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Nos. 04-1144, 05-0145, and 05-0148

In the Supreme Court of Texas

SHIRLEY NEELEY, TEXAS COMMISSIONER OF EDUCATION, THE TEXAS EDUCATION AGENCY, CAROLE KEETON STRAYHORN, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, AND THE TEXAS STATE BOARD OF EDUCATION,
Appellants,

v.

WEST ORANGE-COVE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, COPPELL INDEPENDENT SCHOOL DISTRICT, LA PORTE INDEPENDENT SCHOOL DISTRICT, PORT NECHES-GROVES INDEPENDENT SCHOOL DISTRICT, DALLAS INDEPENDENT SCHOOL DISTRICT, AUSTIN INDEPENDENT SCHOOL DISTRICT, AND HOUSTON INDEPENDENT SCHOOL DISTRICT, *ET AL*,
Appellees.

On Direct Appeal from the 250th District Court, Travis County, Texas

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TABLE OF CONTENTS

Identity of Parties and Counsel i

Table of Contents iv

Index of Authorities vii

Statement of the Case xi

Issues Presented xii

Statement of Facts 2

A. Recap of the Court's Efficiency Jurisprudence 2

B. The Current Efficiency Claim 4

C. Texas's School Finance System 5

1. School districts raise funds by assessing local property taxes 5

2. State funds are allocated primarily through the Foundation School Program 6

a Tier 1: All school districts are guaranteed a certain amount of funding per student 6

b. Tier 2: The State provides additional funding for some districts 8

3. Some districts must share their excess wealth through the recapture program 9

4. The Legislature has established separate financing for facilities 11

5. The Legislature has provided other aid to school districts . 13

Summary of the Argument 15

Argument 17

I. The Court Should Affirm the Trial Court's Judgment That the School Finance System Is Constitutionally Efficient With Respect to M&O Funding Because the Edgewood and Alvarado Districts' Claims That the M&O System Violates the Efficiency Provision of Texas Constitution Article VII, §1 Are Non-Justiciable Political Questions. Because Article VII, §1 Creates No Right of Action, and Because the School Districts Lack Standing To Sue 17

II. Because Texas's System Is Constitutionally Adequate, It Is Also Presumptively Efficient as a Matter of Law . . . 18

A. The Edgewood and Alvarado Districts All But Ignore "Qualitative" Efficiency—a Crucial Element of Their Constitutional Claim 18

B. The Indirect Arguments That the Edgewood and Alvarado Districts Make Relating to Qualitative Efficiency Are Without Merit 21

III The Trial Court Correctly Held That Texas's System of Funding Public School Maintenance and Operations Does Not Destroy the Constitutional Efficiency of the Entire School Finance System 24

A. The Legislature Has Narrowed the Disparity in Access to Revenue Within the FSP—the Measure of the Gap That Most Closely Corresponds to the Court's Analysis in *Edgewood IV* 26

1. The 17-cent tax-rate gap should be used with caution because it is not directly comparable to that calculated in *Edgewood IV* 26

2. The 17-cent tax-rate gap, in the context of a larger equalized system, is not so great as to render the entire system unconstitutional 29

3. The gap in revenue—specifically, the yield under the FSP—has improved dramatically since *Edgewood IV*, confirming the system's efficiency 30

B. The Legislature's Choices in Developing and Funding the School Finance System Are Not Relevant to the Court's Efficiency Analysis 33

1. Property-Wealth Hold Harmless . . . 34

2. Compensatory Education Set Asides 34

3. Recapture Credits 35

4 Raising the Equalized Wealth Level . . 37

IV. The Trial Court's Refusal to Issue Additional Findings of Fact Was Not Reversible Error 38

Conclusion 41

Certificate of Service 43

INDEX OF AUTHORITIES

Cases

Carrollton-Farmers Branch Indep. Sch. Dist v Edgewood Indep. Sch Dist, 826 S W.2d 489 (Tex. 1992) . 3

Cherne Indus, Inc v. Magallanes, 763 S.W.2d 768 (Tex. 1989) 40

Edgewood Indep Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) 2, 18, 30

Edgewood Indep Sch Dist v Meno, 917 S.W.2d 717 (Tex. 1995) . . . . . xii, 11, 18-21, 25-27, 29-32

Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) 2, 3

Jamestown Partners, L P. v. City of Fort Worth, 83 S.W.3d 376 (Tex. App.—Fort Worth 2002, pet. denied) . . . 39

Raymond v Rahme, 78 S.W.3d 552 (Tex. App.—Austin 2002, no pet.) 38

Tenery v Tenery, 932 S.W.2d 29 (Tex. 1996) 39

Walker v Packer, 827 S W.2d 833 (Tex. 1992) 38

West Orange-Cove Cons Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558 (Tex. 2003) 5, 6, 19, 27

Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190 (Tex. App.—Austin 1992, no writ) 38

Statutes, Rules, and Constitutional Provisions

19 TEX. ADMIN. CODE §61.1035(a)(2) 12

19 TEX ADMIN. CODE §62.1071(d)(2) 36

TEX. CONST art V §5 6

TEX. CONST. art. VII. §1 . . . . . 4, 20

TEX. CONST art. VII, §5 13

TEX. CONST. art VII, §5(a)(1) 13

TEX. CONST. art. VII, §5(c) 6, 13

TEX. CONST. art. VIII, §1-e 3

TEX. EDUC CODE Aux Laws art. 278g 5, 14

TEX EDUC. CODE §5.001(4) 7

TEX. EDUC. CODE §11.152 5

TEX. EDUC. CODE §41.002 . . . . . 9-10, 11

TEX. EDUC. CODE §41.002(e) 10

TEX. EDUC. CODE §41.002(g) 11

TEX. EDUC. CODE §41.003 10

TEX. EDUC. CODE §41.003(3) 35

TEX. EDUC. CODE §41.003(e) 11, 27, 34

TEX. EDUC. CODE §41.092(a) 35

TEX. EDUC. CODE §41.098 35

TEX. EDUC. CODE §41.121 36

TEX. EDUC. CODE §42.101 . . . . . 7, 10, 31

TEX. EDUC CODE §42.102 7

TEX. EDUC. CODE §42.103 7

TEX. EDUC. CODE §42.103(b) 7

TEX EDUC CODE §42 103(c) 7

TEX EDUC. CODE §42 103(d) 7

TEX EDUC. CODE §42.105 7

TEX. EDUC. CODE §42 151 ..... 7, 8

TEX. EDUC. CODE §42 152 ..... 7, 8, 34

TEX. EDUC. CODE §42.152(a) 34

TEX. EDUC. CODE §42.152(e)(1) 7, 35

TEX. EDUC. CODE §42 153 8

TEX. EDUC. CODE §42 154 8

TEX. EDUC. CODE §42 155 8

TEX EDUC. CODE §42 156 8

TEX. EDUC. CODE §42.157 8

TEX. EDUC CODE §42.158 8

TEX. EDUC. CODE §42.251 8

TEX. EDUC. CODE §42.251(b) 6

TEX. EDUC. CODE §42.252(a) 7

TEX. EDUC. CODE §42.252(d) 7

TEX. EDUC CODE §42.302 ..... 6, 8, 10

TEX. EDUC. CODE §42.302(a) 8

TEX EDUC. CODE §42.303 8

TEX EDUC. CODE §43.001 13

TEX. EDUC. CODE §43.001(b) 6, 13

TEX. EDUC CODE §43.002 13

TEX. EDUC. CODE §43 302 9

TEX. EDUC. CODE §45.001(a)(2) 5

TEX. EDUC CODE §45.002 5

TEX. EDUC. CODE §45.003(d) 5

TEX. EDUC. CODE §45.0031(a) 5

TEX. EDUC CODE §46.001 12

TEX. EDUC CODE §46.003 12

TEX. EDUC CODE §46.003(a) 12

TEX. EDUC CODE §46.032(a) 12

TEX EDUC CODE §46.033 12

TEX. EDUC CODE §46.034(a) 12

TEX R. CIV. P. 298 39

STATEMENT OF THE CASE

Nature of the Case: This cross-appeal brought by the Edgewood and Alvarado Districts involves the single issue of whether Texas's school finance system is "efficient" under Article VII, §1 of the Texas Constitution [1]

Trial Court: The Honorable John Dietz, 250th District Court, Travis County, Texas

Trial Court Disposition. After a trial on the merits, the trial court held that Texas's school finance system satisfies the constitutional requirement of efficiency with respect to funding for school maintenance and operations and, therefore, declined to grant the Edgewood and Alvarado Districts' request for declaratory and injunctive relief on that ground

1. On April 22, 2005, the Court consolidated the State's appeal in Cause No 04-1144 with the Edgewood and Alvarado Districts' appeals in Cause Nos 05-0145 and 05-0148

ISSUES PRESENTED

1. Should the Court dismiss the Edgewood and Alvarado Districts' M&O efficiency claims?

   A. Are the districts' claims under Article VII, §1 of the Texas Constitution justiciable, or are those claims political questions properly left to the Legislature?

   B. Article VII, §1 merely exhorts the Legislature to enact legislation but does not itself provide any rule of enforcement. Does it provide an enforceable right of action?

