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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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2 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 508 (1974) 40

Becky Stern, *Judicial Promulgation of Legislative Policy: Efficiency at the Expense Of Democracy*, 45 SW. L.J. 977 (1991) 35, 40

Department of Accountability Reporting and Research, Texas Education Agency, 2004 ACCOUNTABILITY MANUAL (July 2004)), adopted as 19 TEX. ADMIN. CODE §97.1002; also available at http://www.tea.state.tx.us/perfreport/account/2004/manual/index.html. 8

Ethan Bronner, *On the Record: Governor Bush and Education; Turnaround in Texas Schools Looks Good for Bush in 2000*, N.Y. TIMES, May 28, 1999 2

STATEMENT OF THE CASE

Nature of the Case: This is a suit for declaratory and injunctive relief under Article VII, §1 and Article VIII, §1-e of the Texas Constitution. The West Orange Cove school districts claim that the State's school finance system constitutes a state property tax prohibited by Article VIII, §1-e, and that the system fails to provide the general diffusion of knowledge required under Article VII, §1. The Edgewood and Alvarado school districts also claim the school finance system fails to provide for a general diffusion of knowledge and that the system fails to satisfy the suitability and efficiency requirements of Article VII, §1.

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

Trial Court Disposition: After trial on the merits, the trial court issued a final judgment that the Texas school finance system fails to suitably provide for a general diffusion of knowledge; that it fails to satisfy the efficiency requirement with respect to school facilities funding and that it constitutes an unconstitutional state property tax. The trial court also held that the system satisfies the constitutional requirement of efficiency with respect to funding for school maintenance and operations funding.[1]

1. The Edgewood and Alvarado school districts are cross appellants on this point. The parties will brief this issue separately pursuant to the schedule issued by the Court in Cause Nos. 05-0145 and 05-0148.

ISSUES PRESENTED

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

2. 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?

3. Do the school districts have standing to assert their claims under Article VII, §1 and Article VIII, §1-e?

4. Has the Legislature provided for the general diffusion of knowledge required by Article VII, §1 by implementing a state accountability/accreditation system that consistently strengthens academic standards and that has been proven effective in improving student performance?

5. The Legislature's duty to provide access to revenue for school facilities at substantially similar tax rates, termed "quantitative" efficiency, "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).

   a. If the Legislature has provided for a general diffusion of knowledge within the current funding structure, is Article VII, §1's requirement of efficiency satisfied as a matter of law?

   b. If not, is there legally sufficient evidence that a meaningful inequity in access to funds for school facilities exists and that this inequity renders the entire system of school finance constitutionally inefficient?

6. If Texas's system is adequate and efficient, is it also constitutionally suitable as a matter of law?

7. In *West Orange-Cove*, the Court held that whether a property tax is an unconstitutional state tax depends on the degree of *state* control. *See West Orange-Cove Cons. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 578 (Tex. 2003). Instead of focusing on *state requirements*, the trial court improperly considered expenditures for educational enrichment desired by local communities or deemed by the districts themselves to be in the best interests of students.

   a. Did the district court apply the correct standard in holding that Texas's system of school finance is an unconstitutional state property tax?

b. Applying the correct standard, is there legally sufficient evidence that *state* requirements deprive districts of meaningful discretion in setting their tax rates?

No. 04-1144

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

APPELLANTS' BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

For more than a decade, Texas has been a national leader in education reform. Beginning in the 1990s, Texas pioneered an integrated statewide system of required curriculum, standardized testing, and accountability measures designed to hold students, campuses, and districts responsible for students' academic performance. And the system has yielded results, especially in minority communities. On the 2000 National Assessment of Educational Progress (NAEP), a national achievement test that one district's superintendent at trial called "the gold standard," 5.RR.15, Texas fourth and eight graders both ranked first

in the nation in math, adjusted for socioeconomic and LEP rates, State Ex. 15856 at 3 (Armor Report). Likewise, in 2002, Texas fourth graders ranked first in the nation in reading. *Id.* In 2003, Texas also ranked first in the nation in closing the gap between African-American and white fourth graders in math, and second in the nation in closing the gap in math and reading between Hispanic and white fourth graders. *Id.* Indeed, across the nation and controlling for socioeconomic and family characteristics, the results in Texas ranked first out of 47 States overall, State Ex. 15862 at 4 (graph at App. N), and demonstrated the second highest rate of improvement in the country, State Ex. 15863 at 1 (graph at App. O).

These extraordinary results were widely noted and heralded. As one publication, not noted for its partiality to Texas, observed:

> "[O]n national examinations, Texan schoolchildren have begun to show up their peers in other states. The trend has become so consistent that *Texas' public school system*, long among the nation's most troubled, *is viewed today by educators as an emerging model of equity, progress and accountability.* It is a remarkable turnaround for a school system that is more than half black and Hispanic, and the causes and effects are being debated around the country. Few would dispute that children are the chief beneficiaries."

Ethan Bronner, *On the Record: Governor Bush and Education; Turnaround in Texas Schools Looks Good for Bush in 2000*, N.Y. TIMES, May 28, 1999, at A1 (emphasis added). And, as a result, States across the nation looked to Texas and emulated the reforms that had proven so successful in improving student performance.

Not satisfied with past performance, for two decades, Texas has steadily increased its accountability standards to ensure that students will continue to make consistent, incremental progress toward the State's increasing educational goals. And the students have risen to the

challenge by consistently meeting these goals. Toward that end, Texas recently completed the enormous task of designing and implementing a new, even more demanding state curriculum and standardized testing system. The new system was developed in collaboration with hundreds of Texas educators, business and community leaders, and other citizens and was the model for the federal No Child Left Behind Act, as well as accountability systems in other States. Texas's new system is considerably more rigorous and comprehensive than its predecessor, continuing Texas's twenty-year policy of consistently raising the bar for academic achievement.

Notwithstanding this consistent record of national leadership and proven results, the plaintiff school districts alleged, and the district court held, that the Texas public education system is constitutionally "inadequate." In so doing, the district court disregarded this Court's clear dictate that "[t]he legislative determination of the methods, restrictions, and regulations [concerning education] is final, except when so arbitrary as to be violative of the constitutional rights of the citizen," *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931), indeed, although the teachings of *Mumme* featured prominently in the State's defense at trial, the district court did not so much a cite *Mumme* anywhere in its 137-page opinion. Despite the fact that the plain text of the Constitution assigns the educational policymaking role to the Texas Legislature ("*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," (emphasis added), TEX. CONST. art. VII, §1), the district court accorded the Legislature no deference whatsoever.

Instead, the district court substituted its own policy judgments for how Texas should administer its system of public education, issuing some some 655 findings of fact and 24 conclusions of law comprising 137 pages. *See* 4.CR.851-988. The district court's oral remarks upon announcing its judgment are worth reviewing at length:

> . . . Texas in 2040 will have a population that is larger, poorer, less educated and more needy than today.
>
> Who in Texas would choose this as our future? The answer is no one. Not a single Texan, from Brownsville to Dalhart or El Paso to Beaumont, would pick that as a future for Texas.
>
> Well, what can we do to keep this dismal future from becoming a reality? And the key to changing our future is to close the gap in academic achievement between the haves and the have nots.
>
> * * * *
>
> The solution seems obvious. Texas needs to close the education gap. But the rub is that it costs money to close the educational achievement gap. It doesn't come free.
>
> So are Texans willing to pay the price to make the sacrifice to close the education gap, to secure their future and their children's future? Our willingness to make the sacrifice depends upon our vision and our leadership.
>
> * * * *
>
> Are we at this present day to turn our back on 168 years of heritage of Texas public education and say that we're not prepared for the sacrifice?
>
> Are we to say that to close the gap is just too hard, it's just too much money, and simply give up? Are we prepare[d] for a future in Texas that is dismally poor, needy and ignorant? And the answer is I think not.
>
> Again, I repeat, it is the people of Texas who must set the standards, make the sacrifice and give direction to their leaders. And the time to speak is now.

29.RR.167-68. However admirable those sentiments may be as a policy matter, and however desirable such oration may be on the floor of the Texas Legislature, it is not the role of the courts to set education policy for the State of Texas.

On the facts and on the law, there is no credible argument that the Texas Legislature has not—at the very least—provided for the "general diffusion of knowledge" required by Article VII, §1 of the Texas Constitution. In fact, the Legislature has more than exceeded the constitutional minimum by providing an educational system that is a national model, which States across the nation are striving to emulate. Accordingly, the trial court's judgment that Texas's educational system is constitutionally "inadequate" in that it fails to provide a "general diffusion of knowledge"—as well as its judgments that Texas's system is constitutionally inefficient and creates a statewide property tax—should be reversed, and judgment rendered for the State.

STATEMENT OF FACTS

I. TEXAS'S EDUCATIONAL SYSTEM

Texas has an integrated educational system composed of (1) a state curriculum, (2) a standardized test that matches the curriculum, (3) accountability standards, and (4) sanctions and remedial measures for students, schools, and districts that fail to meet those standards. *See* 25.RR.54, 59, 128-29. Since its inception, this system has produced consistent improvement in Texas students' academic performance. *See* State Ex. 16426 at 7-9 (Cloudt powerpoint) (graphs attached as Apps. E, F).

A. The State Curriculum

Texas adopted and implemented its first required curriculum, the Essential Elements, in 1983-84. WOC Ex. 678 at 4 (Smisko Report). Approximately eight years later, the State Board of Education ("SBOE") and the Texas Education Agency ("TEA") began the process of reviewing and improving the curriculum. This effort culminated in the adoption of the current state curriculum, the Texas Essential Knowledge and Skills ("TEKS").

The TEKS was developed over a five-year period in a cooperative effort among Texas educators, business leaders, parents, and other Texas citizens. Starting in 1992, a committee established by the Legislature held over one thousand public meetings across the State in which citizens discussed "what students should know, be able to do, and be like when they graduate from high school." *Id.* at 4-5. Building on those results, in 1995 the SBOE appointed teams of people to write the new curriculum, with instructions to "ensure [a] highly rigorous academic performance." *Id.* at 6. In all, approximately 425 Texas citizens served on seventeen writing teams—one for each academic subject and for bilingual education and English as a Second Language. *Id.* Of the participants, 68 percent were classroom teachers. *Id.* The teams were encouraged to consult national experts. *Id.* Drafts of the TEKS were prepared and circulated to interested parties statewide and made available for public comment, and the SBOE received and considered over 29,000 responses. *Id.* at

7. After further public hearings and review by national experts, the SBOE adopted the TEKS in 1996 and 1997, effective for the 1998-99 school year.[2] *Id.* at 8-9.

In 1999, the Legislature directed the SBOE to strengthen the high-school graduation requirements in light of the new curriculum. *See id.* at 9-10. To that end, the SBOE significantly increased the difficulty of the three available high-school programs: the minimum, the recommended, and the advanced (also referred to as "distinguished"). *Compare* 19 TEX. ADMIN. CODE §74.11(d)(2), (3) (former minimum program requiring Algebra I and either Biology, Chemistry, or Physics) *with id.* §§74.42,.52 (current minimum program increasing requirements to Algebra I, Geometry, Biology, *and* Integrated Physics and Chemistry). Students are now expected to complete either the recommended or the advanced program and are required to formally opt out of these programs if they wish to graduate under the minimum program. *See* TEX. EDUC. CODE §28.025(b).

B. The State Standardized Test to Assess Student Performance

1. Development of the TAKS test

In 1999, the Legislature directed the development of a new state standardized test, the Texas Assessment of Knowledge and Skills ("TAKS"), *see* TEX. EDUC. CODE §39.023, to correspond to the newly-implemented TEKS curriculum.[3] It directed that the new test would

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2. At this time, Texas commenced the task of approving new textbooks aligned with the TEKS curriculum. WOC Ex. 678 at 20. Textbooks are provided to districts by the State with money from the Available School Fund. 25.RR.74-75.

3. The Legislature also provided for other specialized testing for discrete groups, including a Spanish-language version of the TAKS, a reading-proficiency test in English ("RPTE") for limited-English-proficient children, and the State Developed Alternative Assessment ("SDAA") for students with disabilities for whom the TAKS is not appropriate. *See* WOC Ex. 678 at 11-12.

require higher-level knowledge and skills than the former test, the Texas Assessment of Academic Skills ("TAAS"), by increasing the number of grades and subjects tested and by moving the exit-level test from tenth to eleventh grade. *See id.*; State Ex. 16425 at 7 (table attached as App. G). While the TAAS had tested only three subjects for most of its duration (reading/English Language Arts, writing, and math)[4], the TAKS tests five subjects (reading/English Language Arts,[5] writing, math, science, and social studies) in an expanded number of grades. *See* TEX. EDUC. CODE §39.023(a), (c); WOC Ex. 678 at 11-12. Each TAKS subject-area test is also more difficult than its TAAS predecessor, corresponding with the more rigorous high-school graduation requirements. For example, the exit-level TAKS added an exam in science, covering Biology as well as Integrated Chemistry and Physics. *See* TEX. EDUC. CODE §39.023(c); WOC Ex. 678 at 12. And, while Pre-Algebra had been the highest level of math tested on the exit-level TAAS, the TAKS assesses higher-level math, such as Algebra I and Geometry. *See* TEX. EDUC. CODE §39.023(c). The increase in difficulty is also evident from a comparison of test questions over the years. *See* State Ex. 16425 at 9-12 (App. H) (comparing exit-level math test questions from 1982, 1986, 1999, and 2002).

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4. Science and social studies were added to TAAS, for eighth grade only, starting in 1995. Under TAAS, those science test results were not considered in accountability ratings, and social studies test results were not considered until 2002.

5. Reading is tested in third through ninth grades, while English Language Arts, or "ELA," is tested in tenth and eleventh grades. Alv. Ex. 9031 at 7 (Department of Accountability Reporting and Research, Texas Education Agency, 2004 ACCOUNTABILITY MANUAL (July 2004)), adopted as 19 TEX. ADMIN. CODE §97.1002; also available at http://www.tea.state.tx.us/perfreport/account/2004/manual/index.html.

As with the development of the TEKS curriculum, Texas teachers were substantially involved in the development of the TAKS test. Committees of educators reviewed the new TEKS curriculum and selected the most important concepts for inclusion on the TAKS test. WOC Ex. 678 at 13-14. TEA refined these test objectives after several rounds of review and comment by Texas educators and citizens as well as national experts. *Id.* In late 2001, TEA, again assisted by committees of educators and testing experts, developed test questions (referred to as "items"). *Id.* at 14. During 2002, each individual item was field-tested, and, if it passed scrutiny, was available for use in the tests. *Id.* Because new tests for each subject and grade are created each year, TEA continuously develops and field-tests new items.

2. Establishing student passing standards ("cut scores") for the TAKS

After development of a particular test, it is necessary to establish the cutoff for a passing score—the "cut score"—for that test. The Legislature charged the SBOE with that responsibility. *See* TEX. EDUC. CODE §39.024(a). To determine the cut scores, the SBOE used a process recommended by a committee of national experts. That process (1) followed an established method; (2) involved stakeholders such as teachers, administrators, and business and community leaders; (3) was transparent, well-documented, and open to the public; and (4) documented and discussed the impact of the standards. WOC Ex. 678 at 15.

In 2002, advisory panels—again, staffed mostly by active Texas educators—met to recommend specific performance standards to the SBOE. *Id.* at 16. Each panel member examined a particular subject area test in which the test questions (or "items") had been arranged from least to most difficult. *Id.* at 17. Along that spectrum of questions, each

panelist progressed through the test until he or she reached the point at which, in his or her experience, a student who had a basic level of knowledge should, more likely than not, be unable to answer the item correctly. *Id.* This line represented the cut score for the "met standard," *i.e.*, the number of questions a student would have to answer correctly to pass the test. *Id.* Panelists then considered more difficult questions to determine the higher cut score for "commended" performance. *Id.* The entire panel then collected and reviewed each panelist's recommendations and considered how the panelists' median cut scores would have applied to the spring 2002 TAKS field-test results. *Id.* at 17-18. Before making their final recommendations, the panels also ensured that the cuts were reasonably consistent across all grade levels. *Id.* at 18. Finally, the panels recommended that the cut scores for passing the test (the "met standard") be phased in over a short period of time, with the SBOE able to review and, if necessary, revise the phase-in plan as the new standards were implemented. *Id.* Gradually phasing in more difficult standards is a widely accepted practice designed to give students, teachers, and districts time to teach and learn more challenging curricula and to prevent them from becoming discouraged by a more difficult test. 13 RR.40-42. A gradual phase-in was used when the prior TAAS regime was implemented as well as in the federal No Child Left Behind Act. *Id.*; 25.RR.35; State Ex. 16426 at 7, 28 (Cloudt ppt).

These recommendations were reviewed by the SBOE along with all TAKS test materials, projected impact data, and information comparing student performance on TAKS to results on the previous state assessment, the TAAS. WOC Ex. 678 at 18. In November 2002, after hearing testimony from school districts and the public, the SBOE adopted the

panel-recommended standards and the separate panel recommendation that these standards be phased in over time The three-year phase-in chosen by the SBOE would be expressed in terms of standard-error-of-measurement (SEM) units[6] below the panel-recommended standards. State Ex. 15974 at 1 (*see* fig. 3, attached as App. 1). Even in its initial phase-in year—at two SEM units below the ultimate panel-recommended targets—the TAKS was more difficult than its predecessor, the TAAS.[7] *Id.*

C. The State Accountability and Accreditation System

1. Goals and development of the accountability system

The Legislature first authorized the creation of a public-school accountability system in 1993. Alv. Ex. 9031 at 1; also located at http://www.tea.state.tx.us/perfreport/account/2004/manual/index.html.[8] The goals of Texas's accountability and accreditation[9] system are (1) to improve the achievement of all students in the core subjects, (2) to increase high-school graduation rates, and (3) to reduce the performance and graduation gaps among student groups. 25.RR.112.

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6. A SEM unit represents the natural variation in performance an individual student would experience if he or she took the same test multiple times. *See* 25.RR.34.

7. Even though the cut scores would be phased in over time, the SBOE instructed TEA to ensure that the difficulty level of the TAKS tests remained constant over time so that improvement could be correctly measured. *Id.* at 19.

8. Many of the exhibits used at trial can also be viewed on TEA's website. Examples include the Accountability Manual, the Completion and Dropout manual, TAKS passing rates statewide and by district, and a variety of other statewide and district-specific information.

9. The terms "accountability" and "accreditation" are used interchangeably to describe the system established in Chapter 39 of the Texas Education Code. *See, e.g., West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 580 (2003); 25.RR.161-62

Because a new state curriculum and state assessment had been implemented, new accountability standards were also needed. Development of the new standards was, again, a collaborative process among TEA, educators, school-board members, business and community representatives, professional organizations, and legislators from across the State. *Id.* Based on these advisory groups' recommendations, and after receiving public comment, the Commissioner of Education issued new accountability standards to be phased in over a six-year period from 2004 to 2009. *See* 25.RR.117; State Ex. 16426 at 30. This phase-in matched how the State had proceeded during the initial implementation of the TAAS test in the 1990s. *See* State Ex. 16426 at 7.

2. How accountability ratings are determined

The accountability system measures the performance of school districts using performance ratings of "exemplary," "recognized," "academically acceptable," and "academically unacceptable."[10] TEX. EDUC. CODE §39.072(a). Those performance ratings are calculated using certain "academic excellence indicators," as determined by the Commissioner of Education. *See id.* §§39.051(b), 39.073(a). The Commissioner has chosen

10. The categories used through 2002 were different for individual schools (or "campuses"), which were rated as "exemplary," "recognized," "acceptable," and "low performing." *See* Alv. Ex. 9031 at 2 (table 1).

three "base indicators"[11]: test scores (both TAKS and SDAA),[12] completion rates, and dropout rates. *See* Alv. Ex. 9031 at 7. Additional indicators (such as SAT and ACT scores, participation in the recommended high-school program, and attendance rates) are measured but do not affect accountability ratings.[13] *See* TEX. EDUC. CODE §39.051(b); Completion and Dropout Manual, supra note 11, at 4. TEA disaggregates student performance on the base indicators by race, ethnicity, gender, and socioeconomic status, among other categories. *See* TEX. EDUC. CODE §39.051(b). Five categories—all students, African-American, Hispanic, white, and economically disadvantaged—go into the accountability ratings. *See* Alv. Ex. 9031 at 8, 15-16.

a. Measuring student learning through scores on state assessments

Passing rates on the TAKS and SDAA tests are the first base indicator. To obtain a rating of exemplary in 2004, a campus or district must have a passing rate of at least 90% on

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11. The trial court's conclusion that there are only *two* base indicators that contribute to the accountability ratings is incorrect. *See* FOF 37; 4.CR.867. TEA's Accountability Manual, which is promulgated as an agency rule, *see* 19 TEX. ADMIN. CODE §97.1002, provides for either three or four base indicators (depending upon whether the TAKS and SDAA test scores are considered as two separate indicators or combined into one general "test score" category). *See* Alv. Ex. 9031 at 7. The trial court may have confused the current system with the system in 2001-02, an interval during which only two base indicators were used. *See* http://www.tea.state.tx.us/research/pdfs/dropcomp_2002-03.pdf at 3.

