243, 247–48 (Ga. 1906) (affirming that the parent has not only a duty to educate the child, but also a property interest in the child's services, the deprivation of which required a showing, after notice and hearing, that the parent had "by his conduct, forfeit[ed] his right to the custody of his minor child").

'Help yourselves and we will help you.'" *Marrs v. Mumme*, 25 S.W.2d 215, 219 (Tex. Civ. App. 1930, writ denied).[2]

Under Texas law, the state can lawfully supplant parental educational authority only where the parents are unfit or otherwise unable to perform their duty: "God, in his wisdom, has placed upon the father and mother the obligation to nurture, educate, protect, and guide their offspring…Parents can not divest themselves of the obligation imposed upon them by their Creator, but when they become disqualified for a proper discharge of such duties, civil government has the right, in the interest of the child, to provide for its proper nurture and education." *Texas ex rel. Wood v. Deaton*, 93 Tex. 243, 247; 54 S.W. 901 (Tex. 1900). But absent the disability of the parent, whether by death or otherwise, the state, with its coercive power, can serve only as the parent's *helpmate*, not his or her *substitute*.

II. According to both the plain text and the original understanding of our Texas Constitution, the primary outcome by which to assess the requisite efficiency of the Texas school system is the preservation of parental liberty.

The preservation of "the liberties and rights of the people" is the express ultimate purpose for which the Texas Constitution compels the legislature to

[2] *Cf. School Board Dist. v. Thompson*, 103 P. 578, 581 (Okla. 1909) (ordering a school district to reinstate children who were expelled because their parents forbad them from participating in singing lessons, on the grounds that by the "law of the land," there was a "presum[ption] that the natural love and affection of the parents for their children would impel them to faithfully perform this [educational] duty" and that repudiating the theory that "the mere act of sending the children to [public] school amounts to a delegation of the parental authority which the law of the land places in the hands of the parent").

establish an "an efficient system of public free schools." TEX. CONST. art. VII, § 1 ("Education Clause"). The goal is not to provide jobs-training or college-preparation, but to secure the liberty of a self-governing people. Therefore, the very text of the Education Clause suggests that *liberty* must be the first outcome to consider in determining whether our school system is efficient. The inquiry is, "Is this system of school finance and regulation efficient for preserving the people's liberties?"

But to refine the inquiry, among the liberties to be preserved, primacy belongs to the liberty of parents to direct the education of their offspring. This liberty is the right that is both most proximate to, and most immediately affected by, our school system.

Furthermore, the historical record indicates that parental educational right was the main liberty under discussion among the drafters of the Education Clause. Indeed, substantial evidence indicates that the main reason for including an *efficiency* rule was precisely to protect taxpaying parents against a system of taxation, expenditure, and regulation that would impair parental educational authority.

At the 1875 Convention, an initial committee draft proposed to reiterate the 1845 constitution's Education Clause that required the legislature to make

"suitable provisions for the support and maintenance of public schools."[3] A substantial minority of the committee, however, strenuously opposed the proposal on several grounds—first and foremost, that taxpayer-supported general schools would interfere with the rights of parents.

> [The minority[believe the education of children to be a private duty — devolved upon the parent by God, as is manifest both from the laws of nature and revelation — and to the end that the parent may be enabled to discharge this great duty, the same laws confer on him the right to control his children; and they do not believe that a democratic government can, without violating the great principles of personal freedom and individual right upon which it is founded, either relieve the parent of this duty by laying it upon the shoulders of another, or deprive him of this right by assuming it.[4]

In the full convention, several delegates likewise objected that "the people of Texas [should] be left free to raise their children and educate their children in their own way" for the "God in Heaven has granted [the parent] the privilege of raising a family" and thus "he has the right to educate his children as he pleases."[5]

Opponents favored, instead, an approach far more favorable to parental liberty; this system would (1) rely exclusively on funds derived from public lands (and thus not burden taxpayers) and (2) serve primarily, if not exclusively, the children whose parents were so poor as to be unable to educate them privately.[6]

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[3] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS OF 1875. at 243 (1875) (hereinafter "Journal").
[4] *Id*. at 245
[5] DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1873, at 195 (1930) (hereinafter "Debates").
[6] Journal, at 246–47:

Such a tax-free system would in no way interfere with the liberty of most parents to use their own resources to educate their children.