   C. Do the school districts have standing to assert their claims under Article VII, §1?

2. The Legislature's duty to provide access to revenue for school maintenance and operations to property-wealthy and property-poor districts at substantially similar tax rates "applies *only* to the provision of funding necessary for a general diffusion of knowledge." *Edgewood Indep. Sch. Dist v Meno*, 917 S.W 2d 717, 731 (Tex. 1995) (*Edgewood IV*)

   A If the Legislature has provided for a general diffusion of knowledge within the current funding structure, is the Article VII, §1 efficiency requirement presumptively satisfied?

   B. If not, does the disparity in maintenance and operations funding between property-wealthy and property-poor districts render the entire system of school finance constitutionally inefficient?

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Appellees

On Direct Appeal from the 250th District Court, Travis County, Texas

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STATE APPELLEES' BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS

In their Appellants' Briefs, the Edgewood and Alvarado Districts challenge the trial court's rejection of their claim that the disparity in access to maintenance and operations funding between property-wealthy and property-poor districts renders Texas's entire multi-billion dollar system of school finance inefficient under Article VII, §1 of the Texas Constitution Because this portion of the trial court's judgment is correct as a matter of law, the Court should affirm it

STATEMENT OF FACTS

A. Recap of the Court's Efficiency Jurisprudence

Efficiency was the sole issue considered in the first of the *Edgewood* cases *See Edgewood Indep Sch Dist. v. Kirby*, 777 S.W.2d 391 (Tex 1989) (*Edgewood I*) In *Edgewood I*, the Court enjoined the operation of the school finance system because enormous funding inequities existed between property-poor districts and property-wealthy districts The Court noted the vast property-wealth disparity existing at that time, with the wealthiest district having over $14,000,000 per student and the poorest district having only $20,000 per student—a 700-to-1 ratio. *Id* at 392. Because districts were allowed to greatly augment their state funds with local money, the disparity in property wealth resulted in a corresponding disparity in spending per student, with the property-wealthy districts able to spend, on average, $2,000 more per year on each student. *Id* at 392-93 But because the system was based substantially on property value, higher property-value districts could tax at significantly lower rates and still spend more per student than the property-poor districts that were required to tax high just to spend low *Id* at 393.

Focusing on these gross financial disparities, the Court in *Edgewood I* held the system to be constitutionally inefficient because it did not give property-poor districts substantially similar access to revenue at similar tax rates. *See id.* at 397. The Legislature attempted to cure the constitutional deficiency but, in *Edgewood Independent School District v Kirby*, 804 S W.2d 491, 493 (Tex. 1991) (*Edgewood II*), the Court held that the Legislature had failed to cure the inefficiency identified in *Edgewood I*. The Court also clarified that equity in

access to revenue was not required at all levels of funding; thus, unequal local supplementation was constitutionally permissible *Id* at 499-500 The Legislature again attempted to remedy the problem, but, although it accomplished the goal of efficiency, its solution ran afoul of a different constitutional provision—Article VIII, §1-e.[2] *See Carrollton-Farmers Branch Indep Sch. Dist v Edgewood Indep Sch Dist*, 826 S.W 2d 489 (Tex 1992) (*Edgewood III*).

The Legislature's next attempt at devising a constitutional system—Senate Bill 7—was successful. Building on its conclusion in *Edgewood II* that local revenue beyond that necessary to provide a general diffusion of knowledge need not be substantially equal, 804 S.W.2d at 499, the Court clarified that the Legislature's duty to provide "financial" efficiency—substantially equal access to revenue—applies only to that funding necessary for a general diffusion of knowledge. *Edgewood Indep Sch Dist. v Meno*, 917 S W 2d 717, 729 (Tex. 1995) (*Edgewood IV*). In the process, the Court expanded the concern about financial efficiency that was at the center of *Edgewood I* to include a second element—qualitative efficiency, *i.e.* whether districts are able to provide a general diffusion of knowledge. *Id.* at 729.

In applying this framework, the Court equated "qualitative" efficiency—the provision of a general diffusion of knowledge—with the provision of an accredited system as defined by the Legislature. *Id* at 730. Because the districts were able to provide a general diffusion

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2. Article VIII, §1-e provides: "No State ad valorem taxes shall be levied upon any property within this State." TEX CONST art VIII, §1-e

of knowledge through the accreditation system, and because the disparity in tax rates necessary to generate the same amount of revenue was enormously reduced from the previous system, the Court held that the system was constitutionally efficient.

B. The Current Efficiency Claim

The present litigation began as a suit by property-wealthy school districts—known as the West Orange Cove Districts—claiming that the system effected an unconstitutional state property tax. The Edgewood and Alvarado Districts joined the suit as intervenors, claiming that the system was, among other things, inefficient as to maintenance and operations funding as well as to facilities funding under Article VII, §1 of the Texas Constitution [3]

After trial on the merits, the trial court ruled in favor of the Edgewood and Alvarado Districts, as well as the West Orange Cove Districts, on all of their constitutional claims except the one at issue in this cross-appeal. 3.CR.842-49 Thus, even after concluding that the school finance system violates every other constitutional provision alleged, including the parallel efficiency claim with regard to facilities funding, the trial court refused to find that the system is constitutionally inefficient as to maintenance and operations funding FOF 296, 3.CR.926. After the State challenged the other portions of the judgment by direct appeal, 4.CR.997, the Edgewood and Alvarado Districts appealed the trial court's maintenance-and-operations-efficiency holding, 4.CR.1119A-1, 1119B-1.

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3 Article VII, §1 provides. "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools " TEX CONST art VII, §1

C. Texas's School Finance System

The Legislature has chosen to divide the responsibility for funding Texas schools between the State and local school districts, *West Orange-Cove Cons Indep Sch Dist v Alanis*, 107 S.W 3d 558, 563 (Tex. 2003), and, toward that end, has enacted the two-tiered Foundation School Program (FSP).

1. School districts raise funds by assessing local property taxes.

School districts raise their share of school funding by imposing taxes on property located within their boundaries. TEX EDUC. CODE §§11.152, 45.002. The local property tax is divided into two parts: Maintenance and Operations (M&O) and Interest and Sinking (I&S). *Id.* §§45.002, 45.001(a)(2). Revenue generated from a district's M&O tax supports all school district expenses except for debt service on buildings, which is funded by a district's I&S tax revenue Thus, M&O revenue is used for operational expenses (*e g*, payroll and electricity), whereas I&S revenue is restricted to paying for the interest and principal on bonds issued to finance a school district's large capital investments (*e g*, constructing, repairing, or refurbishing school buildings). A district's M&O tax rate cannot exceed $1.50 per $100 in property value, *id.* §45.003(d),[4] and its I&S tax rate cannot exceed $.50 per $100 in property value at the time the debt is issued, *id* §45.0031(a).

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4 Some districts are authorized to tax up to $2 00 per $100 in property valuation *See* TEX EDUC CODE Aux Laws art 278g [Act of May 14, 1953, 53rd Leg, R.S, ch 273, 1953 Tex Gen Laws 710, *amended by* Act of February 12, 1959, 56th Leg, R S, ch 7, 1959 Tex Gen Law 14]

2. State funds are allocated primarily through the Foundation School Program.

The customary sources of state aid to school districts for maintenance and operations are the FSP, the Available School Fund,[5] and funds recaptured from property-wealthy school districts. The FSP is the State's two-tiered system for determining how much (if any) state aid each school district receives. The calculation is based on each district's property wealth Districts with higher property wealth receive less state funding per student than lower-wealth school districts, 27.RR.177, and those that reach a certain threshold of revenue based on local tax effort receive no state aid at all from the FSP TEX EDUC. CODE §42.302. Thus, districts that have enough property wealth to meet the threshold through local tax effort alone are ineligible for state aid from the FSP. For those districts that are not wealthy enough to meet the guaranteed yield on their own, the State makes up the difference through "equalization," the statutory term used to describe the process of providing state aid in inverse relation to property wealth. *See id* §§41.001-.002; *West Orange-Cove*, 107 S.W.3d at 570 (describing the FSP's wealth equalization measures).

a. Tier 1: All school districts are guaranteed a certain amount of funding per student.

The FSP generates M&O funding through two "tiers." The State and the local districts share the responsibility for financing Tier 1. TEX. EDUC. CODE §42.251(b). State Ex. 16429 at 11-12 (Wisnoski Powerpoint). To participate in the FSP, a district must collect

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5 The Available School Fund contains a percentage of the value of the Permanent School Fund that is required under the Constitution to be set aside each biennium TEX CONST art V §5, TEX EDUC CODE §43.001(b); 27 RR 178 It ultimately finances textbooks and a constitutionally required per-student allotment to all districts, regardless of wealth. TEX CONST. art VII, §5(c)

sufficient funds from local M&O taxes to equate to a tax rate of at least $ 86 per $100 in property value. TEX EDUC. CODE §42.252(a), (d) The State guarantees that each participating district will receive a certain amount of money per student, plus additional funding through the application of weights for certain student and district characteristics *Id* §42 101; *see also* note 8, *infra*.