12. TEA is also in the process of developing a measure of English-language proficiency for limited English proficient ("LEP") students, which will be included in the accountability system as a base indicator by 2007.

13. Districts and campuses may be recognized through the Gold Performance Acknowledgment system for high levels of performance on these "additional" indicators. Completion and Dropout Manual, supra, note 11, at 4.

the TAKS and SDAA[14] in each subject for each student group (*e.g.*, all students, African American, Hispanic, white, and economically disadvantaged). *See* State Ex. 16426 at 30 (table at App. J). To achieve a recognized rating in 2004, the passing rate must be at least 70%. *See id.* In 2004, the passing rates necessary for a rating of academically acceptable varied according to subject: in 2003-04, for reading/ELA and writing, the required passing rate was 50%; while for math and science, the required passing rates were 35% and 25%, respectively.[15] *See id.* But if even one campus in a district is rated academically unacceptable, the district cannot receive a rating of exemplary or recognized. *Id.* at 24.

These passing rates are held constant for 2005 and 2006 while the panel-recommended cut scores are phased in. *See id.* After the phase-in is complete in 2006, the passing rates for accountability ratings will gradually rise. *See id.* For instance, the passing rate for a recognized rating will rise to 75% in 2007 and to 80% in 2008 and 2009. *Id.* The passing rates for an academically acceptable rating will also gradually rise until they reach 70% for all subjects. *Id.*; Alv. Ex. 9031 at 92 (table at App. R).

b. Measuring high-school completion rates

The number of students who complete high school is the second base indicator. The completion rate used in the 2004 accountability system is a "longitudinal" rate showing the

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14. There are no generally applicable cut scores for the SDAA; instead, standards are set on an individualized basis by each special-education student's Admission, Review, and Dismissal ("ARD") committee, as required by state law. Alv. Ex. 9031 at 10.

15. It is also possible to obtain a rating of recognized or academically acceptable (but not exemplary) through "required improvement." A rating of academically acceptable may also be obtained through the temporary "exceptions" provision. *See* Alv. Ex. 9031 at 17-18, 23-24, 36; 25.RR.137.

percentage of students first entering ninth grade in 1999 who had completed or were continuing their high-school education four years later. Alv. Ex. 9031 at 14. A 2004 "completer" is defined as a student who: (1) graduated with the class of 2003 or earlier; (2) obtained a General Education Development ("GED") certificate by March 1, 2004; or (3) re-enrolled in high-school in the fall of 2003.[16] *Id.*

To attain an exemplary rating, a campus or district must have a completion rate of at least 95%. *Id.* at 36 (table attached as App. K). For a recognized rating, the completion rate must be at least 85%. *Id.* For a rating of academically acceptable, the completion rate must be at least 75%.[17] *Id.* Like the TAKS test passing standards, the completion rate definition will also become more stringent in the coming years. For example, starting with the 2006 ratings (evaluating the class of 2005), GED recipients will no longer be counted as completers. *See* State Ex. 16426 at 19.

c. Measuring dropout rates

How effectively schools retain teenagers leading up to high school, as measured by an annual dropout rate in seventh and eighth grades, is the third "base indicator." *See* Alv. Ex. 9031 at 15. To obtain an exemplary rating, a campus or district must have a dropout rate of two-tenths (0.2) of a percent or less. *Id.* at 36 (table attached as App. K). For a

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16. Students who return to high school for a fifth year are included as completers to create an incentive for schools to re-enroll these students. Returning students are much more likely to earn diplomas than are those who either do not return or enter a GED program. *See* 25.RR.185-86.

17. A campus or district may also obtain an academically acceptable rating (but not recognized or exemplary) through required improvement. *See* Alv. Ex. 9031 at 17.

recognized rating, the dropout rate must be at or below seven-tenths (0.7) of a percent. *Id.* And for an academically acceptable rating, the dropout rate must be at or below 2.0%.[18] *Id.*

The dropout standards will also become more rigorous over time. Starting in 2005, to obtain a rating of academically acceptable, a district or campus must have a dropout rate of 1.0% or less. State Ex. 16426 at 28. And, beginning in 2007, the National Center for Education Statistics' ("NCES") broader definition of a dropout will replace the current definition.[19] *Id.* at 24.

D. Sanctions and Remedial Measures for Unacceptable Performance

To motivate students, individual campuses, and districts to improve student achievement the accountability system provides sanctions and remedial measures for unacceptable performance.

1. Sanctions and remedial measures for students

The Legislature enacted penalties for students who do not pass the TAKS test. For instance, students who do not pass all portions of the eleventh-grade exit-level TAKS will not graduate. *See* TEX. EDUC. CODE §39.025. Students in other select grades must pass certain portions of the TAKS to be promoted. *See* TEX. EDUC. CODE §28.0211(a). This

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18. Again, a campus or district may obtain an academically acceptable rating (but not recognized or exemplary) through required improvement. *See id.*

19. The following categories of students are considered dropouts under the NCES definition but not under the current definition: (1) students who were counted as dropouts in previous school years; (2) students who withdrew to enroll in approved adult education GED preparation programs but did not earn a GED within the year; (3) seniors who met all graduation requirements but did not pass the exit-level TAKS; (4) students who enrolled but were not eligible for state funding; (5) students who were reported as dropouts from more than one district and whose last districts attended cannot be determined; and (6) students who return to school by January of the following school year. Completion and Dropout Manual, *supra* note 11, at 21.

requirement is currently in effect for third and fifth grades and will be extended to eighth grade in 2007-08. *See id.* §28.0211(n).

Along with this so-called "high-stakes" testing in certain grades, the Legislature has provided support structures to assist students who are at risk for failing the TAKS. If a student in any high-stakes grade fails any portion of the TAKS, he or she is given two additional opportunities to pass. *Id.* §28.0211(b). Moreover, for any student who fails a portion of the TAKS, the district must provide accelerated instruction,[20] *see id.* §§28.0211(c), 28.0213(a), formulate an individualized graduation plan for that student, *see id.* §28.0212; and provide study guides to the student's parents, *see id.* 39.024(c).

To assist these remedial efforts, TEA provides an individual TAKS report for each student, detailing that student's performance on each test question. *See* 25.RR.43-44; State Ex. 15982. These reports are sent to students and their parents, and, because they are placed in each student's file at school, teachers may use them to evaluate what knowledge a student is lacking to ensure that the student receives extra instruction in that area. *See* 25.RR.43, 46. In addition, each eleventh-grader who fails a portion of the exit-level exam receives an individualized study guide that is geared toward the student's particular weaknesses. 25.RR.52.

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20. TEA distributes funds to districts to help implement the required intensive instruction programs. *Id.* §28.0213(c).

2. Sanctions and remedial measures for districts and campuses

If a campus or district does not satisfy accreditation criteria, the Commissioner of Education has discretion to apply a wide variety of initial sanctions, ranging from issuing public notice of the deficiency and ordering the school board to hold a public hearing on the deficiency, *see* TEX. EDUC. CODE §§39.131(a)(1), (2), 39.132(a)(1), (2); ordering the school board president and superintendent (and, if a campus, the principal) to appear before the Commissioner, *id.* §§39.131(a)(4), 39.132(a)(6); and ordering an on-site evaluation of the district or campus and recommending appropriate reforms, *id.* §§39.131(a)(5), 39.132(a)(7)(A), (B). If a district has been rated academically unacceptable for one year or more, the Commissioner may appoint a board of managers to perform the school board's duties. *Id.* §39.131(a)(9). If a district receives an unacceptable rating for two years or more, the Commissioner may annex the district to an adjoining district. *Id.* §39.131(a)(10). And, if a district has been rated unacceptable for two years or more because of its dropout rates, the Commissioner may impose a range of sanctions and programs designed to decrease dropout rates, including restructuring the district or certain campuses. *Id.* §39.131(a)(11). For a campus that is academically unacceptable, the Commissioner may appoint residents of the district to take over the school board's duties regarding that campus. *Id.* §39.132(a)(8). If a campus is rated unacceptable for two consecutive years or more, the Commissioner is required to either reconstitute the campus (*i.e*, change personnel) or order its closure. *Id.* §39.132(b).

E. Improvements in Student Performance Under The System

Texas's two-decade-old policy of gradually increasing educational standards through curriculum, testing, and accountability has enabled Texas students to make steady performance gains over time. For instance, from 1994 to 2002, the percentage of all students passing the math portion of the TAAS test (the predecessor to TAKS) increased from 60.5% to 92.7%. State Ex.16426 at 7 (table at App. E). The overall passing rate for the reading section went from 76.5% to 91.3%. *Id.* Distinct racial and socioeconomic groups also experienced dramatic improvement. For example, on the math portion of TAAS, passing rates improved from 38.1% to 86.5% for African Americans, from 47.1% to 90.1% for Hispanics, and from 45% to 88.9% for economically disadvantaged students. *Id.*

The number of campuses and districts earning higher accountability ratings also steadily improved over this time period, even as standards were increasing. *See id.* at 7-9 (Apps. E, F). From 1994 to 2002, the number of exemplary campuses increased thirty-fold from 67 to 1,921. *Id.* at 8. The number of recognized campuses more than quadrupled, from 516 to 2,400. *Id.* Similarly, the number of districts rated exemplary increased twenty-fold, from 6 to 149, and the number of recognized districts grew seven-fold, from 54 to 426. *Id.* at 9.

This academic success is confirmed by Texas students' performance on the National Assessment of Educational Progress (NAEP), a national achievement test that one district's superintendent at trial called "the gold standard," 5.RR.15. From 1990 to 2000, as noted by West Orange Cove expert David Grissmer, Texas students made great performance gains on

the NAEP. Controlling for socioeconomic and family characteristics,[21] Texas outperformed other States in several categories: it was first out of 47 States overall, State Ex. 15862 at 4 (graph at App. N), and had the second highest rate of improvement, State Ex. 15863 at 1 (graph at App. O). By race, Texas placed first for white students, fifth for African American students, and ninth for Hispanic students from similar families. State Ex. 15862 at 1-4 (graphs at App. N). In sum, Texas has one of the highest success rates of any State at educating its diverse population. *See* State Ex. 15864 at 1-2 (report at App. P).

II. THE HISTORY OF THE SCHOOL FINANCE LITIGATION

This is the sixth constitutional challenge to Texas's school finance system to reach the Court in the sixteen years since its first school finance decision in *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*). The first two cases concerned whether the State had fulfilled its duty to provide a general diffusion of knowledge by suitably providing "for the support and maintenance of an efficient system of public free schools," *i.e.*, whether the system was constitutionally "efficient."[22] TEX. CONST. art. VII, §1; *Edgewood I*, 777 S.W.2d at 391-92; *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 493 (Tex. 1991) (*Edgewood II*).

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21. The districts' and the State's experts agreed that comparing students with similar family and socioeconomic characteristics (*i.e.*, whether low-income or limited-English-proficient (LEP))—rather than comparing raw scores alone—is the most accurate measure of the quality of a State's educational system. *See* 27 RR 24-26; State Ex. 15864 at 1-2. Texas students' raw scores on NAEP, were, in the aggregate (and not accounting for family or socioeconomic characteristics), roughly average as compared to students from all other States (including those with more homogenous and affluent student populations) from 1990 to 2000. *See id.*

22. In its previous decisions, the Court has used the terms "efficiency" and "equity" interchangeably. For consistency, the State will use the term "efficiency."

The next three cases also wrestled with the question whether the school finance system, in its various incarnations, constituted a state property tax in violation of Texas Constitution Article VIII, §1-e. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (*Edgewood III*); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*); *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003).

This sixth case revisits not only the efficiency and tax issues but adds yet another constitutional issue—whether Texas's education system provides an "adequate" education under Article VII, §1, *i.e.*, a "general diffusion of knowledge." While the Court has mentioned adequacy in interpreting the other constitutional provisions, this case moves adequacy to the fore, as an independent claim and an important factor bearing on the other claims. Thus, the Court is now being asked to directly determine the validity of the policy choices made by the Legislature to implement the Texas school system.

A. The *Edgewood* Cases and the Legislative Reaction

In *Edgewood I*, several property-poor districts challenged the State's school finance system for its disparities in access to revenue, contending it was inequitable, and thus, inefficient in violation of Article VII, §1. 777 S.W.2d at 392. The Court first explained that devising an "efficient" and "suitable" system of public schools was the Legislature's constitutional mandate. *Id.* at 394. The Court then noted that "[i]f the system is not 'efficient' or not 'suitable,' the legislature has not discharged its constitutional duty and it is *our* duty to say so." 777 S.W.2d at 394 (emphasis in original).

The Court did not outline the parameters for what would constitute a "suitable" system but instead, focused on the financial inequities created by the then-present taxing structure. The Court held "there must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenue per pupil at similar levels of tax effort." *Id.* at 397. Because property-poor districts were unable, even taxing at the maximum allowable rate, to generate revenue substantially equal to that available to property-wealthy districts, the Court concluded that the system was constitutionally inefficient. *Id.*

Following *Edgewood I*, the Legislature enacted Senate Bill 1 as a remedy to the constitutional problems identified by the Court. That legislation was challenged by the Edgewood Districts and ultimately struck down by the Court in *Edgewood II*. 804 S.W.2d at 496. The Court concluded that the inequities found in *Edgewood I* remained, and thus so did the constitutional infirmities. The Court reaffirmed its *Edgewood I* decision stating, "[t]o be efficient, a funding system that is so dependent on local ad valorem property taxes must draw revenue from all property at a substantially similar rate." *Id.* The Court clarified, however, that school districts were permitted to generate local taxes to supplement an already efficient system, and that such enrichment need not be equalized. *Id.* at 499.

The Legislature responded with Senate Bill 351. In an effort to equalize the disparities in local school districts' property wealth, it created 188 county education districts (CEDs) to levy, collect, and distribute property taxes as directed by the Legislature. *Edgewood III*, 826 S.W.2d at 498. That system was then challenged by the property-wealthy

districts, which alleged that the CED system created a state property tax in violation of Texas Constitution Article VIII, §1-e. In *Edgewood III*, The Court held that a tax is a state property tax when the Legislature "so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the taxing authority is without meaningful discretion." *Id.* at 502. Concluding that the CED system fit that definition, the Court struck it down as an unconstitutional state property tax. *Id.* at 503.

The Legislature responded to the Court's decision in *Edgewood III* with Senate Bill 7, which remains in substantial effect today.[23] Immediately after the bill's passage, both property-poor and property-wealthy school districts challenged the system, claiming it was unconstitutionally inefficient and unsuitable, and constituted a state property tax. *Edgewood IV*, 917 S.W.2d at 727. The Court ultimately rejected the districts' claims and upheld the system. *Id.* at 731-32, 735-38.

The *Edgewood IV* Court clarified that an efficient system has two components: a quantitative component in the sense of substantially equal access to revenue at similar tax rates and a qualitative component in the sense that districts must have sufficient available revenue to provide a general diffusion of knowledge. *Id.* at 729. Operating from the conclusion in *Edgewood II* that local enrichment spending beyond a general diffusion of knowledge need not be equalized, the Court held that the Legislature's duty to provide "quantitative" efficiency—substantially equal access to revenue—applies only to that

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23. The Legislature first proposed a constitutional amendment that would have allowed the creation of CEDs with limited authority to levy, collect, and distribute property taxes, but that measure failed to garner the support of the electorate. *See* TEX. S. J. RES.7, 73d Leg., R.S., 1993, TEX. GEN. LAWS 5560; *see also Edgewood IV*, 917 S.W.2d at 727.

funding necessary for a general diffusion of knowledge, provided that local enrichment did not reach a level sufficient to destroy the efficiency of the entire system.

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. The *Edgewood IV* Court held that the Legislature had fulfilled its duty to provide a general diffusion of knowledge through the accreditation system and that the system was constitutionally efficient in all respects. *Id.* at 730-31. Because Senate Bill 7 so dramatically reduced the disparity in tax revenue and because the financing system was sufficient to provide a general diffusion of knowledge, both aspects of efficiency—quantitative and qualitative—had been fulfilled. *Id.* at 730.[24]

In rejecting the state-property-tax claims, the *Edgewood IV* Court considered whether Senate Bill 7 ran afoul of the standard enunciated in *Edgewood III*—that an "ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." 917 S.W.2d at 737 (quoting *Edgewood III*, 826 S.W.2d at 502). Senate Bill 7 established a structure, still in effect today, under which districts are encouraged to tax at a minimum amount of $0.86 to receive

24. The Court also rejected the districts' contention that the school finance system was unsuitable under Article VII, §1 because it relied too heavily on local property taxes for funding. Without explaining what the criteria are for a "suitable" system, the Court noted that the Legislature is authorized to choose the method by which it will fund and operate the public schools, provided the method is not "so arbitrary as to be violative of the constitutional rights of the citizen." *Id.* at 736 (quoting *Mumme*, 40 S.W.2d at 36).

equalized state funding and are authorized to tax up to a maximum rate of $1.50 for school-district maintenance and operation (M&O) taxes. *Id.*

The Court specifically affirmed the Legislature's authority to set the minimum and maximum tax rates for local property tax assessment. Distinguishing Senate Bill 7's taxing structure from the one at issue in *Edgewood III* because Senate Bill 7 did not set the tax rate or prescribe the distribution of proceeds, the Court concluded that Senate Bill 7 did not create an unconstitutional state property tax. *Id.* at 737-38.

The Court hypothesized, however, that such a structure might become a state property tax if the cost to provide accreditation or a general diffusion of knowledge were to rise to the level that districts must tax at the maximum allowable rate just to meet that standard. The Court reasoned that the State would then be controlling the levy, assessment, and disbursement of taxes, and the districts would have lost all meaningful discretion in setting their tax rates. *Id.*

B. The Current Case

In 2001, several property-wealthy school districts—known as the West Orange Cove (WOC) Districts—filed the instant lawsuit claiming the statutory cap of $1.50 per $100 in property valuation on school district M&O tax rates left them with no meaningful discretion in violation of Article VIII, §1-e of the Texas Constitution. *See West Orange-Cove*, 107 S.W.3d. at 573. The districts claimed that the tax floor and the tax ceiling had merged, creating an unconstitutional state property tax and bringing the Court's *Edgewood IV* hypothesis to life.

A group of property-poor school districts—the Edgewood Districts—intervened as Defendants in the case, opposing the WOC Districts' claim that the $1.50 cap is unconstitutional. The Edgewood Districts also joined another group of property-poor districts—the Alvarado Districts—in intervening as Plaintiffs to assert that Texas's school finance system is inadequate and inefficient under Article VII, §1 of the Texas Constitution. *Id.* at 574.

The trial court granted the State's plea to the jurisdiction and special exceptions, dismissing the WOC Districts' tax suit for failure to state a claim. *Id.* at 576. The court of appeals affirmed, but this Court reversed, holding that the WOC Districts could state a claim under Article VIII, §1-e by alleging that they had lost all meaningful discretion in setting their tax rates, *i.e.*, that they were forced by the current system to tax at the maximum rate in order to provide students with a general diffusion of knowledge or an accredited education. *Id.* at 580.

On remand, the WOC Districts joined the Edgewood and Alvarado Districts in asserting a new adequacy claim under Article VII, §1 of the Texas Constitution. After a six-week trial, the district court ruled orally that the Texas school finance system was inadequate, unsuitable, inefficient, and constituted an unconstitutional state property tax. 29.RR.169-70. On November 30, 2004, the trial court issued its final judgment and its findings of fact and conclusions of law, ruling in favor of the WOC Districts on all claims and in favor of the Edgewood and Alvarado Districts on all but one claim. 3.CR.842-49. Specifically, the trial court determined that the school finance system operates as a state property tax in violation

of Article VIII, §1-e because the districts lack meaningful discretion in setting their tax rates. 3.CR.843. The court also held that the money available to school districts is insufficient to allow them to provide a general diffusion of knowledge under Article VII, §1. 3.CR.842-43. Finally, the court concluded that inequity in facilities funding among school districts violated the efficiency mandate of Article VII, §1. 3.CR.843. The court rejected, however, the claim that inequities in M&O funding rise to the level of a constitutional violation. FOF 296; 3.CR.926. This direct appeal followed. 4.CR.997.