In response, supporters of a general school system protested that they too endorsed parental educational rights. As one delegate said, "We do not propose compulsory education or the *slightest invasion of the right of the parent* over the control of the child. That right is sanctified by the laws of nature and of God, and may not be invaded by any human power."[7] Or as another delegate insisted, "the rights of the parents over the child are [not] to be infringed upon. We *all* contest for these rights."[8]

According to one supporter, their purpose was not to supplant parental authority—"it should be left optional for people to educate their children in private or public schools, as they choose." Instead they viewed a general school system as a way to provide for children whose parents were unable to educate them, for systems of "private education," although preferable, was inadequate to educate "the large number of orphans [and] children of the poor people."[9]

But why did delegates favor a general instead of a more targeted school system? Supporters explained that any targeted, mean-tested educational system would not be "practical," for "poor men will be found too proud…to say 'I am too

[7] Debates, at 198 (emphasis added).
[8] *Id*. at 199 (emphasis added).
[9] *Id*. at 200.

poor to educate my children, they are indigent children,'" so "they will not get any of the benefits, while the children of idle, intemperate, and vicious parents will be educated."[10] A program for the poor only would not help the truly poor.

Still, the danger to parents remained. To support a general school system, taxation might become so high as to materially impair with the right of otherwise able parents to educate the child in the manner they saw fit.

In an effort to resolve the sharp discord on this and other questions in the Convention, a new committee of seven was assigned the task of drafting a compromise.[11] Among the committee's new suggestions, approved by the committee nearly unanimously (a 6-1 vote), was a rule requiring *efficiency*: the legislature must support not only public schools, but "an efficient system" of such schools.[12] Although no delegate offered any direct exposition of the word "efficient," the evidence strongly suggests that its inclusion was designed to allay the fears that the school system would impair private educational initiative and choice.

Some opponents, however, still feared that even with such an inclusion, the Education Clause would still impair the liberty sustaining private educational choice. The state's power, opponents insisted, should be strictly limited to

[10] *Id.*
[11] Journal at 337, 339; Debates, at 231–32.
[12] Journal, at 396.

providing "an education to every child whose parents were unable to do it."[13] But a system that was both general and "efficient" was impossible in 1875. As one delegate argued, the people still lacked the resources to "guarantee an efficient system" that would *both* (1) "give a substantial education to every child" *and* (2) avoid such a burdensome taxation on the community so as to "paralyze the individual enterprise that has sustained the [private] schools and colleges of Texas by their own private means and energies up to this time."[14] The problem was compounded by a rapidly growing population of school-age children, such that a general school system would require tax increases that would far outpace economic growth: "how long will the people…be able to stand perpetually increased taxation without being sold out by public free schools?"[15] A general education, to be substantial, would require a tax burden that would cripple private educational choice.

In response, supporters again protested that the proposed system would not deny to parents either "the right to select the teacher" or the concomitant "right to select the books by which his children would be taught."[16] Proponents further insisted that free public schools would not involve any "injury to private schools"; for the example in other states showed that private institutions, "so far from being

[13] Debates, at 356.
[14] *Id*. at 351.
[15] *Id*. at 352.
[16] *Id*. at 358.

injured by the free schools, receive fresh accessions [of more, better prepared students] from these every year."[17]

The word *efficient* was proposed, then, seemingly to reassure opponents that the system would not threaten the liberty of taxpayers, and especially parents. In this regard, Amicus respectfully submits that in *Edgewood*, this Court was mistaken in concluding that the original intent of "efficient" was *not* economical or inexpensive—in the interest of taxpayer freedom. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). As the Court itself noted, "[t]he language of the Constitution must be presumed to have been carefully selected." *Id.* at 395. But the drafting history of our Constitution strongly indicates that the Convention, in the face of pro-taxpayer, pro-liberty objections, carefully selected the word "efficient" but carefully declined to use any word like "thorough" or "high-quality" that would imply a duty to spend.[18]

In fact, the Convention deliberately and conspicuously omitted the word "thorough." When the Texas provision was adopted, several other state constitutions likewise mandated an "efficient" system, but they paired that

[17] *Id.* at 365–66.