Under Tier 1, districts are guaranteed a "basic allotment" of $2,537 for each student in average daily attendance. TEX. EDUC. CODE §42.101. A district's basic allotment is increased through the Cost of Education Index (CEI), which adjusts for regional variations in resource costs that are outside a district's control *Id.* §42 102, *see* State Ex. 16429 at 3 A district's allotment is then further increased based on the district's size[6] and on the weights for categories of students who are more expensive to educate (the latter are also called "special allotments")[7] TEX. EDUC. CODE §42.103(b), (c), (d), State Ex 16429 at 4 Weights are applied for students who are (1) in special education programs, TEX EDUC CODE §42.151, (2) educationally disadvantaged or pregnant, *id* §42 152, (3) in bilingual education

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6. The basic allotments of districts that have a minimal number of students in average daily attendance are adjusted to compensate for additional costs associated with small enrollment TEX EDUC CODE §42.103. Similarly, some districts with very small numbers of students in average daily attendance are funded for a minimum number of students to adjust for their diseconomies of scale. *Id* §42 105

7. The special allotment that educationally disadvantaged (those students eligible for free/reduced price lunch, *id.* §5.001(4)) and pregnant students receive is called the Compensatory Education Allotment *Id.* §42 152. The Legislature "sets aside" a portion of the funds for compensatory education services to fund specific state priority programs. State Ex. 16060 at 7 (Wisnoski Report). TEA uses these funds to provide districts with guidance counselors, study guides, and testing materials for the Texas Assessment of Knowledge and Skills, or TAKS. TEX. EDUC. CODE §42.152(e)(1); State Ex. 16060 at 8 Although districts do not directly receive the money that is withheld through this set-aside, the money is used to benefit districts (primarily property-poor districts, which typically have larger numbers of these students) with direct, in-kind services. State Ex. 16060 at 8 n.9

or special language programs, *id.* §42.153, (4) in career and technology education programs, *id* §42 154; (5) in programs for the gifted and talented, *id.* §42.156; and (6) eligible for a public education grant, *id* §42.157[8] A student can fall into more than one weighted category: in that case, the school district receives the benefit of all applicable weights for that student.[9] The sum of the basic allotment plus the effects of the application of the Cost of Education Index as well as the district's size and special allotments, in addition to other allotments,[10] amounts to a district's entitlement under the FSP's first tier. *Id* §42 251. To the extent a school district cannot generate its Tier 1 entitlement while effectively taxing at $ 86 per $100 of property value, the State makes up the difference

b. Tier 2: The State provides additional funding for some districts.

Tier 2 of the FSP provides additional state aid to districts based upon the remaining $.64 of a district's M&O taxing potential. *Id* §§42 302, 303 For every cent of tax effort above the effective $.86 rate required for Tier 1 up to $1.50, the State guarantees a yield of $27.14 per weighted student. *Id* §42.302(a) (defining "guaranteed level of state and local

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8. Special education students receive additional weights ranging from 1.1 to 5 0, depending on the program. TEX. EDUC. CODE §42.151. Educationally disadvantaged students receive an additional weight of .2, but if the student is pregnant, she temporarily receives an additional 2 41 weight *Id* §42.152 Bilingual education students receive an additional weight of 0.1, *id.* §42 153, career and technology students receive an additional weight of 1.35, *id.* §42 154, and students attending school under public education grant receive an additional 0 1 weight, *id.* §42 157.

9. For example, an economically disadvantaged student in bilingual education would receive a weight of 3 (.2 for being economically disadvantaged and 1 for bilingual education) *See id.* §§42 152 153 27 RR 175; State Ex. 16429 at 9

10 A district that operates a transportation system is entitled to an allotment for transportation costs TEX EDUC CODE §42 155, and some districts are entitled to a new instructional facilities allotment if they have opened a new facility, *id* §42.158.

funds per weighted student"). The use of the weighted student count in the calculation allows the Texas Education Agency (TEA) to account for costs associated with each district's actual student populations. State Ex. 16060 at 13 (Wisnoski Report)

To determine a district's weighted student count, TEA subtracts from that district's aggregate Tier 1 entitlement certain amounts related to the transportation and new instructional facilities allotments and the Cost of Education Index. TEX EDUC CODE §43.302; State Ex. 16060 at 13. This new amount is then divided by the $2,537 basic allotment to determine a district's weighted student count TEX. EDUC. CODE §43 302, State Ex 16060 at 13. Each district's total property wealth is then divided by its weighted student count to determine that district's property value per weighted student.

As under Tier 1, if a district fails to yield $27.14 per penny of tax effort under Tier 2, the State makes up the difference For example, a district with a property value per weighted student of $115,000 would raise only $11 50 per penny of tax effort. The State would provide to the district an additional $15.64 per weighted student to make up the difference between the district's yield from its tax effort and the State's guaranteed $27 14 level By contrast, a school district with a property value per weighted student of $271,400 or greater can raise at least $27.14 per penny of tax effort and, thus, will not receive any Tier 2 funds from the State.

3. Some districts must share their excess wealth through the recapture program.

To ensure that districts across the State have substantially equal access to funding, the Legislature has set a maximum equalized wealth level per student. TEX EDUC CODE

§41.002. School districts with a property value per student greater than $305.000 (Chapter 41 districts) receive no state aid through the FSP and must share their excess wealth with other districts to reduce their wealth to the $305.000 level *Id* §§41.002- 003. This sharing of wealth is called "recapture." Districts with a property value per student less than $305,000 (Chapter 42 districts) are not subject to recapture and receive state aid through the FSP Chapter 42 districts whose property wealth falls between $271,400 and $305,000 per weighted student, however, do not receive state aid under Tier 2 of the FSP and are commonly referred to as "gap" districts.[11] Chapter 42 districts with property wealth below $271,400 receive state aid under both Tier 1 and Tier 2.

A Chapter 41 district has five options to "reduce" its wealth under recapture: (1) consolidation with another district, (2) detachment of district territory; (3) the purchase of attendance credits; (4) the education of nonresident students; or (5) tax base consolidation with another district. *Id* §41.003. Buying attendance credits and educating students from another district are the most commonly used options State Ex. 16060 at 18

A small number of Chapter 41 districts are not required to reduce their wealth level all the way to $305,000. These districts, often referred to as the "hold-harmless districts," must reduce their wealth only to the level that enables them to achieve the same revenue per student that they had during the 1992-1993 school year, TEX. EDUC. CODE §41 002(e), State Ex. 16060 at 1495, the year before the equalized wealth level was first enacted, TEX EDUC

11. Although these districts receive no Tier 2 funding, they are eligible to receive Tier 1 funds if their relative property wealth is lower than what is necessary to generate revenue equal to the Tier 1 guaranteed yield. *Compare* TEX. EDUC. CODE §42 101 *with id* §42.302

CODE §41.002 (history), which is typically referred to as the "wealth-hold-harmless level."[12] To fully access the wealth level-hold-harmless level, eligible districts must assess a $1.50 M&O tax rate *Id.* §41.003(e). Its effect is to permit some districts to retain some excess revenue that would ordinarily be subject to recapture

4. The Legislature has established separate financing for facilities.

A district's I&S tax revenue funds debt service on new construction and renovation of existing school facilities. Before 1997, and at the time the Court decided *Edgewood IV*, a district's I&S tax revenue was considered in determining the district's share of Tier 2 state aid and was included in the $1.50 cap. State Ex. 16060 at 14 Districts were required to operate their schools *and* finance their debt as well as build new schools with tax revenue generated at a maximum tax rate of $1.50 per $100 of property value But with the advent of the Instructional Facilities Allotment (IFA) and the Existing Debt Allotment (EDA), the Legislature removed all debt service taxes from Tier 2, left the M&O cap at $1 50 per $100 of property value, and established a separate facilities funding system that authorizes districts to tax up to $.50 per $100 of property value and equalizes revenue for I&S up to at least $ 29 per $100 in property value. *Id.* at 16. Districts can now use their full $1.50 taxing capacity for maintenance and operations and still have an additional $.50—of which at least $.29 is equalized[13]—to fund facilities.

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12 The level of revenue that districts may hold harmless was increased beginning in 1999 *See* TEX EDUC CODE §41 002(g).

13. Any district can obtain up to $.29 in equalized funds through the EDA, and districts that qualify for the IFA can obtain even more. State Ex. 16060 at 14-16

The IFA and the EDA effectively supplement districts' I&S tax revenue. The IFA provides aid to districts for new instructional facilities [14] TEX EDUC CODE §46 003 The EDA provides additional aid to districts for preexisting debt that is not funded by the IFA and is not limited to instructional facilities. *Id* §46.033; 19 TEX ADMIN. CODE §61 1035(a)(2) Like the FSP, the IFA and the EDA operate based on a "guaranteed yield" for each cent of tax effort. TEX. EDUC. CODE §§46.003(a), 46.034(a). Under the IFA, districts are guaranteed $35 per student for each penny of tax effort To the extent a district cannot meet that level of funding, the State makes up the difference. The EDA also provides a $35 guaranteed yield for each penny of tax effort, *id.* §46.032(a), for the first $.29 of tax effort per $100 in property valuation, *id.* §46.034(a).

Together, the IFA and the EDA have significantly expanded districts' ability to pay for new and existing facilities. Under both programs, approximately 90% of eligible facilities debt service is equalized—70% under the EDA and another 20% under the IFA 28 RR.19; *see also* State Ex. 16429 at 49. Of the 10% of debt service that was left unequalized in 2002 and 2003 under the IFA, a substantial share of it became eligible for equalization in 2003 and 2004 under the EDA. 27.RR.215; 28 RR.19.[15]

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14 An "instructional facility" for purposes of the IFA is "real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching" the required curriculum. TEX. EDUC. CODE §46.001.