SUMMARY OF THE ARGUMENT

This is the most expansive school finance case yet to come before the Court. Unlike any of the previous appeals, the substance of Texas's educational system has now been the subject of a trial on the merits in which the trial court scrutinized and ultimately rejected numerous decisions made by the Legislature and agencies entrusted with educational policymaking. The trial court's *post hoc* dissection of Texas's entire system of education demonstrates that no judicially discoverable and manageable standard exists for evaluating whether the system is constitutionally adequate without encroaching upon the Legislature's exclusive policymaking authority. Accordingly, the Court should hold that the question of constitutional adequacy is nonjusticiable.

If the Court determines that the adequacy of Texas's educational system is justiciable, the only way to achieve any semblance of judicially manageable standards is to follow prior precedent and accord rational-basis deference to the Legislature. Not only did the trial court fail to apply the rational-basis standard, it failed to grant the Legislature any deference at all.

Unmoored from the constraint of deference, the trial court violated the most fundamental precept of the Court's school-finance cases: that "it is outside the scope of judicial authority to review the Legislature's policy choices in determining what constitutes an adequate education." *West Orange-Cove*, 107 S.W.3d at 582.

Once the correct level of scrutiny—rational basis—is applied, Texas's educational system—which has been widely praised as a national model—easily passes constitutional muster. Over the past two decades, the State has developed and implemented an integrated system consisting of a comprehensive, rigorous curriculum that is regularly improved and updated to meet the changing needs of society; a standardized testing system that assesses students' knowledge of the curriculum's core subjects; and a system of accountability that identifies failing students and schools and triggers an entire spectrum of remedial assistance. The system is more than rational, and its effectiveness has been demonstrated by Texas students' steady improvement over the past twenty years and by their performance on national achievement tests. Thus, the system is constitutionally adequate.

Moreover, Texas's system of funding school facilities is constitutionally efficient as a matter of law. Again, the trial court applied the wrong standard to this claim, considering only the "quantitative" aspect of efficiency and ignoring this Court's explicit instruction in *Edgewood IV* to also analyze "qualitative" efficiency. *See Edgewood IV*, 917 S.W.2d at 729-30. Because the State's duty to provide quantitative efficiency "applies *only* to the provision of funding necessary for a general diffusion of knowledge," *id.* at 731, and because a general diffusion of knowledge is being provided with money currently available for school facilities,

the system is efficient. Moreover, the school districts' evidence of a quantitative gap in access to facilities funds is legally deficient because it failed to account for differences in *need* for facilities among districts in Texas. Thus, even if a quantitative gap in access alone were enough to establish a violation of constitutional efficiency, the evidence in the record would be legally insufficient to establish such a gap. Further, regardless of need, the gap in facilities funding identified by the districts is insufficient as a matter of law to render unconstitutional Texas's entire system of school finance.

The trial court also applied the wrong legal standard to the districts' state-property-tax claim under Article VIII, §1-e by failing to heed the Court's statement in *Edgewood III* that a property tax becomes an unconstitutional state property tax "when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." *Edgewood III*, 826 S.W.2d at 502. The trial court did not evaluate the degree of *state* control over the districts' expenditures, *i.e.*, expenditures that the State requires districts to incur. Instead of focusing on *state requirements*, the trial court improperly included expenditures for educational enrichment desired by the local communities or deemed by the districts themselves to be in the best interests of students. Because the State does not force districts to make such expenditures, the trial court should not have included them in its examination of the state-property-tax claim.

Under a proper assessment of state requirements, the districts did not prove a constitutional violation. The trial court did not hold the districts to their burden of proof;

instead, it improperly shifted the burden to the State to *dis*prove a constitutional violation. Undisputed evidence shows that districts offer a wide range of courses, services, and activities beyond the minimum required by the State. Thus, as a matter of law, the districts failed to prove that they lack meaningful discretion to "control[] the levy, assessment and disbursement of revenue." *Id.*

Therefore, the Court should reverse the trial court's judgment declaring that Texas's system of school finance is unconstitutional and enjoining the operation of the system, and the Court should render judgment for the State.

ARGUMENT

I. THE COURT SHOULD DISMISS THE DISTRICTS' CLAIMS UNDER ARTICLE VII, §1 OF THE TEXAS CONSTITUTION.

The districts' claims under Article VII, §1 of the Texas Constitution should be dismissed for three reasons. First, the claims raise non-justiciable political questions concerning the Legislature's policymaking decisions in enacting a system of free public schools. Second, Article VII, §1 does not create a private right of action. And third, the districts lack standing to challenge the constitutionality of the school system.

A. The Adequacy and Efficiency of Texas's Public Schools Present Non-Justiciable Political Questions.

Until its decision in *Edgewood I*, the Court had long considered the adequacy and efficiency of Texas's public school system to present non-justiciable political questions.[25]

25. In *Mumme*, 40 S.W.2d at 36-37, the Court considered and upheld one aspect of the then-existing public school system, applying a rational basis standard. None of the parties apparently raised, and the Court did not address, whether the case raised a political question.

See Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859, 867 (Tex.App.--Austin 1988) (reversed by *Edgewood I); see also Edgewood IV*, 917 S.W.2d at 768 (Spector, J., dissenting). In *Edgewood I*, the Court departed from the long-standing rule that the assignment of that task to a coordinate branch of government rendered legal challenges nonjusticiable. *See* 777 S.W.2d at 394. At the time it reversed course and launched the courts on a path of continually entertaining challenges to the Legislature's fulfillment of its duties under article VII, §1, the Court believed that clear judicially-administrable standards could be ascertained. As Justice Spector explained in *Edgewood IV*:

> "Until recent years, the enormous complexity of the school system was thought to make efficiency a political question not suitable for judicial review. See *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 867 (Tex.App.—Austin 1988) (reversed by *Edgewood I*). Under *Edgewood I*, though, this Court was able to assess the efficiency of the school finance system by reference to a clear standard: similar access to similar revenues at similar levels of tax effort. The simplicity of this standard is what made the enforcement of article VII, section 1 justiciable.
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> "Today's departure from the strict *Edgewood I* standard will mire the judiciary in deciding purely political questions. Even if we could speak coherently on such issues, addressing them at all is inconsistent with the proper role of the judiciary."

917 S.W.2d 717, 768 (1995) (Spector, J., dissenting).

The predicate of that decision — that simple bright-line rules provided a workable standard for judicial second-guessing of the Legislature's policy judgments providing for a "general diffusion of knowledge" — has been altogether undermined by now two decades of school finance litigation. No end is reasonably in sight.

In *Edgewood I*, the Court deviated from precedent on the presumption that a clear, manageable, judicial standard could be applied to measure the financial efficiency of the system. 777 S.W.2d at 394. Sixteen years into that effort, the Court is now asked to embark on yet another substantive analysis of the adequacy of the Texas school system, which is certain to lead it to "continually reassess the state's accreditation requirements to determine whether they are satisfactory." *Edgewood IV*, 917 S.W.2d. at 768 (Spector, J., dissenting).

The district court's exhaustive assessment of the Legislature's policy choices demonstrates the prescience of Justice Spector's prediction. Indeed, the benefit of hindsight shows that the underlying predicate to *Edgewood I*—an assumption that the judiciary could assess the school finance system without becoming perpetually embroiled in the smallest details of education policy—has all but unraveled.

1. Under United States Supreme Court political-question jurisprudence, questions regarding the adequacy or efficiency of the Texas school system raise non-justiciable political questions.

In *Baker v. Carr*, the United States Supreme Court identified a series of independent tests for determining whether a legal issue presents a nonjusticiable "political question." 369 U.S. 186, 217 (1962). Under two primary tests announced in *Baker*, a non-justiciable political question involves either "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.*[26] Under either test, the question whether Texas's

26. *Baker* identified six independent definitions of a non-justiciable political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving

current school-finance system violates the adequacy and efficiency standards of Article VII, §1 is a non-justiciable political question.

2. Article VII, §1 tasks the Legislature, not the judiciary, with oversight of Texas's public school system.

The structure and history of the Texas Constitution demonstrate that the authority to design and fund the school system has expressly been assigned to the Legislature. Article VII, §1 specifically and explicitly delegates the duty to provide an adequate and efficient system of public schools to the Legislature rather than the judiciary. *See* TEX. CONST. art. VII, §1 ("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.") (emphasis added).

Other States with constitutions requiring the legislative branch to provide for the public school system have rejected legal challenges to those systems on that basis. *See Ex parte James*, 836 So.2d 813, 815 (Ala. 2002) (per curiam) ("[B]ecause the duty to fund Alabama's public schools is a duty that . . . the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further

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> it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. These tests are "probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 124 S.Ct. 1769, 1776 (2004) (plurality op.).

redress should be sought."); *Marrero v. Commonwealth*, 739 A.2d 110, 114 (Pa. 1999) (holding that what constitutes an "adequate" education or funding in support thereof is "exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government"); *Coalition for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So.2d 400, 408 (Fla. 1996) (affirming trial court's dismissal of school-finance lawsuit on "political question" grounds, and agreeing with state defendants' argument that "the [Florida] constitution has committed the determination of 'adequacy' to the legislature"); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (concluding that plaintiffs challenging the state's school-finance system "have asked that the court take on a responsibility explicitly committed to the Legislature").[27]

The structure of Article VII, §1 of the Texas Constitution directly results from the historical distrust Texans have had for centralized government and their desire to keep the power to tax within the branch of government considered to be the most representative—the Legislature:

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27. *See also Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1160 (Mass. 2005) (Cowin, J., concurring) ("Even if the education clause is to be interpreted as imposing some duty upon the Commonwealth to maintain a public school establishment, . . . our Constitution requires that the duty be fulfilled by the legislative and executive branches, without oversight or intrusion by the judiciary.") (citation omitted); *Abbeville County School Dist. v. State*, 515 S.E.2d 535, 541 (S.C. 1999) (allowing school finance challenge to proceed, but declaring that "the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government," and stating that court would not "usurp the authority of [the legislative branch] to determine the way in which educational opportunities are delivered to the children of [South Carolina]" or allow "the courts of this State to become super-legislatures"); *cf. Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002) (distinguishing above decisions by the Alabama, Pennsylvania, Florida, and Rhode Island Supreme Courts rejecting school finance challenges on "political question" grounds, on basis that "in those state constitutions it is incumbent upon the General Assembly to provide, maintain, or promote the public schools," whereas Arkansas Constitution delegated school financing responsibility to the State itself).

> Perhaps more important than the delegation of the educational power is the Texas Constitution's explicit delegation of the taxing power to the legislature. At the time of the ratification of the 1876 Constitution, taxation for the purpose of supporting public schools was a controversial issue. It was controversial, not because people rejected altogether the necessity of taxing for the support of public schools, but rather because the framers, as well as the ratifiers, wanted to abolish the centralized system of education established by the 1869 Constitution. As the amendment to Article VII, Section 3 of the 1876 Constitution demonstrates, the people intended to maintain local control over taxation. The desire to monitor closely the taxing power clearly indicates that the people wanted to keep the power to tax in the political branch most closely accountable to the people. The legislature has traditionally been considered the most representative branch. The framers' intentions, coupled with the express delegation to the legislature of both the right to levy taxes and the duty to create a state-wide system of public schools, clearly demonstrate that the first of [the *Baker v. Carr*] factors is present in this case: namely, that the function has been allocated by the constitution to a particular branch of government.

Becky Stern, *Judicial Promulgation of Legislative Policy: Efficiency at the Expense Of Democracy*, 45 SW. L. J. 977, 1001 (1991).

The Framers' intentions, coupled with the express delegation to the Legislature of both the power to levy taxes and the duty to create a statewide system of public schools, demonstrate that the first of the *Baker* factors is present in this case in that education policy has been allocated by the Constitution to a particular branch of government—the Legislature. *Id.* Because Article VII, §I explicitly delegates to the Legislature rather than the judiciary the duty to provide a system of free public schools, that provision involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217.

3. Article VII, §1 provides no judicially discoverable and manageable standard for addressing the districts' adequacy and efficiency claims.

Sixteen years of school finance litigation has disproved the Court's expressed hope in *Edgewood I* that it could pass upon the legitimacy of the system without intruding upon the Legislature's province. With the full benefit of hindsight, and the prospect of unending suits about school finance administration, the Court should conclude that questions of the adequacy and efficiency of the system are non-justiciable political questions. At a minimum, however, the Court should cabin its review of the school system to the limited scope of its initial *Edgewood I* inquiry—efficiency—and reject the districts' request that the Court expand its review to encompass the adequacy of Texas's entire system of education.

a. The Court should reject the districts' adequacy challenges as raising a non-justiciable political question.

Because this is the first adequacy challenge, the Court has never had occasion to decide whether the constitutional adequacy of Texas's educational system is justiciable. The Court recognized in *West Orange-Cove* that the cost of a "general diffusion of knowledge" was justiciable in the context of a state-property tax claim, for the purpose of determining the expenses that the State forces districts to bear. *See* 107 S.W.3d at 582. However, because the Court was not then considering an adequacy claim, that statement was not a determination that adequacy, *per se*, is justiciable. Indeed, the Court has cautioned that "it is outside the scope of judicial authority to review the Legislature's policy choices in determining what constitutes an adequate education." *West Orange-Cove*, 107 S.W.3d at 582. Now, after a full trial on the merits, and the trial courts' expansive final judgment with

its criticism of numerous individual policy choices, the quintessentially political nature of the adequacy question has become clear.

Ultimately, the Legislature must take responsibility for addressing existing challenges to the State's public education system. If legislative action is instead directed by judicial decree, it becomes increasingly likely that the Court will find itself making the very policy determinations that are the sole province of the Legislature. Unless the Court wishes to be the arbiter of education and policy, overseeing such issues as curriculum and testing development, textbook approval, and teacher certification, the Court should hold that the constitutional adequacy of Texas's educational system is a non-justiciable political question.[28]

b. The Court should—as have other States—reconsider its prior conclusion that the efficiency of the school system is a justiciable issue.

In the first *Edgewood* case, the court of appeals concluded that the constitutional challenge to the school finance system posed a political question that could be addressed only by the Legislature, not the judiciary. *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 867 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d at 393. This Court disagreed. Although the Court acknowledged that the standards mandated by Article VII, §1 involved "admittedly not precise terms," 777 S.W.2d at 394, the Court nevertheless believed that it had an

28. The courts of several other States have concluded that questions regarding the constitutional adequacy of school funding schemes present non-justiciable political issues. *See Marrero*, 739 A.2d at 114; *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189 (Ill. 1996); *Coalition for Adequacy & Fairness in Sch. Funding*, 680 So. 2d at 408; *City of Pawtucket*, 662 A.2d at 58.

affirmative duty to remedy the inequities resulting from the system then existing when the Legislature had failed to address the problem. *See id.*

The Court's sixteen-year involvement—through four *Edgewood* lawsuits and including the present litigation—has not put to rest litigation over the efficiency of the Texas school finance system, despite the Court's best intentions and a substantial devotion of its judicial resources. Instead, it has become increasingly clear that there is no apparent end to the judiciary's oversight, such that what was perhaps originally contemplated in *Edgewood I* as a temporary or intermittent involvement has evolved into a perpetual duty.

Other States have noted the burden of continual involvement. The Rhode Island Supreme Court observed that the "political question" doctrine exists to save courts from the mire of quintessentially legislative issues such as the efficiency of a public school-finance system:

> We point out one additional caveat: the absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that has attempted to define what constitutes the "thorough and efficient" education specified in that state's constitution. . . . [T]he New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.

City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) (citations omitted).

New Jersey, to take one example, has indeed long struggled with the "efficiency" problem noted by the Rhode Island Supreme Court.[29] By contrast, the courts of several other

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29. *See Abbott v. Burke*, 857 A.2d 173 (N.J. 2004); *Abbott v. Burke*, 852 A.2d 185 (N.J. 2004) *Abbott ex rel. Abbott v. Burke*, 790 A.2d 842 (N.J. 2002); *Abbott ex rel. Abbott v. Burke*, 748 A.2d 82 (N.J.

States have declined to follow the path chosen by New Jersey and instead have held "efficiency" challenges non-justiciable under the political question doctrine.[30] The Court need not—and should not—follow the New Jersey Supreme Court into the thicket of perpetually reviewing "efficiency" challenges to the State's public school system.

Accordingly, the Court should conclude that "what is an efficient, suitable educational system is a political question that this Court is ill-equipped to answer." *See Edgewood IV*, 917 S.W.2d 717, 751 n.1 (Enoch, J., concurring and dissenting).

B. Article, VII, §1 Provides No Right of Action Because It Is Not a Self-Executing Constitutional Provision.

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. This provision does not authorize an individual to sue the State or its agencies to enforce the legislative duty to provide for an efficient public-school system, and thus it is not self-executing. That is, although the provision might authorize legislation that would make the duty enforceable through suit, it does not itself provide a right of action for enforcement.

2000); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott by Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985); *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976); *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975); *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

30. *See Pa. Sch. Bds. Ass'n v. Commonwealth Ass'n of Sch. Adm'rs*, 805 A.2d 476, 490-91 (Pa. 2002); *Hornbeck v. Somerset County Bd. of Ed.*, 458 A.2d 758, 790 (Md. 1983).

A constitutional provision is self-executing if it supplies a sufficient rule by which the duty imposed may be enforced. *Mitchell County v. City Nat'l Bank of Paducah*, 43 S.W. 880, 883-84 (Tex. 1898); *Frasier v. Yanes*, 9 S.W.3d 422, 426 (Tex. App.—Austin 1999, no pet.); *Motorola, Inc. v. Tarrant County Appraisal Dist.*, 980 S.W.2d 899, 902 (Tex. App.—Fort Worth 1998, no pet.). Article VII, §1 supplies no rule of enforcement whatsoever. *See* Stern, *supra*, 45 SW. L.J. at 1001 (observing that "the efficiency requirement [of Article VII, §1] lacks judicially cognizable standards"). Indeed, the author of a leading treatise on Texas constitutional law describes the provision as "largely hortatory, reflecting a desire to give some direction and moral guidance in an area preeminently important to the public welfare." 2 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 508 (1974). Because Article VII, §1 exhorts the Legislature to enact legislation but does not itself provide any rule of enforcement, the provision is not self-executing and cannot be enforced through suits such as this one.

The Court applied this analysis in *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955). Corpus Christi claimed that Pleasanton had engaged in the wasteful use of water in violation of Article XVI, §59 of the Constitution, which declares that "[t]he conservation and development of all of the natural resources of this State . . . are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." TEX. CONST. art. XVI, §59. Concluding that Article XVI, §59 did not prohibit the wasteful use of water at issue, the Court noted that although the provision

declared the conservation of the State's natural resources, including water, to be a public right and duty, the amendment was not self-enacting. *Id.* at 803. And because the provision was not self-executing, the Court concluded its conservation mandate was not independently enforceable by the courts.[31]

Article VII, §1 is not self-executing for the same reasons. Article XVI, §59 identifies water conservation as a public duty and exhorts the Legislature to pass laws to attain it. Similarly, Article VII, §1 identifies free public education as a public duty and exhorts the Legislature to pass laws in furtherance of that goal. By their terms, however, neither constitutional provision is self-executing. Neither provision supplies any rule by which the legislative duties they identify may be enforced; instead, both depend for enforcement on the very laws they urge the Legislature to pass. Just as it is not for the courts to determine whether specific means of water transportation run afoul of the constitutional duty to conserve water, *see City of Corpus Christi*, 276 S.W.2d at 803, it is also a purely legislative function to determine whether specific facets of Texas's public school system satisfy the Legislature's constitutional obligation to "make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, §1. *See Lisa H. v. State Bd. of Educ.*, 447 A.2d 669, 673 (Pa. Commw. Ct. 1982) (holding that the "constitutional duty [of] the legislature to provide for the maintenance of a thorough and

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31. Constitutional provisions that urge or command the Legislature to pass laws in furtherance of particular policy goals are also not self-executing. For example, Article III, §47, which declares that "[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State" has been held not to be self-executing. *See Owens v. State*, 19 S.W.3d 480, 483-84 (Tex. App.—Amarillo 2000, no pet.) (rejecting the State's argument that statute excluding "eight-liners" from definition of "gambling devices" was unconstitutional, because Article III, §47 is not self-executing).

efficient system of public schools throughout the Commonwealth" does not "confer an individual right upon each student to a particular level or quality of education") (citing *Danson v. Casey*, 399 A.2d 360, 366 (Pa. 1979)).