[18] In interpreting "efficiency" in terms of educational results and not taxpayer liberty, this Court relied, in part, on the opinions of Henry Cline, *id.* at 395 n.4. But Cline supported a more extensive duty to spend, and was the leading proponent of the rejected requirement of a "thorough" system. Journal, at 318. Indeed he was by far the most radical delegate in both his enthusiasm for extensive expenditures and his apparent disregard for parental authority: "Now I am willing to concede *anything* to the public schools…It is the demand of the child, and not the parent. We have *nothing* to do with the parent, but *everything* with the child." Debates, at 217–18 (emphasis added).

adjective with another—"thorough"—requiring a "thorough and efficient system" of schools.[19] The apparent goal was to demand both a high-quality education, on the one hand, and an efficient education, on the other; these two adjectives suggested both a duty to spend (for a "thorough" system) as well as a duty to restrain (for an "efficient" system). Consistent with this trend, two delegates initially proposed that Texas likewise mandate a system that is "thorough and efficient."[20] But the special committee and whole Convention decided otherwise, and conspicuously omitted the word "thorough" and mandated only an "efficient" system of schools.[21] Indeed, Texas thus became the first state to require only *efficiency* but not *thoroughness* in its school system.

Texas, then, placed the strong emphasis on taxpayer-protection. The primary purpose of the *efficiency* mandate was to protect taxpayers, and especially taxpaying parents, against an educational system that would impair rather than secure their liberty, especially their parental liberty to educate their children.

[19] *See, e.g.*, OHIO CONST., art. VI, §2 (1851) (mandating a "thorough and efficient system"); PENN. CONST., art. VII, § 1 (1873) (same).
[20] Journal at 318, 336 (proposals of Henry Cline and F. M. Martin).
[21] *Id.* at 396.

III. The reliance on the standard of parental liberty allows for a justiciable rule by which to assess the efficiency of the Texas school system, *viz.*, Does the system assist or hinder the educational authority of a Texas parent of ordinary prudence and average means?

If parental liberty is the primary outcome to consider in assessing efficiency, then a judicially cognizable standard seems possible: Does the whole school system, both its finance and regulation, assist or hinder the parental educational authority of a Texas parent of ordinary prudence and average means?

There are two parts to this test. First, the court should consider whether school taxes—past, present, and future—impose a substantial burden on the ordinary taxpaying parent in such a way as to directly or indirectly affect the parents' present ability to direct the education of their school-age children. If school taxation is *de minimis* or negligible, then the system itself would seem at least neutral to this parental educational liberty, as the system leaves the parents no worse off. Such a system would not be constitutionally inefficient.

But school taxation may be sufficiently burdensome as to impair parental liberty. Parents could otherwise use those tax dollars to hire tutors, pay tuition, bear the opportunity costs of homeschooling, or otherwise. Parents could also indirectly benefit from the private educational funding freed up by lower taxation. Substantial school taxation does substantially impair parental educational liberty.

Second, where school taxation does impair parental liberty, then the court should consider whether school expenditures offer taxpaying parents a degree of

educational discretion equal or greater to what they would have but for the governmental school system.[22] A system that fails to do so is unconstitutionally inefficient at preserving parental liberty.