15. The efficiency of the State's school facilities funding programs is the subject of the State's appeal in No. 04-1144, and is not at issue in this appeal. For a full explanation of the I&S taxing structure as well as the IFA and EDA programs, see State Appellants' Br , No. 04-1144, at 77-82

5. The Legislature has provided other aid to school districts.

In the 2003-04 biennium, the Legislature gave every school district an additional $110 per weighted student in addition to the FSP. State Ex 16060 at 21. And since 1999, the Legislature has appropriated over $1.1 billion in additional dollars to fund specific projects—such as Head Start and the High School Completion Initiative—to improve student achievement *Id.* at 22.

The State also indirectly aids the funding of school facilities through its Permanent School Fund. The Permanent School Fund, established by the Texas Constitution, is made up of state-owned assets. TEX. CONST. art. VII, §5, TEX. EDUC. CODE §§43.001, .002 It guarantees school bonds, allowing school districts to obtain the highest possible bond rating, which in turn lowers the interest rates the districts must pay Additionally, a percentage of the Permanent School Fund accrues annually to the Available School Fund, TEX CONST. art VII, §5(a)(1); TEX. EDUC. CODE §43.001(b); 27.RR.178, which ultimately finances textbooks and a constitutionally required per-student allotment to all districts, regardless of their wealth, TEX CONST. art. VII, §5(c).

The system in place today is functionally identical to the system that the Court found constitutionally efficient in *Edgewood IV*, except that now a third tier has been added to provide for districts' facilities needs. With the additional facilities tier, today's school finance system equalizes $1.79 of the districts' tax effort—and even more if a district qualifies for the IFA—rather than just the $1.50 that was equalized in 1993 The FSP generates and distributes approximately $22.9 billion per year to school districts State Ex

16429 at 21 Under the FSP's equalization measures (Tier 1's basic allotment, Tier 2's enrichment money, the IFA, and the EDA), 95% of all revenues are routed through the FSP to all districts—meaning that they are equalized The remaining 5% of FSP revenue is unequalized. That 5% includes (1) tax revenue that exceeds the Tier 1 and Tier 2 yields and is not recaptured, (2) taxes above the $1.50 M&O level (limited to districts in counties with a population exceeding $700,000, TEX. EDUC. CODE Aux Laws art 278g[16]); (3) debt service tax revenue that exceeds the IFA and EDA yields, (4) debt taxes not in the IFA and EDA: and (5) gains made by the sale of attendance credits. 28.RR 49, State Exs 16060 at 1502, 16429 at 54.

Similarly, for 2003-04 the FSP equalized funding such that approximately 81% of all Texas school children resided in districts that received total funding equivalent to that generated by a district with a property wealth of $271,400 per student. 28 RR 49-50, State Exs. 16060 at 1502, 16429 at 54. And although the additional $110 per weighted student provided by the Legislature to each district in 2003-04 was delivered outside the FSP, its effect was to increase the equalized percentage to almost 86% State Ex 16060 at 1503 This percentage has traditionally remained a few percentage points above or below the State's goal of 85%. *See* 28.RR.49-50; State Exs. 16060 at 1502, 16429 at 54.

16. At present, only some districts within Harris county are taking advantage of this provision

SUMMARY OF THE ARGUMENT

The Edgewood and Alvarado Districts urge the Court to reverse the trial court's conclusion that Texas's school finance system remains constitutionally efficient with regard to M&O funding.[17] To prevail, the districts were required to show that they lack substantially equal access to the funding necessary to provide a general diffusion of knowledge They cannot make this showing because, as a matter of law, districts are already providing a general diffusion of knowledge with their current levels of funding. Absent gross funding disparities akin to those invalidated by *Edgewood I*, a system that provides a general diffusion of knowledge is also presumptively efficient as a matter of law under *Edgewood IV*. Because such enormous disparities do not exist today, the Court need not examine the system's funding in detail and should affirm the portion of the trial court's judgment that held the school finance system efficient with regard to M&O funding

The districts do not discuss or explain why, under *Edgewood IV*, the funding disparity is sufficient to destroy the efficiency of Texas's entire system. Indeed, because the system provides an adequate education, the districts are reduced to complaining about selected aspects of the system that they contend unfairly benefit property-wealthy districts But the question before the Court is the constitutionality of the system as a whole, not the wisdom of particular policy choices that, even taken together, do not alter the system's overall efficiency.

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17. The Edgewood and Alvarado Districts also challenge this portion of the trial court's judgment on suitability grounds, but they do not argue that suitability is distinct from efficiency Thus, for the same reasons the judgment is correct regarding efficiency with respect to the M&O system, it is also correct regarding the suitability of the system. *See also* State Appellants' Br at 90-92

The fact that the "tax-rate gap"—the disparity in tax rates that property-wealthy and property-poor districts must assess to generate sufficient funds to provide a general diffusion of knowledge—may have slightly increased since the Court's review in *Edgewood IV* should not lead the Court to invalidate the system. Unlike the gap calculated by the Court in *Edgewood IV*, the current measure of the gap established at trial includes local supplementation retained by the hold-harmless districts, which artificially enlarges the gap by taking into account funds spent beyond those necessary for a general diffusion of knowledge. But even if the Court considers this measure of the gap to be appropriate, it is still not great enough to destroy the efficiency of the entire system Moreover, the gap within the FSP—a measure that does not include hold-harmless money and therefore more closely approximates the gap examined in *Edgewood IV*—has narrowed considerably, confirming the system's efficiency. Thus, by any measure, Texas's school finance system remains constitutional Indeed, Texas has one of the most efficient systems of any State

Finally, the Court should reject the Edgewood Districts' argument that the judgment should be reversed because the trial court failed to make the additional findings requested by the Edgewood Districts. The trial court was under no legal obligation to grant the Edgewood Districts' request. Moreover, its failure to do so, even assuming it was erroneous, was not harmful because the findings are sufficient to enable this Court to determine the purely legal question of whether the system is constitutionally efficient. The system is efficient, and that portion of the trial court's judgment should be affirmed.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE TRIAL COURT'S JUDGMENT THAT THE SCHOOL FINANCE SYSTEM IS CONSTITUTIONALLY EFFICIENT WITH RESPECT TO M&O FUNDING BECAUSE THE EDGEWOOD AND ALVARADO DISTRICTS' CLAIMS THAT THE M&O SYSTEM VIOLATES THE EFFICIENCY PROVISION OF TEXAS CONSTITUTION ARTICLE VII, §1 ARE NON-JUSTICIABLE POLITICAL QUESTIONS, BECAUSE ARTICLE VII, §1 CREATES NO RIGHT OF ACTION, AND BECAUSE THE SCHOOL DISTRICTS LACK STANDING TO SUE.

In its opening brief in these consolidated appeals, the State urged the Court to dismiss the school districts' Article VII, §1 adequacy and facilities-efficiency claims on three grounds: that (1) the districts' claims raise non-justiciable political questions concerning the Legislature's policymaking decisions in enacting a system of free public schools, (2) Article VII, §1 does not create a private right of action, and (3) the districts lack standing to challenge the constitutionality of the system. State Appellants' Br., No. 04-1144, at 30-45. Those arguments apply equally to the Edgewood and Alvarado Districts' efficiency claims with respect to Texas's system of M&O funding—the sole subject of this cross-appeal Accordingly, the State incorporates by reference the argument and authorities cited under Part I, pages 30-45, of its opening brief into this Appellees' Brief. For the reasons explained therein, the Court should affirm the portion of the trial court's judgment holding that Texas's school finance system is constitutionally efficient with regard to M&O funding

II. BECAUSE TEXAS'S SYSTEM IS CONSTITUTIONALLY ADEQUATE, IT IS ALSO PRESUMPTIVELY EFFICIENT AS A MATTER OF LAW.

As the State demonstrated in its Appellants' Brief, Texas's educational system is constitutionally adequate as a matter of law *See* State Apellants' Br , No. 04-1144, at 45-77.[18] Adequacy is the overarching goal of Article VII, §1. And, under *Edgewood IV*, once the system is adequate, it is also presumptively efficient absent a gross disparity in funding, as was present at the time of *Edgewood I*. Because no such disparity exists today, the system is constitutionally efficient as a matter of law.

A. The Edgewood and Alvarado Districts All But Ignore "Qualitative" Efficiency—a Crucial Element of Their Constitutional Claim.

In *Edgewood IV*, the Court explained that "efficiency" has two aspects. "qualitative efficiency" and "financial efficiency." 917 S W.2d at 729. "Qualitative efficiency" is functionally identical to what has been described as "adequacy" in this lawsuit it is the constitutional mandate for the Legislature to provide for a general diffusion of knowledge *See id.* at 729-30. "Financial efficiency" (also called "quantitative efficiency") is likewise functionally identical to what the districts have termed "equity": it is the requirement that "'districts . . . have substantially equal access to similar revenues per pupil at similar levels of tax effort.'" *Id.* at 729 (quoting *Edgewood I*, 777 S.W.2d at 397). "Financial efficiency," the Court explained, is required "only up to a point":

> That point, of course, although we did not expressly say so in *Edgewood I*, is *the achievement of an adequate school system* as required by the Constitution.

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18 For brevity, the State incorporates by reference the argument and authorities cited in its Appellants' Brief, No. 04-1144, at 45-77

> Once the Legislature has discharged its duty to provide an adequate school system for the State, a local district is free to provide enhanced public education opportunities if its residents vote to tax themselves at higher levels

West Orange-Cove, 107 S.W.3d at 566 (emphasis added).