Self-executing provisions generally either prohibit specific actions or create specific rights or exemptions, and do not depend on the Legislature to enact statutes to make them enforceable. One example is Article I, §17, which proscribes the taking of property without adequate compensation. TEX. CONST. art. I, §17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation"); *see Hartford Steam Boiler Insp. & Ins. Co. v. State*, 729 S.W.2d 372, 373-74 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (citing *State v. Hale*, 146 S.W.2d 731 (Tex. 1941)). Another is Article XVI, §37, a self-executing provision that creates mechanics' liens on buildings or articles for the benefit of those who construct or repair them. TEX. CONST. art. XVI, §37; *see Hayek v. Western Steel Co.*, 478 S.W.2d 786, 790 (Tex. 1972). A third example is Article XI, §9, which exempts from taxation and forced sale buildings and property held solely for public purposes. TEX. CONST. art. XI, §9; *see A.&M. Consol. Indep. Sch. Dist. v. City of Bryan*, 184 S.W.2d 914, 915 (Tex. 1945); *Wackenhut Corr. Corp. v. Bexar Appraisal Dist.*, 100 S.W.3d 289, 291 (Tex. App.—San Antonio 2002, no pet.). These examples demonstrate that Article VII, §1 is not a self-executing provision, and does not create a right of action by which suit may be brought against the State. Accordingly, the districts' adequacy and efficiency challenges should be dismissed.

C. The School Districts Lack Standing To Sue.

The districts lack standing to assert any of their constitutional challenges because, as governmental entities, they generally do not possess constitutional rights. *See, e.g.*, *Deacon v. City of Euless*, 405 S.W.2d 59, 62 (Tex. 1966). It is only "when the state, county, or a political subdivision has a constitutionally created right, [that such] entities will have standing to challenge a statute on grounds that it conflicts with such right. But when rights are afforded only to individuals rather than state entities, the entities have no standing to make constitutional claims against a state statute." *Nueces County Appraisal Dist. v. Corpus Christi People's Baptist Church, Inc.*, 860 S.W.2d 627, 630 (Tex. App.—Corpus Christi 1993), *rev'd on other grounds*, 904 S.W.2d 621 (Tex. 1995). Because the constitutional rights at stake here belong to the taxpayers of the various districts, not the school districts, the districts lack standing to assert the claims at issue. *See West Orange-Cove*, 107 S.W.3d at 588-89 (Smith, J., dissenting) ("The real parties in interest in this litigation are the taxpayers of the plaintiff school districts. . . . Thus, the plaintiffs have no standing [to challenge the statutory cap as being] an unconstitutional statewide ad valorem tax.").

In *West Orange-Cove* the Court held that the school districts did not lack standing to challenge the school finance system by virtue of their role in a legislative scheme as a tax-collecting entity. 107 S.W.3d at 583-84. But the case relied upon by the Court for this principle, *Nootsie, Ltd. v. Williamson County Appraisal District*, 925 S.W.2d 659 (Tex. 1996), and the cases upon which *Nootsie* relied, make clear that an appraisal district's

standing to challenge statutes affecting tax collection is based on its own interest, as a tax-collecting entity, in ensuring the collection of those tax obligations legally due.[32]

The school districts are not claiming that the State impairs their statutory duty to assess and collect taxes that are legally due. Instead, in their tax claim, the districts seek to change *what* taxes are legally due.[33] Moreover, in their adequacy and efficiency claims, their interests as districts *qua* districts are even more attenuated. Even if there might be standing to raise the tax claims, *see West Orange-Cove*, 107 S.W.3d at 583-84, the districts have no viable claim to standing to raise adequacy and efficiency. In those claims, they are merely representing the potential interests of students and parents in their districts. Because it is the interests of the constituents that is at stake, and not the interests of the districts themselves, the districts lack standing.

In *West Orange-Cove*, the majority stated "the fact that the State has not challenged the plaintiffs' standing to sue, nor was the standing of any school district challenged in [any of the four *Edgewood* cases], is some indication of the weakness of the dissent's argument."

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32. *See Nootsie*, 925 S.W.2d at 622 (concluding tax-appraisal district had standing to challenge tax preference statute because the law directly affected the district's duty to collect all tax obligations due; and relying on *Nueces County Appraisal District*, 860 S.W.2d at 630 (affirming county's standing to challenge tax-exemption statute because county had an independent constitutional right under Article III, §55 of the Texas Constitution to be free from legislative enactments releasing liabilities or obligations owing to the county), and *Milam County v. Bateman*, 54 Tex. 153, 165-66 (1880) (holding county had standing to challenge constitutionality of statute because it offended the county's constitutionally protected right to property)). *See also Boon-Chapman, Inc. v. Tomball Hosp. Auth.*, 941 S.W.2d 383, 385 (Tex. App.—Beaumont 1997, no pet.) ("A political subdivision lacks standing to bring a constitutional challenge based upon a right afforded to individuals rather than to state entities.").

33. Indeed, they have conflicting claims on this point; taxpayers in property-rich districts seek to reduce redistribution of locally generated tax dollars, whereas taxpayers in property-poorer districts seek to increase redistribution. Thus, the school districts represent not their own interests as entities but rather the interests of some of their constituents.

107 S.W.3d at 583. But *in each of the four Edgewood cases*—unlike this case—*there were individual plaintiffs joined in the suit*. Objecting to the school districts' standing would not have reaped any practical benefit in those cases. Therefore, the State's failure to raise the argument in prior cases does not suggest anything about the merits of the standing argument.

Nor is this a circumstance in which school districts need to stand in the shoes of taxpayers because taxpayers are unable to sue. To the contrary, as the dissent in *West Orange-Cove* observed: "Taxpayers can bring their own lawsuit if it is in their best interests." 107 S.W.3d at 586 (Smith, J., dissenting). Accordingly, districts are not the proper plaintiffs, and the Court should dismiss the districts' claims for lack of standing.

II. AS A MATTER OF LAW, TEXAS'S EDUCATIONAL SYSTEM IS CONSTITUTIONALLY ADEQUATE.

If the Court determines that Article VII, §1 provides a justiciable right of action, the Court would necessarily have to identify a "judicially discoverable and manageable standard[] for resolving" an adequacy claim. *See Baker*, 369 U.S. at 217. The only standard that could even arguably serve that purpose would be a standard grounded in substantial deference to the Legislature, so that its judgments may be overturned only if they lack any rational basis. *See West Orange-Cove*, 107 S.W.3d at 585 & n.125 (citing *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931)). That deference was the cornerstone upon which the Court's initial willingness to review the school finance system was based: "the courts cannot undertake to review [the Legislature's policy] choices one by one or attempt to define in detail an adequate education." *Id.* at 582.

Notwithstanding this Court's repeated admonition that the judiciary must not second guess the Legislature, the trial court accorded no deference to the Legislature. Its voluminous, microscopic findings illustrate how a lack of deference inevitably usurps the Legislature's exclusive policymaking function. *See, e.g.*, FOFs 594-620; 4.CR.969-72 (finding that certain districts had alleged deficiencies in school libraries—such as old books, insufficient numbers of books, and insufficient numbers of certified librarians and para-professionals); FOF 322; 4.CR.929 (noting leaky roofs in 13 schools); FOF 331; 4.CR.930 (criticizing one district's facilities, including the structure of its elementary gymnasiums and its use of portable classrooms); FOFs 195-96; 4.CR.899-900 (finding that a district had reduced the numbers of assistant principals and athletic coaches). By applying rational-basis review, the Court may be able to draw a clear line between the proper roles of the judiciary and the Legislature. Otherwise, there is no conceivable end to the Court's frequent and intimate involvement in educational policy and finance.

Texas's system more than satisfies rational-basis review. This Court has held that the state accountability system is presumed to meet or exceed the constitutional requirement of adequacy, and, contrary to the trial court's conclusions, the school districts did not overcome that presumption. Abandoning this Court's presumption, the trial court improperly expanded its review beyond the performance-based accountability system to include educational "inputs," *i.e.*, the specific means employed to achieve broad-based educational goals. Inputs, such as curriculum, testing, teacher certification, and facilities, among others, are matters of policy that should be determined by the Legislature.

A. The Court's Decisions Make Clear that Rational-Basis Review Is the Proper Level of Deference for Claims Under Article VII, §1.

The Court has held that although the judiciary may "determine, in a proper case, whether the Legislature on the whole has discharged its constitutional duty," *West Orange-Cove*, 107 S.W.3d at 585, "[t]he legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen," *Mumme*, 40 S.W.2d at 36. The Court has also made clear that whether government action is "arbitrary" under *Mumme* is the standard for challenges to the educational system under Article VII, §1. *See West Orange-Cove*, 107 S.W.3d at 585 & n.125 (citing *Mumme*, 40 S.W.2d at 36). *Mumme*'s "arbitrary" analysis originates from and mirrors the "rational basis" test applied in the equal-protection context.

Mumme involved constitutional challenges to the Rural Aid Act, which provided financial aid to relatively smaller and poorer school districts but not to larger or wealthier districts. 40 S.W.2d at 35-36. At issue was, first, whether Article VII of the Texas Constitution required all legislatively distributed school funds to be apportioned by scholastic population and second, whether the Act's apportionment of supplemental aid only to "small and financially weak school districts" violated the equal protection and due process clauses of the Texas Constitution. *See id.*; TEX. CONST. art. I, §§3, 19.

The Court began by holding that the Legislature's authority under Article VII, §1 to provide for an efficient system of public free schools included the power to aid financially weaker schools using general revenue funds. 40 S.W.2d at 36; TEX. CONST. art. VII, §1. The

Court next rejected the argument that the Rural Aid Act's distinctions were unconstitutionally arbitrary:

> The constitutional guarantee does not forbid the state from adjusting its legislation to differences in situation. Equal protection of laws is secured if the statutes do not subject the individual to arbitrary exercise of the powers of government. It is well settled that legislation is not open to objection if all who are brought under its influence are treated alike in the same circumstances. In the very nature of society, with its manifold occupations and contacts, the Legislature must have, and clearly does have, authority to classify subjects of legislation, and, when the classification is reasonable—that is, based upon some real difference existing in the subject of the enactment—and the law applies uniformly to those who are within the particular class, the act is not open to constitutional objection.

40 S.W.2d at 36 (citations omitted).

Mumme's deference to non-arbitrary legislative acts parallels the modern concept of rational-basis scrutiny, the equal-protection test applicable to most legislation that does not impair fundamental rights or involve a suspect class. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Indeed, the Court has cited *Mumme* in equal-protection cases for the proposition that legislative classifications must be non-arbitrary. *See Avery v. Midland County*, 406 S.W.2d 422, 427 (Tex. 1966), *rev'd on other grounds*, 390 U.S. 474 (1968); *Houston Endowment, Inc. v. City of Houston*, 468 S.W.2d 540, 544 (Tex. Civ. App—Houston [14th Dist.] 1971, writ ref'd n.r.e.); *see also Spring Branch Indep. Sch. Dist.*

v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985) (reciting *Mumme*'s language regarding the Legislature's authority to determine the "methods, restrictions, and regulations" of school finance in conjunction with equal-protection analysis of the "no pass, no play" rule). Accordingly, under *Mumme,* legislative line-drawing is unconstitutionally arbitrary only if it fails equal-protection rational-basis scrutiny.[34] *See also Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 936 (Tex. 1996).

In *Mumme*, the Court did not restrict itself to stated legislative purposes but instead considered what "possible legislative reasons" might underlie the financial distinctions drawn by the Act. *See Mumme*, 40 S.W.2d at 37. The United States Supreme Court has long used a similar standard in applying rational-basis scrutiny, in that the rationale identified by the court as justifying the challenged legislative distinction need not have been expressly articulated by the legislative body that passed it. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Thus, in defending Texas's educational system from constitutional attack, the State need only articulate a possible legislative reason underlying the challenged components of the educational system.

B. The Trial Court Failed to Apply Rational-Basis Scrutiny; Instead, It Substituted Its Judgment for That of the Legislature.

The trial court did not cite *Mumme*, much less apply it. Nor did the trial court attempt to offer an alternative standard or purport to apply strict scrutiny, reasonableness scrutiny,

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34. The Court's use of a "substantially defaulted" standard for evaluating a suitability claim in *Edgewood IV* and *West Orange-Cove* mirrors *Mumme*'s rational-basis standard, *see West Orange-Cove*, 107 S.W.3d at 579-80; *Edgewood IV*, 917 S.W.2d at 736, particularly since the Court has made clear that *Mumme* governs suitability claims, *see Edgewood IV*, 917 S.W.2d at 736.

rational-basis scrutiny, or any other level of deference recognized in the law. Instead, the trial court simply substituted its own policy judgments for those of the Legislature.

The very length and detail of the trial court's findings and conclusions illustrate how far it ventured into the education-policy debate. *See* 4.CR.851-988 (issuing 137 pages consisting of 655 findings of fact and 24 conclusions of law). The trial court erred at the outset, when it quickly dismissed the state accountability/accreditation system as the measure of constitutional adequacy—not because the trial court believed the system was irrational, but because the trial court would have made different policy choices. *See infra*, Part I.C.2.

Having rejected the accountability system *in toto*, the trial court lacked any objective, performance-based standard for evaluating Texas's educational system. As a result, the trial court improperly relied on generic cost studies and anecdotal evidence from individual districts concerning a variety of educational "inputs," including the compensation and qualifications of teachers, the condition of school facilities, the quality of library books, and the availability of extracurricular activities, among many others. *See, e.g.*, FOF 601; 4.CR.970; FOF 307; 4.CR.928; FOF 485; 4.CR.952. The trial court observed that many districts are experiencing difficulties in areas such as teacher recruitment and construction of new facilities, and that many districts do not have the resources to fund all of the programs and improvements that they believe are necessary, *see, e.g.*, FOF 196; 4.CR.899-900 (observing that one district made decisions to eliminate central-office administrative personnel and to forego purchase of new school buses). The trial court's error was to convert the unremarkable economic fact of sometimes scarce resources into a constitutional violation.

Through recognizing the accountability system as the presumptive measure of constitutional adequacy, *Edgewood IV*, 917 S.W.2d at 730, the Court has confirmed that the constitutionality of the educational system can be assessed only by reference to actual results—the "output" of education. The trial court's fundamental mistake was to brush aside those results and focus instead on a complex array of "inputs." How these educational "inputs" interact with each other, and which may or may not be most efficacious, is a matter of great debate among scholars in the field of education. Making those policy choices is appropriately the province of the Legislature, not the courts.

C. Under Rational-Basis Review, Texas's System Is Constitutionally Adequate.

Texas's educational system easily passes rational-basis review. The new state curriculum is widely recognized—even by the districts' experts and superintendents—for its quality and rigor. *See, e.g.*, 5.RR.26; 6.RR.114; 22.RR.195. The TAKS test evaluates student knowledge in five core subjects and represents a significant increase in rigor over its predecessor. *See supra*, SOF I.B.1. And the state accountability/accreditation system identifies failing students and schools and triggers an entire spectrum of remedial assistance. *See supra*, SOF I.C, D. The Texas system works as a coherent whole to ensure that Texas students make consistent, incremental progress toward ever-increasing educational goals. *See* WOC Ex. 678 at 1. The system, as a whole, has been effective, as demonstrated by students' steady improvement over time on the TAAS and TAKS tests and confirmed by Texas's performance on the NAEP national achievement test. *See supra*, SOF I.E. It took hundreds of Texas educators, business and community leaders, and other citizens years to

construct this comprehensive, integrated system. *See supra*, SOF I.A, B, C. But the trial court determined that it was better suited to the task, and held the system unconstitutional without regard to its indisputable rationality.

1. The Massachusetts Supreme Court recently upheld that State's educational system against an adequacy challenge under very similar circumstances.

A recent decision of the Massachusetts Supreme Judicial Court rejected an adequacy challenge to that State's educational system. *See Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1136-37 (Mass. 2005). Unlike some decisions by other state courts, *Hancock* addresses a system that is strikingly similar to the Texas system. In *Hancock*, the court ended its continuing jurisdiction over the system it had held inadequate under the Massachusetts Constitution's education clause twelve years earlier. *Id.*; *id.* at 1137 (Marshall, C.J., concurring) (discussing *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516, 617 (Mass. 1993)). When *McDuffy* was decided, Massachusetts had a "dismal and fractured public school system." *Id.* at 1138 (Marshall, C.J., concurring). Under that system, "public education in Massachusetts was governed by a loosely connected melange of statutes, local regulations, and informal policies." *Id.* at 1140. The State had essentially abdicated its responsibility to set education policy, leaving this duty to local school boards. *See id.* There were also great inequities in funding because funding formulas "went largely unheeded," making basic state aid fundamentally unpredictable from year to year. *Id.* To make matters worse, the State did not even require cities and towns, the recipients of state educational aid, to use that aid for schools. *Id.*

Shortly after *McDuffy*, the Massachusetts legislature enacted significant reforms, resulting in an educational system that bears a marked resemblance to the integrated curriculum, assessment, and accountability system that Texas has implemented. Like Texas, Massachusetts enacted a curriculum "of excellent quality," and a "centralized system of objective, data-driven performance assessment and school and district accountability." *Id.* at 1142. As in Texas, student performance under Massachusetts's new system, although far from perfect, has consistently improved over time. *See id.* at 1150-51.

Applying rational-basis review, a three-judge plurality of the seven-member Supreme Judicial Court of Massachusetts held that the State's educational system was constitutionally adequate.[35] *See id.* at 1152-53. The plurality did not confuse policymaking with judging, and made clear that it was not determining what kind of educational system Massachusetts citizens *should* have. Instead, the court properly framed the question before it in terms of the constitutional floor: "whether this record of considerable progress, marred by areas of real and in some instances profound failure, offends the education clause." *Id.* at 1152. The Court should follow the Massachusetts plurality's lead and conclude that, if the adequacy of Texas's educational system is to be reviewed at all, the Legislature's policy choices must be accorded proper deference through rational-basis review.

35. Two other justices concurred in the judgment on the ground that the claim was a nonjusticiable political question. *See id.* at 1165 (Cowin, J., concurring).

2. The districts failed to rebut the presumption that Texas's accountability and accreditation system meets or exceeds the Legislature's constitutional duty to provide for a general diffusion of knowledge.

The constitutional standard of a general diffusion of knowledge requires a "basic," "minimum" education. *See Edgewood IV*, 917 S.W.2d at 754 (Enoch, J., concurring and dissenting); *id.* at 759 (Hecht, J., concurring and dissenting); *Edgewood III*, 826 S.W.2d at 527 (Cornyn, J., concurring and dissenting). The Court has held that state accountability and accreditation standards presumptively satisfy a general diffusion of knowledge. *See West Orange-Cove*, 107 S.W.3d at 581 (citing *Edgewood IV*, 917 S.W.2d at 730).

In *West Orange-Cove*, the Court recognized the possibility of rebutting the presumption that the accreditation system satisfies the constitutional requirement of a general diffusion of knowledge:

> The public school system the Legislature has established requires that school districts provide both an accredited education and a general diffusion of knowledge. It may well be that the requirements are identical; indeed, as in *Edgewood IV*, we presume they are, giving deference to the Legislature's choices. But it is possible for them not to be—an accredited education may provide more than a general diffusion of knowledge, or vice versa.

107 S.W.3d at 581. The trial court incorrectly held that the presumption had been defeated and that the accreditation system did not satisfy constitutional adequacy. *See* FOFs 15-38; 4.CR.861-67. The trial court based its erroneous conclusion not on any demonstration of arbitrariness but on its criticisms of policy choices in the State's assessment and accountability standards. *See id.* But, because it cannot be said that the Legislature's choices were arbitrary or irrational, and because "it is outside the scope of judicial authority to review

the Legislature's policy choices in determining what constitutes an adequate education," *West Orange-Cove*, 107 S.W.3d at 582, the trial court's judgment should be reversed.

a. The composition of the TAKS test is supported by a rational basis.

The trial court faulted the TAKS test for focusing on five core subjects (reading, writing, math, science, and social studies) instead of every corner of the curriculum. *See* FOF 34; 4.CR.866-67. Given the centrality of the five core subjects to the curriculum[36] and the significant state and district resources (as well as the investment of classroom instruction time) necessary to develop and administer each portion of the TAKS test, the State rationally decided to concentrate its testing on these five core subjects. *See* 25.RR.18. Testing in these precise core areas is standard practice across the nation, as exemplified by the NAEP test. *See* State Ex. 15864 at 9 (Grissmer Report) (noting that NAEP covers reading, writing, math, and science); *see also Hancock*, 822 N.E.2d at 1142-43 (Marshall, C.J., concurring) (holding Massachusetts system constitutional when only math and English tested, although additional subjects expected to be phased in).

In reaching its conclusion that the five-subject TAKS was an insufficient measure of student performance, the trial court overlooked another base indicator in the accountability system—the high-school completion rate—which does cover the curriculum's full breadth. Because the completion rate accounts for whether students take and pass the classes required for graduation, it measures student achievement in the entire required curriculum. *See*

36. Those five subjects account for over half of the required *credits* for graduation. *See* 19 TEX. ADMIN. CODE §74.53; 25.RR.16-17.