IV. There is substantial evidence, to be ascertained merely by judicial notice, indicating that the Texas school system hinders, and does not assist, the parental liberty of ordinary Texans

Applying this two-part test to the Texas school system, there is abundant evidence to support the conclusion that the current system does not preserve (let alone enhance) parental educational authority, but instead frustrates it. First, the rate of taxation is not negligible: it substantially impairs the educational resources of the average parent—and thus his or her parental liberty. At present the median Texas household shoulders a local and state tax burden of roughly 8.6% of their household incomes, with the poor paying an even larger percentage.[23] For the median Texas household, with an income of $55,000,[24] their total tax burden is roughly $4,730 per year. While tracing those tax dollars to school expenditures is difficult, it is probable that at least one-third of those tax dollars are spent on our

[22] A fiscal and regulatory regime that left parents with greater ability to direct the education of their offspring would seem to exceed the constitutional mandate of liberty-efficiency, by not merely preserving, but promoting and extending parental educational liberty.

[23] Brakeyshia Samms, *Who Pays Taxes in Texas?* CENTER FOR PUBLIC POLICY PRIORITIES (March 2015), http://forabettertexas.org/images/IT_2015_04_PP_WhoPaysTxTaxes.pdf (relying on data from the Texas Comptroller showing that, for instance, the poorest quintile of Texas households must relinquish 18% of their household income to state and local tax collectors).

[24] Michael Theis, Mapped: Household Income, Down to the Neighborhood, Across all of Texas, Austin Bus. J. , Jan. 20, 2015, http://www.bizjournals.com/austin/news/2015/01/20/mapped-household-income-down-to-the-neighborhood.html.

school system.[25] Consequently, our school system imposes on the median Texas household an annual burden of at least $1600.

But the true burden on *parental* choice is substantial greater. The average Texas woman will be a parent of a school-age child for only about fifteen of her adult years (assuming two children, born three years apart). The lifelong burden on her household of $1600/year, as it affects her during those years (whether through lost pre-maternal income, or present burden of future taxes on real estate values, etc.), is surely far greater.

Further, these taxes burden parental ability in an indirect way. School taxation impairs the ability of her own parents (grandparents) to supplement her present educational resources. Moreover, school taxes place a burden on private educational charity, to the detriment of the parent's educational choice.

A *very* conservative estimate, then, is that our current school system annually takes from the average household roughly $3000 in educational resources that they could otherwise enjoy to provide and direct their children's education. Such an amount represents a substantial impairment of parental educational discretion.

[25] Texas Comptroller of Public Accounts, *Public Education Funding in Texas*, FINANCIAL ALLOCATION STUDY FOR TEXAS, http://fastexas.org/about/funding.php (last visited Aug. 20. 2015) (showing that in 2012–13, school taxes comprised over half of local property taxes and that school expenditures represented 29% of all state appropriations).

As to the second part of the test, it is plain that the current Texas school system fails to offer Texas parents an equivalent in exchange for that burden. Parents have almost no choice in directing the expenditure of those funds: there is a strict cap on charter schools, and no vouchers are available to pay for the fees of tutors, private schools, or compensate parents for the opportunity costs of homeschooling. The tax and regulatory features of our school system combine to deny Texans the benefits of an *efficient* system of education—one that is efficient at preserving Texans' parental liberty.

CONCLUSION

Our Texas Constitution required an efficient school system to preserve the people's liberties. The framers of that Constitution emphatically promised that such an efficient system would not infringe the educational liberty of parents and that private education would not be harmed. Our constitutionally inefficient system has betrayed that promise.

Amicus therefore requests that the Court declare the Texas School System to be unconstitutional and direct the Legislature to comply with the efficiency standard mandated by the Texas Constitution. More specifically, Amicus asks this Court to direct the legislature to do one of the following:

(1) dramatically reduce the direct and indirect tax burden on ordinary parents so that it has a *de minimis* effect on their educational liberty, *or*

(2) provide, in exchange for the substantial parental tax burden, a system of substantial parental choice—one that would give ordinary Texas parents at least as much educational choice as they would have but for our system of school finance and regulation.

Respectfully submitted,

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August 21, 2015

CERTIFICATE OF COMPLIANCE

1. Relying on the word count function in the word processing software used to produce this document, I certify that this Brief contains 4,234 words.

/s/David R. Upham
David R. Upham

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, the foregoing Brief was served via the Court's electronic service to all attorneys as listed on Appellants' Brief, p.55-57.

/s/David R. Upham
David R. Upham