The Appellants' Briefs filed by the Edgewood and Alvarado Districts focus almost exclusively on "financial efficiency" (equity), *i e*, the difference in tax rates that property-wealthy and property-poor school districts must adopt in order to obtain an equal amount of revenue. Edgewood Br. at 23; Alvarado Br. at 12-14. In fact, the Alvarado Districts go so far as to claim that, of the four constitutional claims raised in this appeal, "equity [*i e*, financial efficiency] is *the key*." Alvarado Br at 2 (emphasis added) In so doing, the Edgewood and Alvarado Districts make the same mistake the district court made in *Edgewood IV*:

> The district court viewed efficiency [qualitative and financial] as synonymous with equity, meaning that districts must have substantially equal revenue for substantially equal tax effort *at all levels of funding* This interpretation ignores our holding in *Edgewood II* that unequalized local supplementation is not constitutionally prohibited. The effect of this 'equity at all levels' theory of efficiency is to 'level-down' the quality of our public school system, a consequence which is universally regarded as undesirable from an educational perspective. Under this theory, it would be constitutional for the Legislature to limit all districts to a funding level of $500 per student as long as there was equal access to this $500 per student, *even if* $3500 per student were required for a general diffusion of knowledge. Neither the Constitution nor our previous *Edgewood* decisions warrant such an interpretation.

917 S.W.2d at 730 (underscores added; italics in original).

The Edgewood and Alvarado Districts' single-minded focus on financial efficiency demonstrates a fundamental misunderstanding of *Edgewood IV*, the last decision in which the Court considered the constitutional efficiency of Texas's system In *Edgewood IV*, the

Court made clear that *qualitative* efficiency, *i.e.*, whether districts can provide a general diffusion of knowledge, is the linchpin of efficiency First, the Court noted that the qualitative component of efficiency—adequacy—is explicit in the text of Article VII. §1. whereas the financial component is only implicit. *Id* at 729. In fact, the constitutional text makes clear that adequacy is the overarching objective:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools

TEX. CONST. art VII, §1 In other words, to achieve the "essential" goal of a general diffusion of knowledge, a suitable and efficient system is required Adequacy is the primary object, and efficiency and suitability are subordinate means for achieving that goal

Second, in *Edgewood IV*, the Court repeatedly emphasized the primary nature of the qualitative component, observing that,

> [o]nce all districts are provided with sufficient revenue to satisfy the requirement of a general diffusion of knowledge, allowing districts to tax at a rate in excess of $1.50 *creates no constitutional issue*. Districts that choose to tax themselves at a higher rate . . . are, under this record, simply supplementing an *already efficient system*.

Edgewood IV, 917 S.W.2d at 733 (emphasis added). Thus, financial efficiency is not, as the Alvarado Districts claim, the "key" to the overall constitutionality of the school finance system. Rather, the key is qualitative efficiency, or adequacy.

When adequacy is the focus, it is apparent that Texas's school finance system fully satisfies the efficiency requirement Under *Edgewood IV*, the system is "already efficient" once property-wealthy and property-poor districts have funds sufficient to provide an

adequate education. *See id* In other words, if the system is adequate, it is also presumptively efficient as a matter of law. Absent evidence of a gross disparity in relative tax rates needed to provide adequate revenue—such as the 700-to-1 ratio at issue in *Edgewood I*, there is no need to inquire further as to financial efficiency

Texas's educational system is adequate, as the State has already explained exhaustively. *See* State Appellants' Brief, No 04-1144, at 45-77. Accordingly, the trial court correctly held that the system is also constitutionally efficient with respect to M&O

B. The Indirect Arguments That the Edgewood and Alvarado Districts Make Relating to Qualitative Efficiency Are Without Merit.

The Edgewood Districts do not directly discuss qualitative efficiency in their briefs Instead, they largely assume that the system is inadequate, limiting themselves to implying inadequacy by making a few oblique references in their statement of facts to individual cases of poor test scores of limited-English-proficient (LEP) students in some districts Edgewood Br. at 4-5. But those statistics are not evidence that the system is inadequate

LEP students, by definition, are not proficient in English, and thus can be expected to face substantial difficulties on an English-language test. The system is designed to overcome those challenges over time, but once an individual LEP student passes the English-language test, he or she is no longer considered LEP. His or her test scores will be included with the English-proficient students and therefore cannot bring up the LEP passage rate in subsequent years. Thus, the LEP passing rate on English-language tests can never be expected to mirror—and in fact will invariably be lower than—that of other groups, which contain 100% English-proficient students

The Edgewood Districts also specifically cite the scores of eleventh-grade LEP students as evidence that the system is inadequate Edgewood Br at 5-6 That evidence also fails to demonstrate any inadequacy in the system Many eleventh-grade LEP students have been in the Texas school system only a few years and previously had little or no formal education, even in their native language. 26.RR.30-31. Their performance on a high school exit-level test cannot be expected to equal that of students who have received more than ten years of formal education. Therefore, eleventh-grade LEP scores, like LEP scores in general, are not an appropriate measure of the adequacy or efficiency of Texas's overall educational system

More fundamentally, the fact that not all students pass the TAKS test demonstrates that the State has set appropriate standards with the goal of motivating students, schools, and districts over time to consistently improve their performance [19] Indeed, were the test "dumbed down" so that virtually all students would pass it, the districts would no doubt challenge its constitutional adequacy Instead, the State has rationally chosen an accountability system that fairly measures performance, disincentivizes failure, and rewards academic success.

The Alvarado Districts also briefly assert that what property-poor districts receive under the FSP is less than what is required to provide a general diffusion of knowledge

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19. The Edgewood Districts also erroneously cite lower passage rates in the first year of the TAKS as compared to the first year of its predecessor, the Texas Assessment of Academic Skills, or TAAS Edgewood Br at 6 Because the TAAS and the TAKS are two different tests, with TAKS being significantly, and indisputably, more difficult, 5.RR 26, 6 RR 114-15; 22 RR 195, comparison between the two is not meaningful

Alvarado Br. at 9. But statewide academic performance belies this assertion, as the vast majority of districts are rated "academically acceptable" or better in the state accountability system, based on their test scores, high school completion rates, and dropout rates Indeed, only one of the Alvarado Districts is rated "academically unacceptable "[20] Additionally, a full 33% of the Alvarado Districts are rated "recognized,"[21] which is a higher rating than "academically acceptable" and requires, among other things, that no campus in the district be rated "academically unacceptable, " State Ex. 16426 at 24, and that at least 65-70% of students in all categories pass all portions of the TAKS test, *see* 2004 Accountability Manual at 36 (App.R in State Appellants' Br., No. 04-1144). Of the Edgewood Districts, none are rated "academically unacceptable," and two are rated "recognized "[22] The rest are rated "academically acceptable "[23]

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20. Dime Box ISD was rated "academically unacceptable" in the 2004 ratings *See* http://www.tea.state.tx.us/perfreport/aeis/2004/index.html.

21. Those districts are Abbott, Anna, Aspermont, Aubrey, Axtell, Balmorhea, Bells, Brock, Bruceville-Eddy, Bryon, Burkburnett, Campbell, Canton, Central Heights, Central, Childress, China Spring, Chireno, Cisco, Collinsville, Copperas Cove, Cotton Center, Crandall, Crawford, Dodd City, Douglas, Early Ector, Elysian Fields, Era, Etoile, Forney, Frost, Grandview, Gregory-Portland, Gunter, Harleton, Haskell, Hemphill, Hidalgo, Holland, Hudson, Huntington, Itasca, Jacksboro, Joaquin, Karnes City, Knox City-O'Brien, Leveretts Chapel, Linden-Kildare Cons, Lorena, Mabank, Martinsville, Mildred, Millsap, Montague, Motley County, Muenster, Nederland, Newcastle, New Home, Nueces Canyon, Orange Grove, Panhandle, Paradise, Pottsboro, Prairiland, Ricardo, Rice, Robinson, Roby, Roosevelt, Samnorwood, Sam Rayburn, Sands, San Perlita, Seymour, Shiner, Springtown, Spur, Sulphur Bluff, Texline, Thorndale, Throckmorton, Trenton, Valley View, Van, Wellman-Union, Wells, and White Oak. *See id*

22 Those districts are Los Fresnos CISD and Sharyland ISD. *Id*

23 *Id.*

The Edgewood and Alvarado Districts, as a whole, performed well on the 2004 TAKS test and showed considerable improvement over their 2003 TAKS scores [24] The districts' performance conclusively demonstrates that adequacy—and therefore efficiency—has been satisfied.[25] Thus, the trial court correctly concluded that the system is constitutionally efficient, and that portion of the judgment should be affirmed

III. THE TRIAL COURT CORRECTLY HELD THAT TEXAS'S SYSTEM OF FUNDING PUBLIC SCHOOL MAINTENANCE AND OPERATIONS DOES NOT DESTROY THE CONSTITUTIONAL EFFICIENCY OF THE ENTIRE SCHOOL FINANCE SYSTEM.