25.RR.133-34. Although the trial court might have designed the TAKS test differently, the State was not irrational to focus testing on the five core subjects.

b. The choice of base indicators to determine accountability ratings is rational.

The trial court also criticized the structure of the accountability system, which uses base indicators, additional indicators, and report-only indicators. *See* FOF 37; 4.CR.867. Completion and Dropout Manual, *supra*, note 11, at 3. The base indicators—TAKS and SDAA scores, completion rates, and dropout rates—are used to determine accountability ratings, while the additional indicators—*e.g.*, SAT and ACT test scores, participation in the recommended high-school program, and attendance rates—are used to determine gold-performance recognition. *Id.* at 4. The trial court apparently believed that *all* of the indicators must be included as base indicators. *See* FOF 37; 4.CR.867. But it did not conclude—nor could it have concluded—that focusing on three base indicators was irrational. *See id.*

Indeed, choosing to use the selected base indicators was quite rational. It could reflect a judgment that the chosen measures (*e.g.*, test scores in core subjects) reflect basic educational achievement, while others (*e.g.*, SAT scores) represent advanced achievement. It could reflect a judgment that the chosen measures are a sufficient indicator of educational quality and that inclusion of other measures would be unnecessary. In any event, the choice of TAKS scores, completion rates, and dropout rates as base indicators, although not all-inclusive, is at least reasonably comprehensive, and as such withstands rational-basis scrutiny.

c. Phasing in the TAKS cut scores and accountability standards is rational.

The trial court also disapproved of (1) the current student passing standards, or "cut-scores," for the TAKS test, and (2) the current accountability standards. *See* FOFs 30-33; 4.CR.865-66. The trial court took issue only with the current standards—not with the higher standards scheduled to be introduced in later years. *See id.* But the current standards are set slightly lower because the decision was made, based on solid consensus in the educational field, to phase them in over time. *See supra*, SOF I.B.2.; 13.RR.40-42. Thus, the trial court's complaint seems to be with the State's decision to phase in the standards gradually instead of imposing them immediately in the first year.

The trial court's apparent disagreement with the decision to phase in the new standards does not render that decision irrational. Nor could it. Gradual phase-in of more difficult requirements is a widely accepted practice: it is used by the federal government in the No Child Left Behind Act, *see* State Ex. 16426 at 28 (Cloudt ppt), as well as in other States. *See Hancock*, 822 N.E.2d at 1155 (Marshall, C.J., concurring) (holding Massachusetts system, which incorporated phase-in of new requirements, constitutional). Moreover, even the districts' superintendents and experts overwhelmingly agree that a gradual phase-in of requirements is educationally sound. *See, e.g.*, 5.RR.76; 6.RR.115-16; 9.RR.103.

The specific cut scores, as well as their gradual phase-in, were recommended by panels of educators, business and community leaders, and other Texas citizens before being adopted by the SBOE. *See supra*, SOF I.B.2. And though, for purposes of this litigation, the

districts now complain that the standards are too low, some districts actively lobbied for an even longer phase-in. *See* 9.RR.102-06; State Ex. 15950. Nonetheless, the trial court concluded that the initial year of the phase-in, with a cut score amounting to 41% or 43% of questions answered correctly and an initial required pass rate of 25% or 35% (for science and math, respectively) were *per se* too low. *See* FOFs 30-33; 4.CR.865-66.

But these standards cannot be evaluated in a vacuum; they must be assessed in relation to the difficulty of the test. For example, a passing standard of 80% might be too low on a very easy test, while a passing standard of 40% might be too high on an especially difficult one. *See* 25.RR.31. The TAKS is significantly more difficult than its predecessor, the TAAS, as even the districts' superintendents and experts acknowledged. *See* 5.RR.26.; 9.RR.141-42; 17.RR.54-55. For example, on the tenth-grade math test, a score of 70% of questions answered correctly on the TAAS would be equivalent to a score of only 18% on the TAKS.[37] *See* 25.RR.23-24; State Ex. 16425 at 8 (Smisko ppt) (table at App. L). Thus, the State could have rationally chosen to phase in the cut scores and accountability standards in view of the TAKS test's considerable increase in difficulty and breadth. In fact, the trial court expressly concedes the rationality of the phase-in by finding that "these passing rates and cut scores may be an appropriate starting point in light of the phase-in of the new accountability regime and testing instrument." FOF 33; 4.CR.866.

37. The drafters of the TAKS purposefully made the test extremely difficult compared to the TAAS in order to create more "top," that is, room at the top of the test for students to demonstrate higher levels of knowledge and skills. 25.RR.25-26. This is desirable from a policy perspective so that the test will continue to accurately measure the full spectrum of academic achievement for years to come. If there is less "top," on the test, it ceases to challenge high-performing students after a relatively short period of time, necessitating the development of a new test. *See* 25.RR.191-92.

The trial court's fixation on the exact percentages forming the cut scores and accountability standards suggests that the system would have passed constitutional muster had the State included more easy questions on the TAKS test and raised the passing percentage proportionately. This illustrates the fallacy of the trial court's approach: clearly, the choice between a more difficult test and lower standards versus an easier test and higher standards is a choice between two rational policy options. That the trial court saw constitutional significance in such a decision reveals just how far the trial court encroached on the Legislature's policymaking realm.

The trial court's final criticism of the standards is that they were set "not to constitute a minimal level of adequacy but rather to ensure that most districts and campuses fell upon the 'academically acceptable' side of the line." FOF 32; 4.CR.866. To the extent this is meant to imply some sort of nefarious intent, there is no basis in the record to support it. Alternatively, to the extent it merely recognizes that the State took into account Texas students' current level of educational achievement when setting the standards it is, at a minimum, rational. As WOC witness—and former Lieutenant Governor—Bill Ratliff testified, this common practice is educationally sound, and if standards are set too high, students become defeated—instead of motivated—by the increased difficulty of a test. 13.RR.40-42. And, Texas's use of this method has been proven effective over time by Texas students' consistent academic progress.

The trial court made the mistake of failing to look at the system as a whole. Rather, it judged the standards through its own lens, colored by its own opinions and preferences,

based on the first year of the new standards' implementation. The Massachusetts Supreme Court correctly observed that "[w]hen change is directed at a system as complex and multi-dimensional as public education . . . change must be measured over years." *Hancock*, 822 N.E.2d at 1156. In speaking about student improvement on the TAKS test, Pat Forgione, Superintendent of Austin ISD (one of the WOC districts) remarked, "[w]e can't remake Texas overnight." 5.RR.76.

A system that begins at a 25% or 35% passing requirement and never increases those standards could be viewed much more skeptically than a system, such as Texas's, that begins at those levels but rises to a 70% passing requirement within five years. Indeed, Texas's traditional practice of gradually raising the bar is not only rational but can be seen as a reasonable and even superior strategy for improving student achievement, as was conceded by numerous district witnesses, including Mike Moses, then-Superintendent of Dallas ISD and former Commissioner of Education. *See, e.g.*, 13.RR.40-42; 9.RR.105; 5.RR.76; 5.RR.11-13; *see also Hancock*, 822 N.E.2d at 1152 (Marshall, C.J., concurring) (citing with approval Massachusetts' educational strategy of "pragmatic gradualism."). Accordingly, the phase-in of TAKS passing standards and accountability standards is rational and does not defeat the constitutional adequacy of Texas's educational system.

d. Administering the exit-level TAKS test in the eleventh grade is rational.

The trial court criticized the exit-level TAKS as being a "measure of mid-high school level achievement." FOF 35; 4.CR.867. This description is somewhat accurate: students are not yet seniors when they take the test. Accordingly, students must learn most of the relevant

material by the spring semester of their junior year. But giving the exam in the eleventh grade provides several benefits: most importantly, the opportunity for students who fail the test on the first attempt to receive additional, individualized instruction to achieve the desired educational goals, the success of which can then be measured when the student re-takes the test. *See supra* SOF I.D. And, the TAKS is not the only measure of high-school seniors' achievement: they still must pass the courses required for graduation. Thus, TAKS passage, in conjunction with the high-school completion rate, comprehensively accounts for student mastery of the full curriculum. There was no showing that this system is irrational. To be sure, Plainly, the State could have decided to give the exit-level exam on the last day of the twelfth grade and to prohibit those who failed from participating in graduation, but it chose another system. The trial court did not find that choice to be irrational—it simply disagreed with it. *See* FOF 35; 4.CR.867.

e. The State's method of calculating dropout rates is rational.

Finally, the trial court criticized the State's method of accounting for dropouts because it employs a method different than what the trial court would prefer. Again, however, the State's policy judgments can be overturned only if they are irrational—not because of a difference of opinion.

Texas school districts are required to report the status of each student who was enrolled in grades 7-12 during a school year. Each fall, returning students are reported on enrollment records; students who left during the previous year or did not return are reported through "leaver records." Completion and Dropout Manual, *supra* note 11, at 6. "Leavers"

are categorized as graduates, dropouts, or other leavers. *Id.* Other leavers include students who withdraw to: (1) transfer to another public school; (2) enroll in private school; (3) enroll in school in another state or foreign country;[38] (4) graduate early and enroll in college; (5) enroll in a GED preparation program;[39] and (6) enter home schooling. *Id.* at 6, 102 (complete list of leaver codes at App. M). This system enables Texas to track every single leaver and determine whether that student has in fact dropped out of school. 25.RR.196.

At trial, the districts disputed the wisdom of this system and advocated the use of an "attrition" rate, which simply counts the number of students enrolled in eighth grade statewide and then compares that number to the number of students who graduate from high school five years later. 15.RR.23-24. The attrition rate, therefore, counts as dropouts students who move to another school, move to another state, or begin private or home schooling. 15.RR.105-08. It would also count as a dropout a student who died before graduation. 15.RR.63. The attrition rate is an estimate rather than an enumeration of dropouts; it depends on an assumption that an equal number of students enter Texas public schools each year as exit, and that these new entrants roughly make up for those leavers who are not true dropouts. 15.RR.109. Precisely because the attrition rate is an estimate, and because it can fluctuate due to numerous factors, such as the student-mobility rate, that do

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38. The trial court incorrectly concluded that Texas would not consider as a dropout a student who withdrew from a Texas school and expressed his intent to move to Mexico and *not* to attend school. *See* FOF 651; 4.CR.975. Any student who withdrew informing the school that he would not be continuing his studies would be considered a dropout under the Texas system. 25.RR.187.

39. Beginning in 2006, Texas will adopt a new definition of dropouts used by the National Center for Education Studies ("NCES"). Alv. Ex. 9031at 92 (table attached as App. R); *see supra* note 19.

not reflect school performance, the attrition method is not used in the accountability system. *See* Completion and Dropout Manual, *supra* note 11, at 22 (table at App. Q); 25.RR.146-47.

According no deference to the State's decision to adopt an actual-count system, the trial court concluded that "considerable doubt" exists "as to the accuracy of [dropout and completion rates[40]]" because "the officially reported dropout statistics . . . understate the true number of students in Texas who fail to graduate *with their cohort* from high school." FOFs 36, 649; 4.CR.867, 975 (emphasis added). In effect, the trial court believed that Texas's official dropout rate was questionable because it is a lower number than the longitudinal rate. *See* FOF 651; 4.CR.975 (concluding that leaver codes "tend to understate longitudinal dropout rates"). Of course, Texas's rate is annual and thus, by definition, lower than a five-year aggregate attrition rate. And when Texas's annual rate is compared to an annualized attrition rate, the attrition rate is higher precisely because it considers all leavers to be dropouts. 15.RR.105-06.

The trial court's findings merely describe different methodologies and their varying results. While these findings seem to indicate the trial court's preference for an attrition rate, they are not a determination that Texas's actual-enumeration method is irrational. Undoubtedly, reasonable people could disagree as to what method, as a policy matter, is superior. However, it is difficult to imagine how a system that actually counts every single student who leaves any school in Texas could be irrational. As a matter of law, therefore,

40. Dropout rates are a component of the completion-rate calculation, *see* Alv. Ex. 9031 at 90, which is why inaccuracies in the dropout rate could impact the accuracy of completion rates.

Texas's method of calculating the dropout rates used in the accountability system[41] is rational.

In the end, the trial court's criticisms of Texas's accountability system relate only to the State's policy choices within the system—not to the rationality of the system as a whole. Under rational-basis scrutiny, therefore, the trial court should have upheld the system as made up of many policy decisions regarding which reasonable educational experts and policymakers could disagree.

D. The Trial Court Should Not Have Abandoned the Accountability System as the Touchstone for Measuring Whether an Adequate Educational System Has Been Achieved.

When the Court has discussed the Legislature's duty to provide for an adequate educational system, it has done so with reference to the State's accountability system. *See, e.g.*, *West Orange-Cove*, 107 S.W.3d at 571, 581 (citing *Edgewood IV*, 917 S.W.2d at 730) (presuming that accountability regime meets Legislature's obligation to provide general diffusion of knowledge); *id.* at 579-80 (holding that accountability system satisfies suitability requirement because it consists of "legislated requirements that school districts provide an adequate education"). Yet the trial court incorrectly expanded the constitutionally required general diffusion of knowledge to include a wish list of anything an educator might believe would benefit children. Such a standard is inherently unmanageable and would result in the constitutionalization of virtually every aspect of the public schools.

41. Although the enumeration method is used in the accountability system, TEA calculates and publishes, on its website, dropout rates using the entire range of methods, including an attrition rate. *See* http://www.tea.state.tx.us/research/dropout/0203/.

1. The trial court misconstrued the Legislature's aspirational goals as minimum constitutional requirements.

The Education Code contains many types of provisions: statements of mission and purpose, concrete requirements, and grants of discretion to local districts. The trial court seemed to recognize this distinction. *See* 4.CR.862 ("The Legislature has defined the *objectives and mission* of the public education system much more expansively than simply the provision of an 'academically acceptable' education, as defined in the accountability system.") (emphasis added). Nevertheless, it wrongly concluded that statements of mission and purpose define what the Legislature believes to be the constitutional floor, *i.e.*, necessary to provide a general diffusion of knowledge. Even assuming that the Legislature could redefine constitutional standards, in this instance it did not, as is apparent from other provisions of the Education Code.

First, the trial court derived the standard it applied in part from the Education Code's mission statement, which recites the Legislature's goal of providing a general diffusion of knowledge. *See* FOF 19; 4.CR.862 (citing TEX. EDUC. CODE §4.001(a)). However, this reasoning departs from the Court's precedent. Although the Court in *Edgewood IV* was aware of the mission statement, *see* 917 S.W.2d at 728-29 & n.7, it declined to pronounce it as the standard for a general diffusion of knowledge, choosing the accountability system instead, *see id.* at 730.

The trial court also cited as other academic goals of the public-education system that Texas students will demonstrate "exemplary performance" in the "reading and writing of the English language" and in "mathematics," "science," and "social studies." FOF 23; 4.CR.864

(citing TEX. EDUC. CODE §4.002). And the trial court relied on several other clauses reciting Texas's objectives and purposes, such as "[t]hrough enhanced dropout prevention efforts, *all* students will remain in school until they obtain a high school diploma," and "qualified and highly effective personnel will be recruited, developed, and retained." FOF 22; 4.CR.863 (citing TEX. EDUC. CODE §4.001(b)); *see also* FOFs 18-24; 4.CR.862-64.

These provisions demonstrate that the Legislature has established—as it should— very high educational goals for Texas public schools. The trial court erred in concluding that the Legislature intended these goals to be constitutionally mandated rather than aspirational. If the Legislature had intended to impose an absolute goal that all students demonstrate "exemplary performance" in all core subjects, TEX. EDUC. CODE §4.001(b), it could have required all campuses and districts to meet the "exemplary" rating in the accountability system. Instead, the Legislature sanctioned a range of academic performance, including "recognized" and "academically acceptable" levels.[42] *See id.* §39.072(a). The Legislature also created a "gold performance" accountability rating for exceptional performance above the basic accountability ratings. *Id.* §39.0721.[43] Similarly, if the Legislature had meant to immediately enforce its goal that "*all* students will remain in school until they obtain a high school diploma," *id.* §4.001(b) (emphasis added), it could have required a zero-percent dropout rate for all campuses and districts. The Legislature did neither of those. Rather, the

42. Examples abound of how the Legislature recognized a wide range of acceptable levels of academic performance. For instance, it established a "commended" level of performance on the TAKS exam, which is above the basic passing standard.

43. Significantly, the trial court chose selectively among the goals in §4.001(b), omitting those such as "[p]arents will be full partners with educators in the education of their children." Such a provision could almost certainly never be enforced, confirming the conclusion that the Legislature intended the goals to be purely aspirational.

Legislature expressly contemplated the existence of dropouts by authorizing the Commissioner of Education to define exemplary, recognized, and unacceptable performance for dropout rates. *See id.* §39.051(d).

One can conclude from examining the Education Code as a whole that the Legislature established strong goals and aspirations for public education, but, at the same time, recognized that those goals could not necessarily be reached today. The Legislature, therefore, imposed practical short-term requirements that, as proven by prior experience, will gradually move Texas students along the path to achieving the ultimate goals. Those goals can only be interpreted as aspirational, and not as the minimum required by the Texas Constitution. Otherwise, the effect would be to penalize the Legislature for setting high educational goals and to create a perverse incentive to *lower* future aspiration for education reform. The Court should not encourage such a result.

2. The trial court expanded the definition of a general diffusion of knowledge beyond all judicially manageable bounds.

The trial court also enlarged the concept of a general diffusion of knowledge beyond classroom instruction, bringing within the constitutional minimum almost all aspects of the public school system, including, but not limited to:

> (a) adequate and well-maintained facilities; (b) remedial and literacy programs to help Limited English proficiency, economically disadvantaged, and other special needs students; (c) sufficient numbers of qualified teachers; (d) small class sizes; (e) preschool programs to give a "head start" to special needs students; (f) dropout prevention programs; (g) extracurricular activities to keep students in school and assist them with getting into colleges; (h) nurses to keep students healthy; (i) security guards in certain schools to keep students safe; and (j) guidance counselors to help students with course selection and with planning for college or careers.

COL 10; 4.CR.923-24. The trial court also included within the constitutional minimum all statutory and administrative mandates, whether instructional or not. *See* COLs 7-8; 4.CR.923. It is a challenge to identify any aspect of the entire public school system that is *not* within the trial court's definition of the constitutional minimum.

It is difficult to overstate the separation-of-powers problems raised by the trial court's approach. It establishes a constitutional right to the full spectrum of educational "inputs," including facilities, specific programs, preschool, extracurricular activities, counselors, nurses, and security guards. *See* COL 10; 4.CR.923-24. Presumably, then, the courts would be called on to decide if schools needed more security guards, if school facilities needed to be replaced, if students were improperly barred from participating in extracurricular activities,[44] and if schools had enough "qualified" teachers. Those are clearly individual policy decisions that should be made by the Legislature and the school districts, not by courts.

By comparison, Justice Cornyn defined constitutional adequacy as a *system*, consisting of:

> (1) requirements for minimum curriculum; (2) minimum competency tests; (3) testing requirements that trigger remedial assistance; and (4) programs designed to identify failing schools and to generate plans to improve them.

Edgewood III, 826 S.W.2d at 532 (Cornyn, J., concurring and dissenting). Unlike the trial court, Justice Cornyn believed the details should be left up to the Legislature. Justice Cornyn's approach prevailed in *Edgewood IV*, in which the Court identified the

44. Because the trial court's approach establishes a constitutional right to extracurricular activities under Article VII, §1, it would directly conflict with the Court's decision in *Stamos*, in which the Court held that there was no constitutional right to participate in such activities. 695 S.W.2d at 561.

accountability system—which clearly satisfies Justice Cornyn's criteria—as the presumptive measure of constitutional adequacy. *See* 917 S.W.2d at 730; *see also West Orange-Cove*, 107 S.W.3d at 571, 579-81. The Court should not depart from this prudent standard, which strikes a balance between the judicial and legislative branches that accurately reflects their constitutionally defined roles as well as their respective institutional capabilities.

Of course, all requirements—whether accountability-related or not—that the State places on school districts are relevant to the state-property tax claim under Article VIII, §1-e because they contribute to the calculation of the districts' tax "floor." *See infra*, Part V. By contrast, only the accountability system is relevant to the adequacy claim.[45] Any more expansive interpretation of adequacy would be inconsistent with the Court's presumption that the accountability system satisfies a general diffusion of knowledge and would fail to comport with the stated view of a general diffusion of knowledge as a "minimum," "basic" education. *See Edgewood IV*, 917 S.W.2d at 754 (Enoch, J., concurring and dissenting); *id.* at 759 (Hecht, J., concurring and dissenting); *Edgewood III*, 826 S.W.2d at 527 (Cornyn, J., concurring and dissenting).

45. The district court incorrectly concluded that all statutory and administrative requirements are part of a general diffusion of knowledge. COLs 7-10, 4.CR.923-24. However, many of the Education Code sections specifically included by the trial court are only tenuously related to classroom instruction. For instance, Chapter 38 deals with student health and safety and, among other things, requires all students to have certain immunizations and requires school districts to keep immunization records. *See* TEX. EDUC. CODES §38.001, .002. Although desirable as public policy and undoubtedly statutorily required, student immunizations and district record-keeping are so tangentially related to instruction that they simply cannot be considered an element of a general diffusion of knowledge if that standard is to retain meaning. If the trial court's definition were accepted, a failure to provide adult education, *see id.* §29.252-.253, transportation, *see id.* ch. 34, legally-prescribed discipline, *see id.* ch. 37, or school counselors, *see id.* §33.002, among other things, could provide a cause of action against the State to challenge the adequacy of the educational system.

E. Because the "Output"-Driven Accountability System Is the Measure of a Constitutionally Adequate Education, Educational "Inputs" Are Not the Measure of Either a Violation or a Remedy.

The accountability system evaluates campuses and districts based on objective performance criteria, or "outputs," such as test scores, *not* on educational "inputs," such as the subjective quality of teaching, the condition of facilities, or the number of library books. Inputs are all the aspects of the educational system that enable a student to learn and to render a certain level of performance, or output. By choosing the output-based accountability system as the measure of a constitutionally adequate education, *see West Orange-Cove*, 107 S.W.3d at 571, 579-81, the Court necessarily rejected inputs as an independent constitutional element. The trial court disregarded that precedent by judging the adequacy of the system based on its own assessment of the system's many inputs.

1. Inputs are not constitutional rights in themselves, but are merely the means for achieving educational goals.

The trial court made extensive findings regarding hundreds of inputs in numerous individual school districts around the State. For instance, the trial court found that Edcouch -Elsa ISD could only afford to offer half-day preschool. FOF 525; 4.CR.958. The trial court found that the library books in Edgewood ISD were old. *See* FOF 609; 4.CR.971. The trial court also found that Humble ISD had difficulty retaining experienced teachers because it was unable to offer competitive salaries. FOF 174; 4.CR.896. The trial court focused on these purportedly lacking inputs despite the fact that, even with such deficiencies, the districts are performing satisfactorily under the accountability system, and their students are making steady academic progress. *See*

www.tea.state.tx.us/perfreport/account/2004/statelist.html; State Ex. 16426 at 7-9 (table and graphs at Apps. E, F). Even if student performance in these districts were poor or declining, then more preschool, newer library books, or more experienced teachers might remedy the problem. Or the remedy might be better textbooks or improved facilities. But inputs are the means of producing results, not the measure of any constitutional right. A district should not be able to sue the State on adequacy grounds because it believes it has insufficient money to hire more certified teachers if the students are already performing at an acceptable level with the teachers they have. Otherwise, the courts will become responsible for evaluating and monitoring inputs such as curriculum and test development as well as facilities needs in over a thousand districts across the State. Clearly, evaluation of inputs is an invitation to a dangerous slippery slope of judicial policymaking.

By putting into place a comprehensive system of accountability standards, the Legislature is meeting its duty to provide for a general diffusion of knowledge statewide. With no violation of any right, any discussion of remedy is unnecessary. Thus, all of the trial courts findings regarding insufficient resources and other inputs, while potentially helpful to legislative policymakers, *see Hancock*, 822 N.E.2d at 1157-58, are irrelevant to the constitutional question before the Court.

2. Educational cost studies are irrelevant to constitutional adequacy and are poor tools for judicial decisionmaking.

The trial court based many of its findings on cost studies by economists hired by the parties for trial. FOFs 275-91; 4.CR.913-921. Because these cost studies attempt to gauge the sufficiency of inputs—notably money—to reach a certain level of academic performance,

they are irrelevant to the output-based question of constitutional adequacy. Money, although undoubtedly important, is just another input, and there is great debate among education experts as to the effectiveness of pouring more money into a system versus redirecting existing resources into proven programs. Again, if districts are performing at an objectively acceptable level, then the resources they have must, by definition, be adequate for that result.

Moreover, cost studies are very poor tools for judicial decisionmaking. They can be "rife with policy choices that are properly the Legislature's domain." *Hancock*, 822 N.E.2d at 1156. Indeed, the cost study that the trial court relied upon (and found *under*stated the true cost of education in Texas) fails to demonstrate even minimum standards of credulity. On its face, it concludes that school districts in Texas need billions more dollars to satisfy academic standards that the vast majority of districts are *already* meeting.[46] State Ex.16390; 12.RR.23-24. Thus, while cost studies might be appropriate to aid legislative policymaking, they are irrelevant and ill-suited to the judicial determination of constitutional adequacy.[47]

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46. It also concluded that limited-English proficient ("LEP") students are less costly to educate than non-LEP students, 12.RR.30-31; 24.RR.85-87; State Ex. 16411 at 13 (Taylor ppt), which not only defies common sense but also contradicts all other trial evidence on the subject, including the testimony of the district superintendents. 5.RR.19-20; 6.RR.22-23; 16.RR.107-08; 18.RR.10-13; 22.RR.128.

47. In *West Orange-Cove* and *Edgewood IV*, the Court cited several numbers that it believed might represent the cost of an adequate or accredited education. *See* 107 S.W.3d at 574 (citing districts' representation that $4,179 was the State's alleged cost of providing an accredited education); 917 S.W.2d at 731 & n.12 (citing $3,500 as cost of providing a general diffusion of knowledge). Those numbers came from TEA documents used in the litigation, but they were never intended to represent and do not represent an assessment of cost. This is not surprising, since the definition or cost of an adequate or accredited education had not yet been litigated at the pleadings stage in *West Orange-Cove*, and was never litigated in the *Edgewood IV* trial. *See id.* at 768 (Spector, J., dissenting).

3. In other States, courts that have made inputs the center of constitutional analysis have inevitably slid into an impermissible policymaking role.

The Court should be particularly hesitant to insert itself into the political process by declaring the State's school finance system constitutionally inadequate for lack of funding. If the Court were to conclude that the Legislature has appropriated insufficient funds to support an adequate system, then, by necessity, the Court would have to determine the correct amount and order the Legislature to appropriate it. *See Hancock*, 822 N.E.2d at 1157 (holding that a judicially-ordered cost study is "but a starting point for what inevitably must mean judicial directives concerning appropriations.").

The dangers inherent in such judicial action are aptly demonstrated by experiences in other States. In New Jersey, for example, the state supreme court has been deeply engaged in the management of the State's school system for over thirty years. The saga began in 1970 with a lawsuit filed by students in poor urban school districts seeking to enforce the New Jersey Constitution's educational guarantee.[48] *Robinson v. Cahill*, 287 A.2d 187 (Law Div. 1972). Over the next sixteen years, the court considered and rejected three separate attempts by the state legislature to enact a constitutionally sufficient system on the grounds that it did not adequately provide funding for the State's property-poor districts. *See Abbott v. Burke*, 710 A.2d 450, 490 (N.J. 1998) (referencing and collecting cases). Finally frustrated with the legislature's apparent inability to enact a system meeting its approval, the court in 1997 ordered the legislature to appropriate sufficient funds to the property-poor districts to

48. The New Jersey constitution provides that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII §4.

equalize their funding to that of the property-wealthy districts and appointed a special master to develop an educational system for the State. *Abbott v. Burke*, 693 A.2d 417, 456-57 (N.J. 1997).

In 1998, the court adopted the special master's report and ordered the legislature to enact numerous educational and social-services programs and to provide adequate funding to pay for those programs. *Abbott v. Burke*, 710 A.2d 450, 473-74 (N.J. 1998). The court concluded by announcing that it expected its involvement in the school finance system to come to an end. *Id.*

But it did not end. Beginning in 2000, and continuing to this day, the New Jersey Supreme Court has repeatedly been called upon to referee the parties' disputes over the implementation of the court's 1998 order. Plaintiffs have complained that various elements of the system continue to be inadequate, *see, e.g.*, *Abbott v. Burke*, 748 A.2d 82, 101, 118-19 (N.J. 2000) (certification requirements for pre-school teachers and community-outreach funding for low pre-school enrollment inadequate), and state officials have sought relief from the court's 1998 order when they have been unable to meet its demands, *see, e.g.*, *Abbott v. Burke*, 857 A.2d 173 (N.J. 2004) (ordering two-year delay in implementation of certification requirement to allow more child-care providers to meet the new certification requirements); *Abbott v. Burke*, 852 A.2d 185 (N.J. 2004) (adjusting ruling to provide time for teachers to obtain head-start certification).

Absent dramatic change, the New Jersey Supreme Court will never see the end of its involvement in the public education system. As noted ten years ago by the Rhode Island Supreme Court,

> the New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.

See City of Pawtucket, 662 S.2d at 59.

The Court of Appeals of New York, the State's highest court, has had a similar experience. In 2002, the court held that the State had failed in its responsibility to provide an adequate system for the city, or what the court called a "sound basic education," for the city of New York. *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003). The court ordered the State—by July 30, 2004—to determine the cost of providing a sound, basic education, to fund those costs in each school, and to establish an accountability system. *Id.* at 347-49. When that deadline passed with no state action, the court appointed a panel of three special masters to hold a hearing and make recommendations to the court.

On November 30, 2004—the same day final judgment issued in this case—the special-master panel issued its report and urged the court to order the State to enact legislation within ninety days that would: (1) provide an additional $5.63 billion for annual operating aid, phased in over a four-year period; (2) undertake a new cost study every four years to determine the cost of a sound basic education; (3) provide an additional $9.2 billion for facilities; and (4) undertake a facilities study every five years. Justice Leland DeGrasse

of the New York Supreme Court adopted the special masters' recommendation on March 15, 2005. *See* http://www.cfequity.org/compliance/degrassefinalorder031505.pdf.

Confirming the ultimate futility of this course of judicial involvement, the Alabama Supreme Court decided in 2002 to dismiss that State's school finance litigation—nine years and four implementing decisions after the court had found the State's system inadequate and inefficient and had entered an order directing the State's legislature to implement and adequately fund within six years the court's specified education program. *Ex parte James*, 836 So. 2d 813 (Ala. 2002) (dismissing *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993)).

The Alabama Supreme Court's determination that its involvement in the school finance policy debate was at best ill-advised, and likely improper under separation-of-powers principles, developed slowly over those nine years. In 1997 the court vacated the trial court's remedy plan and directed the legislature to formulate a constitutional education system within one year. *Ex Parte James*, 713 So. 2d 869, 882 (Ala. 1997). The plurality opined that, while the judiciary had the authority to implement a remedy, the legislature had primary responsibility for devising a constitutionally valid public-school system. *Id.* Less than one year later, the court on rehearing modified that opinion to allow the legislature a "reasonable time" within which to formulate a proper educational system. *Id.* at 993. Finally, in 2002, the court completed its "judicially prudent retreat from this province of the legislative branch," recognizing that "any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature." *Ex Parte James*, 836 So. 2d at 819.

The Court should heed the warning inherent in these States' experiences: elevating public policy disagreements into constitutional cases has the potential of committing the Court to years, even decades, of designing, monitoring, and administering the State's educational system.[49] The Court should leave the question of how much funding and other inputs are required to achieve an adequate educational system to the Legislature. That is, the Court should confine its scrutiny to a rational-basis review of the output-driven accountability system.

III. FUNDING FOR SCHOOL FACILITIES IN TEXAS IS CONSTITUTIONALLY EFFICIENT AS A MATTER OF LAW.

In *Edgewood I* and *IV*, the Court held that school districts must have "substantially equal access to the operations and facilities funding necessary for a general diffusion of knowledge." *Edgewood IV*, 917 S.W.2d at 746 (citing *Edgewood I*, 777 S.W.2d at 397). Thus, a constitutionally efficient school finance system has two components: a quantitative

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49. Although several state supreme courts have held their state educational systems inadequate, most provide no support for invalidating Texas's system because those States in actuality had no accountability systems at all. *See Columbia Falls Sch. Dist. v. State*, No. 04-390 (Mont. Nov. 9, 2004) (preliminary order) (finding that constitutional school funding system requires legislature to establish accountability system); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 751 (N.H. 2002) (holding that constitution required State to adopt standards for establishing constitutionally adequate education); *Brigham v. State*, 692 A.2d 384, 395 (Vt. 1997) (per curiam) (holding that State could not base adequate school funding program on standards established by independent school districts exercising delegated authority); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1262 (Wyo. 1995) (holding that state standards did not establish adequacy because an administrative rule allowed local districts to adopt disparate standards).

Moreover, the remedy imposed by other States' courts has been at most a judicial decree that the school system be measured according to metrics very similar to those already adopted by the Texas Legislature. *See Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540-41 (S.C. 1999) (holding that, rather than requiring "at least minimum educational programs and services," the State's constitution requires literacy and science knowledge, fundamental knowledge of social systems and history, academic and vocational skills"); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 213 (Ky. 1989) (adopting standard requiring such things as oral and written education skills and "self-knowledge and knowledge of . . . mental and physical wellness") (citing *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979) (listing general goals for system, including literacy, mathematical ability, and social ethics), as authority for court's power to create general standards against which to measure adequacy of school system).

component, requiring substantially equal access to revenue, and also a qualitative component, requiring that Texas school children receive a general diffusion of knowledge. *Id.* at 729. The Court emphasized that "[t]he State's duty to provide districts with substantially equal access to revenue applies *only* to the provision of funding necessary for a general diffusion of knowledge." 917 S.W.3d at 731 (emphasis in original). The Court held that the difference in access to *maintenance and operations funding* did not render the entire school finance system inefficient. *Id.* at 731. The Court then noted that the districts' claim of inefficiency with regard to *facilities funding* failed for lack of proof. *Id.* at 725, 746-47.

In its final judgment, the trial court sustained the Edgewood and Alvarado Districts' facilities claims that the system is constitutionally inefficient because of disparate access to funds for facilities. That judgment is incorrect as a matter of law for three reasons. First, the trial court looked only to a gap in the districts' ability to raise tax revenue through facilities taxes and ignored the qualitative component of the Court's *Edgewood IV* efficiency analysis. Second, the Edgewood and Alvarado Districts introduced no evidence of any comparative facilities needs—a necessary element of any facilities-efficiency claim. And third, assuming a strict "gap" analysis without a showing of districts' comparative facilities needs is relevant to a facilities-efficiency claim, the gap in revenue generated from the districts' equal tax effort does not render the entire school finance system unconstitutional. Accordingly, the Court should reverse and render judgment that the State's school finance system is constitutionally efficient.

A. The Texas School Finance System Divides Funding Responsibility Between the State and Local School Districts.

The Legislature, under its duty to fashion the means for providing a public school system, has chosen to place some of the responsibility for funding Texas schools on the local districts. *West Orange-Cove*, 107 S.W.3d 558, 563. A district's responsibility to raise its share of school funds and the State's concurrent responsibility to provide additional aid to districts are set out in the State's two-tiered Foundation School Program.

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

School districts raise their share of school funding by imposing taxes on taxable property located within the district. 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 Fund ("I&S"). *Id.* M&O tax revenue funds all school-district expenses except debt services on buildings, which is funded by I&S tax revenue. For example, M&O revenue is generally used for operational expenses such as payroll and electricity, while I&S revenue is restricted to paying for the interest and principal on bonds issued to finance school districts' large capital investments such as constructing, repairing, or refurbishing school buildings.[50]

2. The State Assists with Financing for Facilities.

A district's I&S tax revenue funds debt service on new construction and renovation of existing school facilities.[51] Before 1997, a district's I&S tax revenue was considered in

50. Whether the constitutional efficiency of the school finance system is compromised by any inequities in access to M&O funding is the subject of the Edgewood and Alvarado Districts' cross-appeal. Thus, the State will discuss the structure of the M&O funding system in its cross-appellee's brief.

51. A district's I&S tax effort is limited to $0.50 per $100 in property value at the time the debt is issued. TEX. EDUC. CODE §45.0031.

determining the district's share of M&O funds. State Ex. 16060 at 14 (Wisnoski Report). But when the Legislature created the Instructional Facilities Allotment ("IFA") and the Existing Debt Allotment ("EDA"), it removed all debt service taxes from the M&O funding system. *Id.* at 16. These programs now supplement districts' I&S tax revenue.

The IFA, created in 1997, provides aid to districts for new instructional facilities.[52] TEX. EDUC. CODE §46.003. Districts with eligible debt must apply for funding, TEX. EDUC. CODE §46.003(h); 19 TEX. ADMIN. CODE §61.1032(b), and are awarded funds on the basis of wealth per student, 19 TEX. ADMIN CODE §61.1032(m). Lower-property-wealth districts receive highest priority. *Id.*

The IFA operates based on a "guaranteed yield" of $50 per student for each cent of tax effort to pay the principal of and interest on bonds issued "to construct, acquire, renovate or improve" instructional facilities.[53] TEX. EDUC. CODE §46.003(a). To the extent a district is not able to raise the guaranteed yield, the State will make up the difference. Once a school district is approved for IFA funding, the district will continue to receive the same amount of IFA funds annually for the life of the debt. *Id.* §46.003(h).

Between fiscal years 2000 and 2003, the Legislature appropriated approximately $50 million per year for new IFA awards. State Ex. 16060 at 15. Facing budgeting pressures, the Legislature did not appropriate any new IFA funds in 2004 but maintained the existing

52. 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.

53. A district may also receive state assistance under the IFA "in connection with a lease-purchase agreement concerning an instructional facility" under certain conditions. TEX. EDUC. CODE §46.004.

IFA grants. *Id.* For 2005, the Legislature appropriated $20 million in contingent funding. *Id.* Even with the dip in 2004, the aggregate amount of new and existing IFA awards in 2004 and 2005 was in excess of $270 million. 16.RR.83-86.

The EDA, created in 1999, provides additional aid to districts for preexisting debt that is not funded by the IFA. TEX. EDUC. CODE §46.033; 19 TEX. ADMIN. CODE §61.1035(a)(2)(2005).[54] The EDA provides a $35 guaranteed yield, TEX. EDUC. CODE §46.032(a), up to the first $0.29 of a district's tax effort. *Id.* §46.034(a). Unlike the IFA, the EDA assists any school district with eligible debt; it has no application process and does not prioritize districts based on wealth. In the 2002-2003 school year, 520 school districts—over half of the districts in Texas—received a total of $457.5 million in state assistance under the EDA. State Ex. 16060 at 16.

The IFA and the EDA together have significantly expanded districts' ability to pay for new and existing facilities. 9.RR.161. Under both programs, approximately 90% of eligible debt service is equalized[55]—70% under the EDA and another 20% under the IFA. 28.RR.19; *see* State Ex. 16429, slide 49 (Wisnoski ppt). Of the 10% of debt service that was left unequalized in 2002 and 2003, a substantial share of it was covered by the EDA in 2004. 27.RR.215; 28.RR.19.

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54. It is quite common for a property-poor district that fails to qualify for IFA funding to have its full debt assumed under the EDA in the next fiscal year. 22.RR.85; 27.RR.195, 215.

55. "Equalization" is the statutory term used to describe the process of providing state aid in inverse relation to property wealth. *See* TEX. EDUC. CODE §§41.001-.002; *West-Orange Cove*, 107 S.W.3d at 570 (describing the Foundation School Program's wealth equalization measures).

The State also indirectly aids the funding of school facilities. The State's Permanent School Fund guarantees school bonds, allowing school districts to obtain the highest possible bond rating. The higher the bond rating, the lower the interest rates the districts must pay.

B. Because the Legislature Has Provided a Constitutionally Adequate Educational System, Its System for Funding School Facilities is Necessarily Efficient.

The school finance system is quantitatively, or financially, efficient when districts have "substantially equal access to similar revenues per pupil at similar levels of tax effort." *Edgewood IV*, 917 S.W.2d at 729. But the Court has repeatedly made clear that the Constitution requires quantitative efficiency only "up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge." *West Orange-Cove*, 107 S.W.3d at 566; *Edgewood IV*, 917 S.W.2d at 729-30 (citing *Edgewood II*, 804 S.W.2d at 499). Thus, if the qualitative aspect of efficiency is satisfied—that is, the system is constitutionally adequate—then the quantitative aspect is also necessarily fulfilled. *West Orange-Cove*, 107 S.W.3d at 566 (citing *Edgewood I*, 777 S.W.2d at 398; *Edgewood II*, 804 S.W.2d at 500).