Even if the Court were to conclude that the qualitative aspect of the Texas school finance system is not dispositive of the constitutional efficiency claim and to find it necessary to consider the system's financial aspect in detail, the result would be the same the trial court's judgment that the system as a whole is efficient should be affirmed. Although the

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24 A rating of "academically acceptable" does not necessarily equate with mediocre scores For example, Alvarado ISD's eleventh graders earned the following scores on the 2004 TAKS 87% passed English language arts, 90% passed mathematics, 92% passed science, and 96% passed social studies *Id* Not only are these scores unquestionably superior in themselves, they represent a significant increase in performance by these particular students from the scores they earned the previous year In 2003, these Alvarado students—then tenth graders—passed the English language arts section of the TAKS at a rate of 66%, mathematics at 50%, science at 47%, and social studies at 71% *Id.* Blooming Grove ISD (another Alvarado District) posted similar scores. The 2004 eleventh graders improved their passage of English language arts from 81% in 2003 to 98% in 2004, improved mathematics from 85% to 92%, improved science from 69% to 92%, and improved social studies from 88% to over 99% United ISD, an Edgewood District, earned similar scores with similar improvement. The 2004 eleventh graders improved their 2003 scores in all subjects: English language arts improved from 61% to 87%, mathematics improved from 50% to 93%, science improved from 38% to 81%, and social studies improved from 72% to 98%. All districts' 2004 TAKS scores, with the comparison to the 2003 scores, are available at the TEA web site http://www.tea.state.tx.us/perfreport/aeis/2004/index.html.

25 The Alvarado Districts do not specify whether they are referring to a narrow or a broad definition of "a general diffusion of knowledge." To the extent that they depart from the Court s presumption that the state accountability and accreditation system provides a general diffusion of knowledge and rely upon the trial court's expansive view of the constitutional standard, their argument is contrary to settled law *See generally* State Appellants' Br. at 45-77

trial court held the system unconstitutional in every other respect, it correctly stopped short of finding for the districts on this particular claim.

The Edgewood and Alvarado Districts argue that, because the disparity in total funding between property-wealthy and property-poor districts has increased since *Edgewood IV*, the system is inefficient as a matter of law. Edgewood Br. at 28; Alvarado Br at 10 But the disparity in *total* funds is irrelevant; the Court made clear in *Edgewood IV* that the State's duty to provide quantitative efficiency does not apply to all funding, but "*only* to the provision of funding necessary for a general diffusion of knowledge " *Edgewood IV*, 917 S.W.2d at 731. Thus, the disparities advanced by the Edgewood and Alvarado Districts are not pertinent to the constitutional question because they measure the aggregate disparity at all levels of funding—including enrichment above and beyond a general diffusion of knowledge *See* Part III.A.3, *infra*

Additionally, the tax-rate disparity demonstrated at trial—the 17-cent difference between the tax rates that property-wealthy and property-poor districts must adopt to obtain the same amount of revenue—is not comparable to the amount calculated in *Edgewood IV* because it represents *total* funds rather than only those funds necessary for a general diffusion of knowledge. *See* Part III.A.1, *infra*. The parties could not replicate the *Edgewood IV* calculation because the assumptions the Court relied upon in *Edgewood IV* are not true today. *See id.* Even taking the 17-cent tax-rate gap as a theoretical maximum instead of an actual disparity, however, the M&O tax-rate gap is not so great as to destroy the efficiency of the entire system. *See* Part III.A 2, *infra*

A measure that more closely corresponds to the measure examined in *Edgewood IV* is the disparity in revenue within the FSP, which—like the Court's analysis in *Edgewood IV*—excludes the revenue retained by hold-harmless districts. *See id* This measure is also appropriate because the vast majority of districts—property-poor and property-wealthy—do not retain hold-harmless funds but instead are providing a general diffusion of knowledge with the funds allotted to them by the FSP. *See id* Within the FSP, equity has improved dramatically. *See id* Since *Edgewood IV*, the disparity in access to revenue within the FSP has been cut in half—from $600 to $300. *See id* Accordingly, the Court should reject the districts' arguments and affirm the portion of the trial court's judgment denying the Edgewood and Alvarado Districts' M&O efficiency claims.

A. The Legislature Has Narrowed the Disparity in Access to Revenue Within the FSP—the Measure of the Gap That Most Closely Corresponds to the Court's Analysis in *Edgewood IV*.

1. The 17-cent tax-rate gap should be used with caution because it is not directly comparable to that calculated in *Edgewood IV*.

The tax-rate disparity—or "gap"—calculated by the Court in *Edgewood IV* was based on two assumptions: first, that the precise level of funding required for a general diffusion of knowledge was calculable and, second, that the hold-harmless provision of Senate Bill 7 would be phased out. *See Edgewood IV*, 917 S.W.2d at 731 & n.12. Neither of those assumptions are true today, therefore, the tax-rate gap then and now cannot be directly compared.

Although the hold-harmless provision, which allows certain property-wealthy districts to retain some excess wealth despite recapture, had previously been slated to expire, it is now

a permanent feature of the system. *See* TEX EDUC CODE §41 003(e). In *Edgewood IV*, the Court chose to exclude the effect of the hold-harmless provision from its calculations of the gap because of the then-temporary nature of that provision *Edgewood IV*, 917 S W 2d at 731 & n.12. The 17-cent tax-rate gap in this case, by contrast, is a gap in *total* funding—including the unequalized wealth retained by the hold-harmless districts—and, being a total gap, it is not comparable to, and is by definition greater than, the gap considered in *Edgewood IV*.

Moreover, in *Edgewood IV*, the Court computed the tax-rate gap based on the assumption that the cost to provide a general diffusion of knowledge could be reliably calculated and was approximately $3,500 per student. *Id* That number came from TEA documents used at trial in *Edgewood IV*, but those documents were never intended to represent—and did not in fact represent—any assessment of actual cost [26] After a full trial on the merits in this case, there is still no reliable, firm number for the actual cost required to provide a general diffusion of knowledge, which the parties agree must vary significantly from district to district. The only contrary argument is based on nothing but the multiple dueling cost studies, which are replete with analytical failings and multiple contradictions and, by their very nature, are inappropriate tools for courts to use in assessing the constitutionality of a State's system of education. *See* State Appellants' Br at 70-77.

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26. Similarly, in *West Orange-Cove* the Court cited $4,179 as a number it believed might represent the cost of an adequate or accredited education. *See* 107 S.W.3d at 574. That number, like the $3,500 referenced in *Edgewood IV*, is not a reliable measure of the cost of providing for a general diffusion of knowledge, and it was never designed to serve as such Indeed, in neither *West Orange-Cove* nor *Edgewood IV* was the definition or cost of an adequate or accredited education even litigated, much less conclusively determined. *See* 917 S W.2d at 768 (Spector, J., dissenting).

These two crucial differences in how the tax-rate gap was calculated in this case as compared to the calculation in *Edgewood IV* means that the Court should exercise caution in how it uses the tax-rate gap in this case. All parties agree that one possible measure is the 17-cent total tax-rate gap. *See* Edgewood Br. at 32; Alvarado Br. at 14. But this is not the tax-rate gap up to the level necessary to provide a general diffusion of knowledge. rather. it represents a *maximum* gap in the tax rates that districts could theoretically assess to reach a defined level of revenue—the maximum a property-poor district could receive under Tier 2—irrespective of the cost to provide a general diffusion of knowledge Assuming property-poor districts choose tax at the maximum $1.50 M&O rate, they generate $1,736.96 in Tier 2 funds on top of what they obtain from Tier 1 State Ex 16429 at 55; 28 RR 51-52. To reach this same level of funding—without state aid—property-wealthy districts would have to tax at $1.33. State Ex. 16429 at 55, 28.RR 51-52. The difference between the $1 50 and $1.33 tax rates is 17 cents.

This 17-cent measure is predicated upon the analytical assumptions most generous to the Edgewood and Alvarado Districts' challenge. It is based on the tax rates that *all* property-wealthy districts—including the wealth-hold-harmless districts—would have to assess to raise $1,736.96. Thus, it accounts for the ability of the wealthiest 3% of districts (which educate only 1% of students) to generate and spend local taxes for enrichment purposes, above and beyond the provision of a general diffusion of knowledge.

Furthermore, because the amount of funding necessary for a general diffusion of knowledge is not calculable, the 17-cent measure assumes that property-poor districts must

tax *at the very maximum* under the cap in order to provide for a general diffusion of knowledge[27] even though, in reality, they can tax substantially below the cap and still provide for a general diffusion of knowledge *See* State Appellants' Br at 92-124 Thus, the 17-cent gap is only a theoretical, maximum gap that gives the districts the benefit of all assumptions and inferences While the 17-cent gap still might be a useful point of reference, the Court should not directly compare it to *Edgewood IV*'s 9-cent gap.

2. The 17-cent tax-rate gap, in the context of a larger equalized system, is not so great as to render the entire system unconstitutional.

In *Edgewood IV*, the Court held that the 9-cent tax-rate disparity between property-wealthy and property-poor districts was not so great as to render the entire school finance system unconstitutional. 917 S.W.2d at 731-32. At that time, the school finance system equalized $1.50 of the districts' M&O tax effort This 9-cent disparity, therefore, amounted to only 6% of the fully equalized system.