The qualitative aspect of the efficiency requirement is satisfied because the system is constitutionally adequate. *See* Part II, *supra*. In *Edgewood IV*, the Court rejected the districts' facilities claims for lack of proof, noting: "Our search of the record reveals that the plaintiffs have not demonstrated that there is even one district that cannot presently provide the facilities necessary for a general diffusion of knowledge within the equalized program." *Id.* at 746. The same is true today, confirmed by the fact that all of the Edgewood and

Alvarado Districts are currently rated academically acceptable or higher.[56] The Edgewood and Alvarado Districts thus have the facilities essential to a general diffusion of knowledge and, as a matter of law, any disparity in facilities funding does not make the system inefficient. *See Edgewood IV*, 917 S.W.2d at 746.

The trial court ignored the Court's clear directive to consider the qualitative component as an essential element of an efficiency claim. Instead, the trial court concluded that the supposed gap in facilities funding invalidated the entire system—irrespective of the Court's pronouncement that efficiency is required only up to the level necessary to provide a general diffusion of knowledge. The trial court's judgment must therefore be reversed.

C. The Edgewood and Alvarado Districts Failed to Introduce Evidence of Need—a Necessary Element of an Efficiency Claim Regarding Facilities.

To establish their claim that unequal access to facilities funding renders the entire school finance system constitutionally inefficient, it was not enough for the districts to show that property-poor districts have access to less revenue for similar tax effort compared to property-wealthy districts. For facilities-inefficiency claims, such a pure "gap" analysis is meaningless without an understanding of the districts' *comparative needs* for facilities. In rejecting the districts' facilities claim in *Edgewood IV*, the Court recognized that a showing of the districts' comparative facilities needs is an essential element of an efficiency claim regarding facilities: "[T]he undisputed evidence is that all districts can presently meet their operations and facilities *needs* with funding provided by Tier 2." 917 S.W.2d at 746-47 (emphasis added). Because the record is devoid of any evidence of comparative need, the

56. *See* www.tea.state.tx.us/perfreport/account/2004/statelist.html.

trial court's judgment that the system is inefficient because of inequities in facilities funding should be reversed.

In *Edgewood IV*, the Court used a pure gap analysis in evaluating whether the districts' unequal access to M&O funding rendered the school finance system unconstitutional. *Edgewood IV*, 917 S.W.2d at 732. The use of a gap analysis in that instance was logical because it was based on the reasonable assumption that school districts across Texas have similar *M&O* needs. M&O revenue funds all basic district expenses, other than debt service on buildings, such as expenses for personnel, materials, transportation, and electricity. All districts need teachers, which on average account for 85 to 90% of the districts' budgets. 5.RR.221; 6.RR.37. All districts also need instructional materials, electricity, and buses. Thus, the revenue required to meet these needs is likely to be comparable across districts, making a pure gap analysis appropriate.

Any gap that may exist between the tax revenue that property-wealthy and property-poor districts generate based on similar taxing efforts would be meaningful only if the wealthy and poor districts have similar needs. But the assumption of similar district needs breaks down when extended to facilities because there is evidence that districts facilities needs vary widely across the State. Alv. Ex. 9008 at 2 (Colbert Expert Rpt. Addendum). ("facility needs and spending are far less uniformly spread across districts than are operating costs . . ."). While all Texas school districts but one levy M&O taxes of at least $0.86, approximately 25% of Texas districts levy *no* I&S taxes *at all*. 14.RR.77; 27.RR.199.[57]

57. *Comptroller's School District Watch List*, http://www3.cpa.state.tx.us/districts.nsf?OpenDatabase&Start=250; State Ex. 16060 at 27.

Given this fact, it cannot be assumed that facilities needs are identical, or even similar, among Texas districts. *See* State Ex. 16060 at 27; Alv. Ex. 9008 at 2. Many reasons could exist for dissimilar facilities needs: in some districts, the student population may be stagnant or declining, while other districts may be experiencing explosive student population growth. Alv. Ex. 9008 at 2. Some districts may have relatively new facilities, regardless of growth, while others may have older facilities that need to be renovated or replaced. *Id.* Thus, a bare gap in access to revenue for facilities between property-wealthy and property-poor districts is meaningless. The Constitution cannot *require* funding for facilities that a district does not *need*, even though some other district may have (and *need*) that facility.

The Edgewood and Alvarado Districts could not, therefore, legally establish their facilities-efficiency claims by relying on the faulty assumption of similar facilities needs across the State. Rather, they were obliged to introduce evidence of similar need or a comparison of need across the districts, thus enabling the trial court to put the purported gap for facilities into perspective. They introduced no such evidence: they presented no studies and no expert opinions regarding comparative facilities needs among Texas school districts. The experts they did provide conducted only pure gap analyses, with no consideration of comparative need. *See, e.g.*, 14.RR.147-48. Because the record contains no evidence of an essential element of the Edgewood and Alvarado Districts' claims of inefficiency in facilities financing—that their need for facilities was similar to those districts with which they sought to compare themselves—*see Edgewood IV*, 917 S.W.2d at 746-47, the trial court's conclusion that facilities funding renders the school finance system inefficient cannot stand.

D. In Any Event, the Gap in Revenue for Equal Tax Effort Does Not Rise to an Unconstitutional Level.

For the school finance system to be constitutionally inefficient, any inequities in the school finance system must be systemic. *Edgewood IV*, 917 S.W.2d at 759 (Hecht, J., concurring). In other words, "[d]isparities in funding facilities become constitutionally significant only when they affect the efficiency of the system as a whole. The question is not whether the method of funding facilities is inefficient, but whether that method makes the entire system inefficient." *Id.*[58]

The Legislature, as part of its duty "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools" has chosen to partially equalize facilities funding through the IFA and the EDA. Thus, even if the Edgewood and Alvarado Districts had carried their burdens of introducing evidence of comparative facilities need, the Court should still reverse because any inequities in the facilities funding system are insufficient to render the *entire* school finance system unconstitutionally efficient.

1. An inquiry into the efficiency of the school finance system must focus on the disparity in tax rates necessary for school districts to provide a general diffusion of knowledge.

In past challenges to the efficiency of the school finance system, the Court has focused on the disparity in tax *rates* between property-wealthy and property-poor school districts. *Edgewood IV*, 917 S.W.2d at 731. In *Edgewood I*, the Court focused on the districts' tax efforts. *Edgewood I*, 777 S.W.2d at 392-93, 397; *see also Edgewood IV*, 917 S.W.2d at 731. The Court first looked to the districts' property-wealth ratio and then to the districts' tax

58. *Cf. Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) ("[O]nly if there has been a systemwide impact may there be a systemwide remedy.").

rates, noting "glaring disparities" in the districts' ability to raise property-tax revenue. *Edgewood I*, 777 S.W.2d at 392-93. The Court then observed, based upon this disparity in property values, that "the property-rich districts can tax low and spend high while the property-poor districts must tax high and spend low." *Id.* at 393.

The Court in *Edgewood IV* clarified the relevant factors upon which its financial-efficiency analysis is based. The Court again considered the property-wealth ratio between the richest and poorest school districts and the disparity in average tax rates of the top and bottom 15% of districts in property wealth. *Edgewood IV*, 917 S.W.2d at 730 & n.12. Ultimately, the Court held that a nine-cent tax rate differential between property-wealthy and property-poor districts and the resulting disparity in access to revenue was not "so great that it render[ed the system] unconstitutional." *Id.* at 731-32. The Court expressly rejected the districts' evidence of a systemic *revenue* gap, holding instead that the relevant inquiry must focus on the disparities in the districts' tax *rates*. *Id.* at 731.

2. The trial court's conclusion that the school finance system is constitutionally inefficient as to facilities is unsupported by legally sufficient evidence.

The trial court erroneously determined "that property-poor districts do not have substantially equal access to facilities funding . . ." COL 23; 4.CR.976.[59] The record

59. Instead of focusing on the constitutional question—whether the gap in access to facilities funds rendered the entire system unconstitutional (indeed, the trial court made no findings about the gap)—the trial court improperly took issue with the *means* by which the Legislature provided the funding:

> The Court declares that the prohibition on the use of Tier 2 funds for facilities, combined with the Legislature's failure to make the Instructional Facilities Allotment and/or Existing Debt Allotment programs statutorily permanent and the Legislature's inadequate funding of the IFA program, means that property-poor districts do not have substantially equal access to facilities funding in violation of the efficiency and suitability provision of article VII, section 1 of the Texas Constitution.

COL 23; 4.CR.976.

evidence does not demonstrate a tax-rate gap sufficient to render the entire school finance system unconstitutional. Thus, the trial court's conclusion that the school finance system is constitutionally inefficient should be reversed.

The Edgewood and Alvarado Districts offered three experts—Albert Cortez, Paul Colbert, and Craig Foster—to testify about a gap in access to operations and facilities funding. All three experts indicated that a gap in access to facilities funding exists between property-wealthy and property-poor districts, although they each made different assumptions and ultimately calculated differing gap amounts. *See* 28.RR.56-58; State Ex. 16429 at 57.

Cortez calculated a total gap in access to operations *and* facilities funding between property-wealthy and property-poor districts by looking at the disparities in the district groups' total average revenue. Ed. Ex. 405 at 2-3 (Cortez Report). Because Cortez failed to isolate any gap in *facilities* funding among the districts from a gap in separately funded *operations*, one cannot discern whether the "gap" he calculated is attributable to facilities at all.[60] Cortez's opinion is no evidence that the districts' unequal access to *facilities* funding renders the entire school finance system inefficient.

But the Legislature's policy choices among different methods are not matters for the judiciary. *See Edgewood IV*, 917 S.W.2d at 759 (Hecht, J. concurring) ("The question is not whether the method of funding facilities is inefficient, but whether that method makes the entire system inefficient."). In any event, the primary policy choices with which the trial court disagreed were made in the 2003 Legislative Session, when the Legislature was confronted with an enormous budget deficit and was forced to make numerous difficult funding decisions, balancing the full spectrum of state budgetary needs. The constitutionality of the entire system should not hinge on one biennium's appropriations made under exigent circumstances. *See Hancock*, 822 N.E.2d at 1155 (holding the Massachusetts educational system constitutional despite budget cuts in response to financial crisis between 2001 and 2003).

60. This is particularly true given that the trial court *upheld* the system with respect to operations funding.

Colbert calculated a gap in districts' average capital *expenditures* per student, 14.RR.70, 72-73; Alv. Ex. 9008 at 2-3, reaching his conclusion by averaging the capital *expenditures* of each district group and then dividing that calculation by the total number of districts in that group. 14.RR.73, 137; 28.RR.65-69. He did not base his conclusion on disparities in tax *rates* the districts must assess to achieve similar revenue, as the Court instructed in *Edgewood IV*, 917 S.W.2d at 731, 732 n.12. Because Colbert failed to engage in the *Edgewood IV* analysis, his opinion amounts to no evidence of any gap and thus, cannot support the trial court's finding that the entire school-funding system is constitutionally efficient.

Of the three efficiency experts offered by the Edgewood and Alvarado Districts, only Foster considered the disparity in tax *rates* between property-wealthy and property-poor districts required to obtain similar revenue. Foster determined that there is an $0.08 tax-rate gap between property-wealthy and property-poor districts' access to I&S tax revenue. 28.RR.109-10. Foster reached his conclusion based on the assumption that all districts are assessing a $0.29 I&S tax rate.[61] The Court, however, has expressly rejected such an approach, focusing instead on the actual tax rate disparities among the districts. *Edgewood IV*, 917 S.W.2d at 731. Because the basis of Foster's analysis is a hypothetical tax rate rather than the districts' actual tax rates, his opinion amounts to no evidence of a tax-rate gap.

Even taking Foster's $0.08 tax-rate gap as true and applying it to the *entire* system, as the Court instructed in *Edgewood IV*, this gap is not so great that it renders the entire

61. This $.29 hypothetical tax rate, which represents the numbers of pennies equalized under the EDA, is not representative of the districts' actual I&S tax rates. While some districts have I&S rates above $.29, others assess no I&S tax at all. 14.RR.77; 27.RR.199; *see* Part III.C, *supra*.

system unconstitutional. *See* 917 S.W.2d at 731-32. In *Edgewood IV*, the Court held that property-wealthy and property-poor districts were able to provide a general diffusion of knowledge at tax rates of $1.31 and $1.22, respectively. 917 S.W.2d at 731. This $0.09 disparity amounted to six percent of a system that equalized $1.50 of the districts' tax effort.[62] The Court, focusing on this rate differential, held that the resulting disparity "in access to revenue [was] not so great that it render[ed the system] unconstitutional." *Id.* at 731-32. Foster's $0.08 gap amounts to only four percent of a funding system that equalizes $1.79 of all districts' total taxing efforts—$1.50 for operations and $0.29 for facilities.[63] When the focus is placed on the rate differential, it is apparent that this disparity is constitutionally insignificant. *Edgewood IV*, 917 S.W.2d at 731-32. Thus, as a matter of law, this gap is not so great that it renders the entire school finance system unconstitutionally inefficient. *See Edgewood IV*, 917 S.W.2d at 759 (Hecht, J., concurring).

IV. TEXAS'S SYSTEM OF EDUCATION AND SCHOOL FINANCE IS CONSTITUTIONALLY SUITABLE UNDER ARTICLE VII, §1.

Of the three duties that Article VII, §1 assigns to the Legislature,"suitability" is perhaps the requirement that the Court has discussed the least. In *West Orange-Cove*, the Court distinguished the three Article VII, §1 requirements in the following way:

> First, the education provided must be adequate; that is, the public school system must accomplish that "general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people." Second, the means adopted must be "suitable." Third, the system itself must be "efficient."

62. Stated differently, $0.09 amounts to six percent of $1.50.

63. In other words, $0.08 is four percent of $1.79.

107 S.W.3d at 563. Although the means must be "suitable," the Court has cautioned that "[w]e do not prescribe the means which the Legislature must employ in fulfilling its duty." *Id.* The Court has discussed suitability as being intertwined with adequacy. *See id.* at 579-80 (stating that suitability requirement satisfied by delegating administration of public education to school districts and requiring, through the accountability system, that they provide an adequate education); *Edgewood IV*, 917 S.W.2d at 735-37 (rejecting districts' arguments that system was unsuitable when all districts could meet "accreditation and other legal standards from Tier 1 and Tier 2 funding" and when total state aid had risen over time, and rejecting arguments that system was unsuitable because it was funded primarily through property taxes and because Legislature was allegedly failing to meet self-imposed funding obligations). It has also discussed suitability in conjunction with equity. *Edgewood I*, 777 S.W.2d at 394.

The trial court found that Texas's system was constitutionally unsuitable, but did not, in its judgment or its findings, discuss suitability at all, much less ascribe to it a meaning independent of adequacy or efficiency. *See* COLs 18, 20, 23, 24; 4.CR.925, 976-77. Rather, it merely included suitability in its judgment that the system was inadequate as a whole and inefficient with regard to the funding of facilities. *See id.* The school districts had treated the Constitution's suitability requirement in a similar fashion in their pleadings, and did not argue at trial that the system violated the suitability requirement in a manner independent of adequacy and efficiency.

Accordingly, the State challenges the trial court's judgment that the system violates the suitability requirement of Article VII, §1 on the same grounds that it challenges the trial

court's determination that the system fails to satisfy the adequacy and efficiency requirements. Like adequacy and efficiency, suitability is a nonjusticiable political question and, as a legislative duty under Article VII, §1, does not provide a private right of action. *See supra*, Part I. Moreover, because the accountability system provides a general diffusion of knowledge as a matter of law, the suitability requirement is similarly satisfied. *See supra*, Part II. And, because there is legally insufficient evidence in the record that the system is inefficient, the system is also suitable as a matter of law. *See supra*, Part III. Finally, the districts have no standing to assert a suitability claim. *See supra*, Part I.

V. THE SCHOOL FINANCE TAXING STRUCTURE DOES NOT IMPOSE AN UNCONSTITUTIONAL STATE PROPERTY TAX.

In *Edgewood III*, the Court set out the general test for determining whether an ad valorem tax is a statewide property tax in violation of Article VIII, §1-e of the Texas Constitution. The Court held that "[a]n ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." 826 S.W.2d at 502. The Court recognized that its test created a "spectrum of possibilities" with state-authorized, but not required, taxes at one end of the spectrum, and state-required taxes with the rate and distribution set by the State at the other. *Id.* at 502-03.

Somewhere within this spectrum lies the taxing system that is at issue in this case and that the Court previously considered and upheld in *Edgewood IV*: a system in which the State requires local school districts to levy an ad valorem tax, but allows the districts

discretion in setting the rate and disbursing the proceeds. *Edgewood IV*, 917 S.W.2d at 737. In *Edgewood IV*, the Court expressly affirmed the Legislature's authority to impose minimum and maximum tax rates and concluded that because, at that time, the districts maintained "meaningful discretion" in setting the tax rate within the range set by the Legislature, the system did not offend the Constitution. *Id.* at 737-38.

The Court cautioned, however, that the system could develop into an unconstitutional state tax if the minimum and maximum tax rates merged. *Id.* at 738. In other words, if the State forced a district to tax at the maximum allowable rate just to provide a general diffusion of knowledge, then the district would have lost all meaningful discretion in setting its tax rate. *Id.*; *see also West Orange-Cove*, 107 S.W.3d at 581. In that circumstance, the system may constitute an unconstitutional state property tax. *West Orange-Cove*, 107 S.W.3d at 581; *Edgewood IV*, 917 S.W.2d at 738.

The WOC Districts claim that the Court's warning has come to pass. They assert that they have lost all meaningful discretion in setting their tax rates because they must tax at the maximum amount allowable—generally $1.50 per $100 of property valuation[64]—just to provide a general diffusion of knowledge and to comply with state and federal mandates. The trial court agreed, finding not only that the WOC Districts lack meaningful discretion in setting their tax rates, but also that the system as a whole fails as an unconstitutional state property tax. FOF 269, 274; 4.CR.912-13.

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64. Some districts are authorized to tax up to $2.00 per $100 in property valuation. *See* TEX. EDUC. CODE Aux. Laws art. 2784g [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. Laws 14].

The trial court's erroneous decision arises from its overly expansive view of the constitutional floor and its failure to hold the WOC Districts to their burden of proof. The WOC Districts elected to pursue their burden of proof on the state-property-tax claim through the nine focus districts: Dallas, Austin, Humble, Spring, Carrollton-Farmers Branch, Northside, Lubbock, North East, and Kaufman. *See* FOF 5; 4.CR.859. To prevail on their claim, therefore, the WOC Districts were required to show that Texas's school finance system operates as an unconstitutional state property tax in at least one of those districts. *See West Orange-Cove*, 107 S.W.3d at 578-79. The trial court, however, required the districts to prove only that they are taxing at the maximum allowable rate and that they are spending all of their revenue on legitimate school purposes. The trial court did not determine—and the districts failed to prove—that all, or even nearly all, tax dollars were spent to satisfy state *requirements* as opposed to local preferences.

The trial court compounded its error by concluding that the school districts will not have meaningful discretion in setting their tax rate unless they have at least 10% of their taxing capacity—or a full fifteen cents of tax effort—left over to use on programs *beyond* what is required by a general diffusion of knowledge and the various state and federal mandates. COL 14; 4.CR.924. Although the WOC Districts purport to derive their 10% threshold from the Court's decision in *Edgewood IV*, the Court did not prescribe any such mathematic formula, nor did it even suggest that such an arbitrary line would be appropriate.

Because the trial court applied an improper legal standard invented by the WOC Districts and failed to hold the districts to their burden under the proper legal standard, the Court should reverse and render judgment for the State on this claim.

A. The Court Should Clarify That the Proper Measure of the Tax Floor Is the Cost of All State Mandates, Not Only the Cost to Provide a General Diffusion of Knowledge or to Comply with Accreditation Standards.

In *Edgewood IV* and *West Orange-Cove*, the Court provided the outline for the elements of the WOC Districts' tax claims. In those cases, the Court held that to demonstrate an unconstitutional state property tax, the districts must prove that they are forced to tax at the maximum allowable rate *either* to provide a general diffusion of knowledge or to meet state accreditation standards. *West Orange-Cove*, 107 S.W.3d at 581; *Edgewood IV*, 917 S.W.2d at 738. Proof of either, the Court concluded, would demonstrate that the "cap on tax rates [has] become in effect a floor as well as a ceiling," and would fulfill the districts' burden to prove that they have lost all meaningful discretion in setting their tax rates. *Edgewood IV*, 917 S.W.2d at 738.