Since *Edgewood IV*, the Legislature has limited districts' use of M&O funding to maintenance and operations only and has created a separate facilities funding component, under which an additional $.29 of a district's tax effort is equalized by the EDA—and potentially more by the IFA for qualifying districts. In this larger equalized system, the 17-cent tax-rate disparity—which is, as explained above, a theoretical maximum and not the actual gap—amounts to at most 9% of the total funding system, which equalizes at least $1.79 of all districts' total taxing efforts—$1.50 for operations and at least $.29 for

27 Taxing at the maximum, even the poorest district is guaranteed at least $4.273 per student

facilities—and more if a district qualifies for the IFA.[28] This relatively small increase in the tax-rate gap—a maximum, theoretical gap that was calculated using the assumptions most favorable to the districts—is insufficient to invalidate the entire school finance system *See id.* The current system is nothing like the system invalidated in *Edgewood I*, where property-wealthy districts were tax havens and there were astronomical disparities in funding 777 S.W.2d at 392 Instead, today's system is very similar to the one the Court found constitutional in *Edgewood IV*, with only a slight, three-point theoretical increase in the tax-rate gap, from 6% to 9% of the entire school funding system. Thus, the trial court correctly held that the M&O gap does not render the entire school funding system constitutionally inefficient.

3. The gap in revenue—specifically, the yield under the FSP—has improved dramatically since *Edgewood IV*, confirming the system's efficiency.

The Edgewood and Alvarado Districts incorrectly argue that the gap in districts' access to revenue demonstrates that the school finance system is unconstitutionally inefficient. *See* Edgewood Br. at 24; Alvarado Br. at 13-14. Because the calculations used by the districts include all money in the system—including hold-harmless funds properly viewed as local enrichment beyond what is required for a general diffusion of knowledge—they are not a measure of the relevant gap identified in *Edgewood IV*. *See* 917 S W.2d at 731. A better measure is the disparity in revenue yielded under the FSP because

28. As discussed in the State Appellants' Brief, analysis of the gap in facilities funding is inappropriate absent a showing of similar facilities needs among all districts This discussion assumes similar need, although the Edgewood and Alvarado Districts did not carry their burden to prove that element of their facilities-efficiency claim. State Appellants' Br at 83-85

this disparity, like the Court's analysis in *Edgewood IV*, excludes revenue retained by hold-harmless districts In *Edgewood IV*, this gap was $600. *See id* Today, the gap has been cut in half—to approximately $300[29]—because the Legislature has, over the past ten years, raised the Tier 2 yield by a higher percentage than the equalized wealth level *See* Part III B 4, *infra*. Expressed as a ratio, this disparity in access to funds between the property-wealthy and property-poor districts is merely 1.07-to-1—hardly a difference of constitutional significance

The Edgewood Districts point to evidence demonstrating that the wealthiest 5% of districts had $5,895 in revenue per student and the poorest 5% of districts had $4,217 in revenue per student, amounting to a revenue disparity of 1.39-to-1. Edgewood Br. at 29 The wealthiest 5% of districts, however, is composed largely of those districts that are able to retain extra revenue beyond the FSP through the wealth-hold-harmless provision Thus, the revenue they obtain must be considered beyond the level necessary for a general diffusion of knowledge *See Edgewood IV*, 917 S W.2d at 731 The Court should not, therefore, employ this evidence as proof of the relevant gap in funding. Even if the Court looks to this 1 39-to-1 gap—if it can be considered evidence of a revenue gap at all[30]—it is not a gap of

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29. Under the FSP's first tier, a district is guaranteed to receive a basic allotment of $2,537 per student (ADA), plus additional funding through application of the CEI and the weights for its first $ 86 of tax effort. TEX. EDUC. CODE §42.101. In other words, for every penny of tax effort (up to $ 86), a district is guaranteed to generate $29.50 in revenue per $100 in property valuation A district is guaranteed another $1,736 for the remaining $.64 of its tax effort—or $27.14 per penny—through Tier 2 of the FSP Thus, at the very least, a district will generate $4,273 per student under the FSP. Those property-wealthy districts that are subject to the $305,000 equalized wealth level will generate $30.50 per penny of tax effort, amounting to $4,575 per student. The difference between $4,575 and $4,273 is approximately $300—the gap in revenue under the FSP.

30. The Edgewood Districts offered Albert Cortez to testify about the gap in revenue for operations *and* facilities, which he calculated by looking at the disparities in the district groups' total average revenue Because Cortez calculated a total gap, rather than segregating that portion of the gap attributable to

constitutional significance.[31] Thus, whatever disparity the Court examines is insufficient to disturb the efficiency of the entire school finance system.

The Alvarado Districts incorrectly contend that the revenue gap is currently 2 25-to-1, amounting to a 350% increase in inequity since 1995. Alvarado Br. at 14. Their calculation, like the Edgewood Districts' calculation, is flawed because it includes hold-harmless retained wealth Thus it cannot be directly compared to the *Edgewood IV* gap. Notably, the Alvarado Districts' amount greatly exceeds the Edgewood Districts' amount because Alvarado takes into account only the hold-harmless districts—the richest 3% of districts—whereas the Edgewood Districts' calculation uses the richest 5% of districts By contrast, in *Edgewood IV*, the Court looked to the top 5% of districts excluding hold-harmless revenue 917 S W 2d at 731 n.12. The Court should, therefore, reject both the Alvarado Districts' and the Edgewood Districts' calculation of the revenue gap because neither is the correct measure of that gap as determined in *Edgewood IV*

The revenue gap identified in *Edgewood IV* has narrowed dramatically over the past ten years. And, even if the Court were to consider the Edgewood Districts' proposed revenue-gap ratio of 1.39 to 1, which improperly includes hold-harmless revenue, today's

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operations from the other portion attributable to facilities, it is impossible to discern whether the gap he calculated is attributable to M&O at all. Edgewood Ex. 405 at 2-3 Thus, his opinion amounts to no evidence of an *M&O* revenue gap.

31. The Edgewood Districts also cite expert testimony regarding the difference in the amount of general operating funds that property-wealthy and property-poor districts have as conclusive proof that the school finance system is unconstitutionally inefficient. Edgewood Br. at 30. Yet according to their expert, in the 2001-2002 school year, property-wealthy districts averaged $5,697 per student in general operating funds and property-poor districts comparably averaged $4,118 in general operating funds Edgewood Ex 411 This disparity in general operating funds between property-wealthy and property-poor districts is hardly proof that the system has become unconstitutionally inefficient. It amounts to a ratio of only 1 38-to-1

system is as equitable as the system was in *Edgewood IV*, when the ratio was 1 36 to 1 Therefore, the gap between property-wealthy and property-poor districts' access to M&O revenue does not render the entire school finance system unconstitutionally inefficient

B. The Legislature's Choices in Developing and Funding the School Finance System Are Not Relevant to the Court's Efficiency Analysis.

The Edgewood and Alvarado Districts point to several built-in provisions of the FSP that they allege disproportionately benefit property-wealthy districts and contribute to the M&O gap. Edgewood Br at 24; Alvarado Br. at 9. Those provisions address (1) the property-wealth-hold-harmless level; (2) compensatory education set asides; (3) credits that allow property-wealthy districts to reduce their recapture payments; and (4) the increase to the equalized wealth level without a concurrent upward adjustment to the basic allotment The Edgewood and Alvarado Districts appear to argue that the trial court should have held the entire system unconstitutional based merely on the existence of policy choices that may favor property-wealthy districts. Edgewood Br. at 24; Alvarado Br at 9. But no matter how unfair or inadvisable the Edgewood and Alvarado Districts perceive those policy choices to be, they remain constitutional as long as overall efficiency is achieved. The policy choices are not relevant by themselves, but only as they relate to the overall gap. Because the overall gap in funding between property-wealthy and property-poor districts does not make the system inefficient, the Legislature's individual policy choices in constructing the system are irrelevant. Moreover, taken singly, these choices are rational, and their financial impact is relatively small.

1. Property-Wealth Hold Harmless

The wealth hold-harmless level allows a very small number of school districts to locally enrich school funding by retaining the property wealth level they had during the 1992-1993 school year, before the enactment of the equalized wealth level. To take full advantage of the wealth-hold-harmless level, a district must assess an M&O tax rate of at least $1 50 per $100 in property value and either agree to detach a portion of its territory to be annexed by another district or purchase average daily attendance credits TEX EDUC CODE §41.003(e). Of the 1,031 Texas school districts with tax bases, only 34 districts—which educate less than 1% of Texas students—are eligible to take advantage of the wealth-hold-harmless level State Exs. 16053, 16060 at 18, 16429 at 58; 28.RR.59.

2. Compensatory Education Set Asides

Districts receive additional funds under the FSP based on the number of economically disadvantaged students that they educate. *See* SOF, Part C.2, *supra*; TEX. EDUC CODE §42.152(a). The Legislature "sets aside" a portion of these funds (known as compensatory education funds) by requiring TEA to proportionately reduce the allotments that would ordinarily go to districts receiving aid under the FSP. State Ex 16060 at 7, 8 n 9 Because Chapter 41 districts do not receive funds under the FSP, however, they do not contribute to the set-aside fund

The compensatory-education-set-aside funds pay for programs that primarily benefit "at risk" students,[32] *see* Alvarado Br. at 8 (citing TEX. EDUC. CODE §42 152); 16 RR 17.

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32. Students who are considered "at risk" are also often economically disadvantaged 21 RR 170-71

21.RR 170, who in turn disproportionately attend school in property-poor school districts 21.RR.170-71. These priority programs include the provision of guidance counselors, TAKS study guides and testing materials, and extended-year programs for students not likely to graduate. TEX EDUC. CODE §42 152(e)(1), State Ex 16060 at 8.

Compensatory education set asides amounted to less than 1% of all FSP funds in both 2002-03 and 2003-04 *Compare* State Ex. 16429 at 21 (FSP total) *with id* at 52 (compensatory set asides) Although this money is not directly distributed to the districts, the districts benefit directly from the services that the money funds Because the set asides directly benefit districts, they should not be considered as contributing to the gap at all Even if they were, their financial impact is minimal and has a negligible impact on the system as a whole.

3. Recapture Credits

To reduce their property-wealth level to the equalized wealth level, property-wealthy districts may choose to purchase attendance credits TEX EDUC CODE §41 003(3) The district must purchase a sufficient number of attendance credits to increase its weighted student count so that it may reduce its property wealth to the equalized wealth level. *Id* §41.092(a). For each credit purchased, the purchasing district's weighted student count is increased by one student. *Id.* In exchange for early purchase of credits from the State or for contracting directly with a property-poor district, property-wealthy districts may reduce the number of attendance credits they must purchase by a small percentage *Id.* §41 098 A district that submits its agreement to purchase attendance credits to the Commissioner of

Education "before September 1 of the school year for which the agreement is made," is entitled to reduce its payment for the attendance credits by either four percent or $80 per credit purchased, whichever is less. *Id.* Less than six percent of all school districts took advantage of the early agreement credit, State Ex 16055, reducing their recapture by approximately $3,250,000—far less than 1% of the total funds allocated by the FSP *Compare id* at 1 *with* State Ex. 16429 at 21.

Similarly, a property-wealthy district may choose to reduce its property-wealth level by contracting directly with a property-poor partner district to pay for the costs of educating a sufficient number of the partner district's students to increase the wealthy district's weighted student count, thus reducing its property wealth to a level equal to or below the equalized wealth level. TEX. EDUC. CODE §41 121. If the partner district agrees to use a portion of the funds it receives for certain programs designated by TEA, the property-wealthy district may obtain an "efficiency credit" from the Commissioner of Education of up to 5% or $100 multiplied by the property-wealthy districts' weighted student count, whichever is less. 19 TEX. ADMIN. CODE. §62.1071(d)(2); State Ex. 16060 at 20 Although this provision enables the property-wealthy district to retain more of its wealth, thereby reducing the amount sent to recapture, the property-poor partner district turns a profit from the arrangement: the property-wealthy district will pay the property-poor district more for the student than the property-poor district would have received from the State. Far from taking money away from property-poor districts, the efficiency credits gave the 161 property-poor

districts that used them an approximate net revenue gain of $81.4 million. State Ex 16056 Thus, these credits are indisputably rational

4. Raising the Equalized Wealth Level

The Edgewood Districts incorrectly complain that, in 1999, the State raised the equalized wealth level but failed to adjust the basic allotment. Edgewood Br. at 24 But that complaint ignores other changes to the FSP that have increased equalization and thus, on balance, actually decreased the revenue gap within the FSP, as discussed above Contrary to Edgewood's assertions, in 1999, when the equalized wealth level was raised from $280,000 to $295,000, the basic allotment *was* in fact elevated from $2,387 to $2,537, and the Tier 2 yield was raised from $21.00 to $24 70. State Ex. 16429 at 2 Since 1999, the basic allotment has remained constant, but the Legislature has consistently increased the Tier 2 yield to equalize more of the system's funding *Id* In 2001, when the equalized wealth level was raised to $300,000, the Tier 2 yield was raised to $25 81. *Id.* And in 2002, when the equalized wealth level was raised to its current level of $305,000, the Tier 2 yield was also increased to $27.14. *Id.* Thus, although the basic allotment has remained unchanged since 1999, the Legislature has increased the Tier 2 yield by 29% while raising the equalized wealth level by only 9%, thereby reducing the overall revenue gap within the FSP

These provisions of the FSP are legitimate legislative policy choices, which taken separately or in the context of the entire system, do not render the system inefficient. The Court should reject the Edgewood and Alvarado Districts' M&O efficiency challenge and affirm the trial court's judgment on this issue.

IV. THE TRIAL COURT'S REFUSAL TO ISSUE ADDITIONAL FINDINGS OF FACT WAS NOT REVERSIBLE ERROR.

The Edgewood Districts incorrectly contend that the trial court's refusal to make additional findings of fact was reversible error. Edgewood Br. at 19-20. This position ignores the posture of this case, the text of Texas Rule of Civil Procedure 298, and a significant body of case law expressly rejecting their argument

The central question presented by both the Edgewood and Alvarado Districts is whether the trial court's *legal conclusion* that the M&O system is constitutionally efficient was erroneous [33] There is no dispute that property-wealthy districts are able to generate more tax revenue than property-poor districts, *i e* , that there is a "gap" in funding The dispute concerns the strictly legal question whether the gap in funding—however it is measured—is large enough to invalidate the entire system *See supra*, Part III. That is a legal question for this Court's review and for which additional findings of fact and conclusions of law from the trial court are unnecessary.

Nonetheless, the Edgewood Districts insist that the Court should reverse the trial court's judgment because the trial court refused to file, as requested, additional findings of fact and conclusions of law concerning the amount of the gap and the various legislative policy choices that make up the gap and with which they take issue. *See* 4 CR 990-95, *se*

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33. The trial court's legal conclusions are reviewed de novo and will be upheld if they can be sustained on any legal theory supported by the evidence *Raymond v. Rahme*, 78 S W 3d 552, 556 (Tex App.—Austin 2002, no pet), *Westech Eng'g, Inc v. Clearwater Constructors, Inc.*, 835 S W 2d 190, 196 (Tex. App —Austin 1992, no writ); *see also Walker v Packer*, 827 S W.2d 833, 840 (Tex 1992) Conclusions of law may be reversed only if they are erroneous as a matter of law *Westech*, 835 S W 2d at 196

also Part III.B, *supra* Because the trial court was not required to make these additional findings, however, the Court should affirm the trial court's judgment concerning the efficiency of the system with respect to M&O.

Texas Rule of Civil Procedure 298 provides the trial court discretion to refuse to file additional findings by requiring the trial court to file "any additional or amended findings and conclusions *that are appropriate* . " TEX. R CIV P. 298 (emphasis added) As the Second Court of Appeals has noted:

> Additional findings are not required if the original findings of fact and conclusions of law properly and succinctly relate the ultimate findings of fact and law necessary to apprise the party of adequate information for the preparation of his or her appeal. If the record indicates that a party did not suffer injury, the failure to make additional findings does not require a reversal.

Jamestown Partners, L P v. City of Fort Worth, 83 S W.3d 376, 386 (Tex. App.—Fort Worth 2002, pet. denied); *see also Tenery v Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam).

Thus, to complain on appeal about the trial court's refusal to file additional findings of fact, the Edgewood Districts were required to demonstrate that the trial court's refusal prevented them from adequately presenting their appeal. But the Edgewood Districts do not even attempt to make that showing. Nor could they. The findings of fact and conclusions of law filed *sua sponte* by the trial court under Texas Rule of Civil Procedure 296, 4.CR.851-

980, are more than adequate to enable the Edgewood Districts to present their legal issue for the Court's review.[34]

In its findings, the trial court acknowledged the gap and concluded that it was insufficient to render the entire system unconstitutional. FOF 434; 4 CR.946. Although the trial court did not specify the amount of the gap, it was not required to do so. Nor was the trial court obligated to file the Edgewood Districts' other requested additional findings of fact concerning the various parts of the school finance system that contribute to the gap. *See* 4.CR.991-93. The Court is fully equipped to analyze the efficiency of the system based on the trial court's original findings of fact, the Court's precedent, and the record. The trial court's decision not to supply additional findings of fact and conclusions of law did not harm the Edgewood Districts, and was thus not error, much less reversible error.

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34. Even if the Edgewood Districts had demonstrated some harm in the presentation of their appeal, reversal would still not be the appropriate remedy. The proper remedy in such cases is abatement and remand to the trial court with instructions to file findings of fact and conclusions of law. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 773 (Tex. 1989). Of course, the Edgewood Districts have not asked the Court to abate and remand to the trial court for additional findings of fact, and that course is neither necessary nor advisable. The trial court's findings of fact and conclusions of law are sufficient to enable the Edgewood Districts to present their complaints on appeal.

CONCLUSION

The Court should affirm the trial court's conclusion that Texas's system of public school finance is constitutionally efficient as a matter of law

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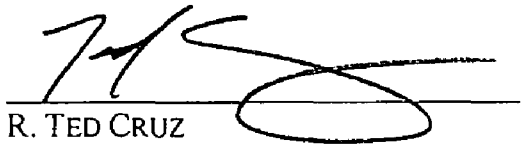

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I certify that a copy of the Appellees' Brief was served by certified mail, return receipt requested, on May 20, 2005, to.

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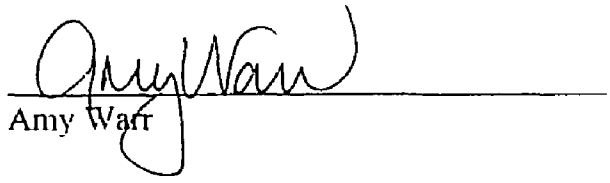

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