In *West Orange-Cove*, the Court noted that a general diffusion of knowledge may or may not be equivalent to what is required by state accreditation. 107 S.W.3d at 581. Given that the State requires school districts to do both, the Court held that either could satisfy proof of the floor. *Id.* The Court remanded the case to the trial court with the expectation that the WOC Districts would have the opportunity to demonstrate that the cost of the state-required floor—whatever it was—monopolized such a degree of the districts' available tax revenue that it amounted to an unconstitutional state property tax. *Id.* at 582-83.

Of course, the State requires more from school districts than a general diffusion of knowledge and accreditation. A general diffusion of knowledge and accreditation are basic instructional requirements and do not include the numerous non-instructional mandates the State imposes on school districts. For example, the districts are required to provide fire escapes in certain types of schools, TEX. HEALTH & SAFETY CODE §791.035, and to verify that all students are current on their vaccinations, TEX. EDUC. CODE §38.001(a), but neither of those requirements,[65] can reasonably be said to relate to a general diffusion of knowledge. Nonetheless, the fact that the State requires school districts to comply with non-instructional mandates is still relevant to whether the school districts are being forced to exact an unconstitutional state property tax. If the State required the districts to spend $1.48 out of their $1.50 per $100 in property valuation on fire escapes, leaving districts with the impossible task of complying with all other state mandates using only two pennies of tax effort, the unavoidable conclusion would be that the State so controlled the rate of tax assessed by the districts that it would amount to an unconstitutional state property tax regardless of the fact that the dollars spent providing fire escapes did not go toward providing a general diffusion of knowledge or achieving accreditation.

Thus, the cost to provide a general diffusion of knowledge or achieve accreditation, assuming it can be quantified, is only part of the cost districts incur to comply with all state requirements. It would make no sense to consider only state requirements relating to a general diffusion of knowledge or accreditation, and turn a blind eye to other unrelated state

65. *See also* TEX. EDUC. CODE §§22.084 (requiring criminal background checks on bus drivers); 38.002 (requiring districts to maintain immunization records); 38.0025 (requiring districts to disseminate information about bacterial meningitis); 38.004 (requiring districts to provide anti-victimization programs).

mandates, when evaluating a claim under Article VIII §1-e. The relevant question is whether a given item is required by the State. If it is, then it must be considered as contributing to the tax floor. As the Court held in *Edgewood III*, it is the level of *state control* over the tax levy that is the determining factor in whether a local tax is, in effect, a state tax. 826 S.W.2d at 502. For these reasons, the Court should calculate the tax floor with reference to the cost of compliance with all state requirements, and not simply the cost to provide a general diffusion of knowledge or accreditation.

From a practical standpoint, however, calculating the floor based on the cost of an adequate education—or the provision of a general diffusion of knowledge—has proven all but impossible. While cost-studies can undoubtedly be useful policy-making tools and should be considered by the Legislature, they are not appropriate tools for courts to consider in determining the constitutionality of legislative action. *See supra*, Part II.E.2. Instead, the districts may make a prima-facie case of unconstitutionality by showing either that (1) even taxing at the maximum, the district cannot comply with all state requirements, or (2) the district is forced to tax at the maximum rate simply to comply with state law, *i.e.*, the district does not spend significant funds over and above what is required by state law. The districts failed to make this prima facie showing.

B. The West Orange-Cove Districts Failed to Prove That They Lack Meaningful Discretion in Setting Their Tax Rates Because They Failed to Segregate the Costs Incurred to Comply with State Law from Costs Incurred to Satisfy Local Preferences.

To prevail on their tax claims, the WOC Districts were required to show that state mandates so dictated their levy of property tax that the districts had no meaningful discretion

in setting their tax rate. They were required to show, to use the Court's words, that the tax ceiling (*i.e.*, $1.50) is necessary simply to provide the tax floor (*i.e.*, what is required by the State). The WOC Districts provided considerable evidence of the total amount of money spent at the district level and per student. There is substantial documentation concerning classes and services offered by each district as well as evidence of higher standards to which the districts will be held accountable in the future. And there is no doubt that most, if not all, districts are spending their tax revenue on legitimate expenses both required by state law and desired by local communities, and yet, in light of their limited financial resources, they are unable to offer every beneficial program their communities might request.

The WOC Districts nonetheless failed to establish the critical element of their tax claim—the tax floor that they claim has merged with the tax ceiling—because they did not differentiate funds spent strictly to comply with state requirements from funds spent to satisfy local choices. That failure is fatal to their claims. Without proof that the districts have no choice but to spend every—or in some cases, nearly every—penny of their tax revenue (the ceiling) just to comply with their *state* obligations (the floor), the districts have not, as a matter of law, demonstrated that the State so controls the levy of tax in the districts that the local property tax has become, in effect, an unconstitutional state property tax.

In effect, the districts are arguing that any program they offer or expense they choose to incur should count toward the calculation of the tax floor if it is good for students. The trial court apparently agreed with the districts' formulation given that it did not require the districts to segregate state requirements from local preferences. The trial court even went so

far as to fault the State—which had no burden of proof—for making "no attempt to quantify the impact of [state and federal] mandates." FOF 53; 4.CR.871. But the amount of money that districts are spending on school services they may *choose* to offer cannot be the proper measure of the floor—that would allow the districts themselves to set the tax floor (and spend themselves into a lawsuit).

If the Court expands the tax floor to include locally preferred items that are not required by the State, then the tax cap, upheld by the Court in *Edgewood IV*, 917 S.W.2d at 737-38, would become *per se* unconstitutional. No matter what reasonable adjustments the Legislature could make to the cap, the districts could always tax and spend up to that level, and then claim that the floor had merged with the ceiling, creating an unconstitutional state property tax.[66]

The State commends school districts for striving to provide the best education possible to the State's children. But the State cannot be held to have created an unconstitutional state property tax in the absence of evidence that *state requirements*, and not *districts' choices*, have resulted in the districts' assessment of tax at the maximum rate. A necessary element of the districts' proof must be that districts are taxing exclusively—or almost exclusively—to comply with *state* requirements, *i.e.*, items over which the districts have no choice. Because the WOC Districts failed to establish that preliminary element, the districts have not proved that the State so controls the levy of tax that they have no meaningful discretion in setting

66. Indeed, it is not uncommon for districts to tax at the maximum in order not to "leave any state money on the table." *See* 9.RR.134; State Ex. 15680 at 131-32 (Hinojosa Depo).

their tax rate. Accordingly, their tax claims must fail, and the district court's judgment should be reversed.

C. Beyond Their Failure of Proof, the West Orange-Cove Districts Cannot, as a Matter of Law, Prove an Unconstitutional State Property Tax.

Even had the WOC Districts segregated the cost of state requirements from the cost of the districts' choices, they cannot make a prima facie case that (1) taxing at the maximum rate, they could not provide the state-mandated floor, or (2) taxing at the maximum was necessary simply to provide the floor. Indeed, the State established—although it had no burden to do so—that the WOC Districts cannot, as a matter of law, prove their tax claim because (1) each of them is meeting or exceeding state accountability standards with their current revenues (and no evidence shows that any WOC District fails to comply with state requirements that do not relate to accountability), and (2) each of them expends significant resources on items that are not required by state law.

1. All WOC Districts meet or exceed state requirements.

As a matter of law the WOC Districts cannot prove that, even taxing at the maximum, they cannot meet all state requirements because, in fact, they are meeting all state requirements. Not a single WOC District pointed to a single state requirement with which it is not in compliance. Every WOC District is rated academically acceptable or better (Northside ISD and North East ISD have recognized ratings) and every district has accomplished overall student improvement on the TAKS test, and on its predecessor, the TAAS test, since their inception.[67]

67. *See* App. S; *see also* http://www.tea.state.tx.us/perfreport/aeis/2004/district.srch.html. This TEA web site provides access to any district's AEIS information, including test scores for 2003 and 2004 and

Student improvement on the TAKS can be seen by comparing tenth-grade scores from 2003 (the first year TAKS was implemented) to eleventh-grade scores the following year in 2004.[68] Those scores indicate, without exception, that student comprehension and mastery of the TAKS subjects improved between tenth and eleventh grades—in some cases by a remarkable margin—even though the passing standard was more difficult in 2004 than it was in 2003. *See* 2003-04 Academic Excellence Indicator Systems Report for Dallas attached at App. S.1. For example, 58% of Dallas ISD tenth graders met the TAKS passing standard for language arts in 2003, but 84% of eleventh graders (presumably, many of the same students from the year before) met the standard in 2004. Similar improvements were achieved by all WOC Districts. *See generally* App. S. With the exception of eleventh-grade math and science scores in Dallas ISD, which came in at 79% and 78% meeting the standard respectively, every district's eleventh graders obtained passage rates of no lower than 81% in each of the tested subjects for 2004. *Id.* And every district obtained at least 96% passage in social studies, with Spring, Northside, and North East ISDs coming in at 99%. *Id.*

Because the WOC Districts are currently meeting—and in many cases exceeding—state accountability standards, and because they are in full compliance with all

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average teacher salaries. To obtain specific district data, enter the district name, *i.e.*, Dallas (*without* ISD). Of course, scores vary from year to year and not every student group will improve on every test in every grade in every year. But, overall improvement has been consistent and sustained.

68. This comparison allows the Court to see the development of a single cohort of students from 2003 to 2004.

applicable state laws, they cannot establish a prima-facie claim by showing that, even taxing at the maximum allowable rate, they are unable to meet state requirements.

2. All WOC Districts devote significant tax resources to local community preferences that surpass the requirements of state law.

Nor can the WOC Districts demonstrate that they must tax at the maximum allowable rate to comply exclusively with state requirements because each district provides classes and services that exceed those required by state law. The State requires a school district offering kindergarten through twelfth grade to provide the following curriculum:

(1) a foundation curriculum that includes:

(A) English language arts;
(B) mathematics;
(C) science; and
(D) social studies, consisting of Texas, United States, and world history, government, and geography; and

(2) an enrichment curriculum that includes:

(A) to the extent possible, languages other than English;
(B) health;
(C) physical education;
(D) fine arts;
(E) economics, with emphasis on the free enterprise system and its benefits;
(F) career and technology education; and
(G) technology applications.

TEX. EDUC. CODE §28.002(a).

Chapter 74 of the Texas Administrative Code contains more curriculum and specific high school graduation requirements. Section 74.3(b) defines the required curriculum for high schools, grades nine through twelve. 19 TEX. ADMIN. CODE §74.3(b). That section describes, in considerable detail, the subjects and classes that school districts are required to

provide their high school students. Under the category of mathematics, for example, §74.3(b)(2)(B) requires that a district offer in its high schools Algebra I, Algebra II, Geometry, Precalculus, and Mathematical Models with Applications. *Id.* §74.3(b)(2)(B). Notably absent from the list of *required* mathematics classes is calculus. Because calculus is not listed in §74.3, districts are not *required* by state law to provide that class. Calculus is, of course, a legitimate and desirable mathematics class that is within the school districts' discretion to offer. Districts offering calculus are undoubtedly providing their students a mathematics option that will satisfy state requirements. But because the State does not require districts to offer calculus as a mathematics class, funds expended on the provision of calculus cannot count toward the calculation of the tax floor required by the State. Accordingly, any district that chooses to offer a class in calculus is necessarily exercising discretion in setting its tax-rate floor.

Also absent from the list of required courses are advanced placement (AP) classes, *see* TEX. EDUC. CODE §28.053, and co-curricular (such as University Interscholastic League (UIL) competitions in speech, debate, and drama) and extra-curricular activities (including athletics and related activities), *see* 5.RR.49. None of these classes or activities is required by state law, even if local communities often demand them. *See, e.g.*, 5.RR.52. Their cost therefore cannot be included in the required tax floor. Any district offering them is exercising its discretion to do so.

Additionally, the districts are only obligated under state law to provide a limited number of languages other than English, fine-arts classes, and career and technology

education classes. Districts are *required* to offer only one language other than English, and only up through level III. 19 TEX. ADMIN. CODE §74.13(1)(F) (language requirement for the advanced high school program). Although districts may choose to offer fine-arts classes in the areas of art, music, theater, and dance, they are not required to offer classes in *all four* of those areas, but only in two. *Id.* §74.3(b)(2)(H). Similarly, while the rules outline eight career and technology education choices from which the districts may choose, districts are required to provide classes in only three of those areas. *Id.* §74.3(b)(2)(I). Therefore, districts that offer more than one language other than English (or more than three levels of such a language) or more than the state-mandated minimum of two fine-arts and three career and technology education classes are exercising discretion over their tax rate.

Finally, the Education Code grants districts the discretion to provide *either* full-day or half-day pre-kindergarten and kindergarten. TEX. EDUC. CODE §§29.152, .153. Any district offering full-day pre-kindergarten or kindergarten is exercising discretion.[69]

The evidence at trial conclusively demonstrated that each WOC District surpasses state requirements in both curriculum and services by providing many non-required courses and activities at the demand of the districts' local communities. The State commends the districts and their communities for setting high standards for the State's youth and for making efforts to accommodate the interests and desires of the students in such a broad range. But although the classes and services offered by the districts are legitimate, beneficial, and, in

69. A district offering full-day pre-kindergarten can receive grant funding from the State under Texas Education Code §29.155. To the extent that the cost of a full-day pre-kindergarten program exceeds the district's grant funding, the district exercises its discretion over its tax rate in providing that service.

most cases, can satisfy the state-required curriculum, the districts are not required to offer them and could comply with the state-required curriculum with fewer or less costly options.

Moreover, no district provided any evidence—as was their burden—that the extra classes and services cost so little that it did not amount to meaningful discretion in setting their tax rate. To the contrary, the following financial decisions and extra classes and services provided by the districts, when added together, could easily amount to meaningful discretion:

Dallas ISD

- non-state required facilities including a 200-acre Environmental Education Center providing a 100-seat ecology theater, five miles of nature trails, ponds, and gardens that the district uses for camping events and summer-enrichment programs, as well as educational field trips at the center;[70]

- budget cut of $30 million dollars accomplished specifically to provide teacher raises.[71] Had Dallas ISD elected to apply the funds generated from the budget cut to its tax rate, those funds alone could have reduced the district's tax rate by *five cents*.[72] Dallas ISD pays teacher salaries in excess of the state-mandated minimum and above the statewide district average, longevity bonuses, and stipends for special areas;[73]

- local property tax exemption of 10%.[74] If the district had eliminated its local property tax exemption in 2003, it would have generated $31.6 million in additional tax revenue, or *five cents* on the district's tax rate.[75] The district maintains the exemption

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70. *See* http://www.dallasisd.org/parent_student/programs.htm.

71. 6.RR.62-63, 65.

72. This number is reached based on Dallas Superintendent Moses's testimony that one cent of tax in Dallas ISD generates $6 million in revenue. 6.RR.83.

73. State Ex.11391 at 14; 11612 at 14; 11832 at 14; App. S.1 at §II.4 (average teacher salaries 2003-04); 6.RR.54-55; State Ex.15674 at 117 (Moses Depo).

74. 6.RR.38-39.

75. *See* http://ww . Click on CPTD Tax Final: Tax Year 2002 and School Funding Year 2003-2004. Dallas ISD is district number 225. The amount listed in column H, as

for historical reasons and because eliminating it would not bring more *state* resources to the district.[76] The district offered no evidence that it would be politically impossible to eliminate the exemption. Indeed, the fact that Dallas ISD is the only WOC focus district with a local property-tax exemption serves to demonstrate that elimination of the exemption is, in fact, politically possible and within the district's discretion;

- nine middle-school magnet programs offering classes in the law, environmental science, exploratory arts, and communications;[77]

- elementary magnets offering Montessori programs, science and technology and expressive arts;[78]

- six year-round swimming pools, four athletic complexes, and seven athletic stadiums;[79]

- evening and adult classes including physical and mental health services, alcohol, drug, and tobacco awareness and intervention, basic education, apprenticeship training, and computer literacy training for adults;[80]

- co-curricular and extra-curricular activities costing 1.01% of the district's budget;[81]

- AP classes including two levels of calculus, statistics, two levels of physics, psychology, two levels of computer science, art history, three levels of studio art IV,

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reported by the district, is half the impact of the local property tax exemption—in Dallas ISD's case the amount is $1,070,558,139.00. To calculate the tax revenue effect of Dallas ISD's 10% local property tax exemption in 2003, multiply the amount in column H by two (total of $2,141,116,278), divide by 100, and multiply by the 2003 tax rate of $1.478.

76. 6.RR.38.

77. Magnet schools course descriptions in Dallas ISD Secondary Student Handbook at 42-43, available at http://www.dallasids.org/parent_students/stu_handbooks.htm.

78. Magnet schools course descriptions in Dallas ISD Elementary Student Handbook at 27-28, available at http://www.dallasids.org/parent_students/stu_handbooks.htm.

79. *See* http://www.dallasisd.org/inside_disd/facts_stats/facilities.htm.

80. *See* http://www.dallasisd.org/parent_students/programs.htm.

81. FOF 133; 4.CR.89; 6.RR.82-83; WOC Ex. 700, slide 37.

several languages (Spanish, French, and Latin) through level VI, and German through level V;[82]

- career and technology classes in five subject areas. Some of these classes include major appliance repair, air conditioning and refrigeration, auto mechanics, diesel mechanics, auto body, piping trades, plastics, sheet metal, cosmetology, culinary arts, fashion design and production, horticulture, hotel management, and travel and tourism;[83]

- classes in all four areas of fine arts;[84]

- several magnet high schools offering specialized areas such as business and management, humanities and communication, education and social services, government and law, the health professions, science and engineering, performing arts, and technical options;[85]

- transportation to magnet schools for all students within the district;[86]

- full-day kindergarten;[87]

- free summer school to students in pre-kindergarten through eighth grade;[88]

- free breakfast and lunch for elementary students in summer school;[89]

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82. *See* Dallas ISD Secondary Student Handbook, *supra* note 77, at 20.

83. *See id.* at 44.

84. *See* Staff Responsibility Record submitted by school districts to the TEA through the Public Education Information Management System, Service Id (courses). This listing of all courses offered by school districts is maintained by the TEA and available to the public. The Court may take judicial notice of this public record. App. T.

85. *See* Dallas ISD Secondary Student Handbook, *supra* note 77, at 44-45.

86. *See* Dallas ISD Magnet Schools Handbook and Application. App. U.

87. *See* Dallas ISD Elementary Student Handbook, *supra* note 77, at 17.

88. *See* http://www.dallasisd.org/parents_students/summer_school.htm.

89. *See id.*

- an immigrant intake center for grades seven through twelve, which provides immunizations to children and support and information to parents and assesses the language needs of recent immigrants.[90]

Austin ISD

- teacher salaries above state-mandated minimum and the average among districts. Starting teacher salaries at Austin ISD at $33,069 are the highest in central Texas.[91] As explained by Superintendent Forgione, the district raised its tax rate each year from 1999 through 2002 by four cents, until it topped out at the $1.50 maximum, specifically to afford teacher pay raises.[92] Forgione "literally took [his] tax rate and gave it to [his] teachers."[93] Even in 2003-04, when the district underwent a budget reduction of $39 million dollars, teachers were given a 1% raise.[94] Teachers in Austin ISD also receive $1,500 signing bonuses, and special-area stipends ranging from $1,000 to $2,500;[95]

- $40 billion dollars in real property, including the district's central office, located in downtown Austin.[96] The central office property was estimated by Texas Comptroller Strayhorn to be worth $12 million dollars in the April 2000 Texas School Performance Review of Austin ISD.[97] The district rejected the Comptroller's recommendation to sell the property and relocate the central office to a more economical location;[98]

- middle-school magnet programs offering classes in introduction to philosophy, introduction to psychology, Shakespeare, anthropology, astronomy, genetics, microbiology, rocketry, space exploration, culinary arts, food and nutrition,

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90. 6.RR.57-58.

91. *See* 5.RR.160-63, 174-75; State Ex. 15683 at 95 (Forgione Depo); *see also* App. S.2 at §II.4.

92. State Ex.15683 at 86; *see also* State Ex.10382 at 14, 10494 at 15, 10606 at 15.

93. State Ex.15683 at 73.

94. *Id.* at 55-56. Superintendent Forgione also testified that he was forced to cut 650 positions as a result of the budget cuts, but only had to lay off thirty employees because he was able to place employees in vacant positions. *Id.* at 56.

95. State Ex.15683 at 148-49.

96. *Id.* at 41.

97. *See* http://www.window.state.tx.us/tspr/austin/findings.htm.

98. 5.RR.84.

homemaking, comic books as literature, heroes and monsters, science fiction,[99] international law, social justice, the Greek language, and mythology;[100]

- co-curricular and extra-curricular activities costing 1.7% of the district's budget.[101] This percentage of the district's budget equates to two cents of M&O tax;[102]

- AP classes in all high schools;[103]

- career and technology classes in eight subject areas;[104]

- reduction in twelfth-grade class size at cost of $908,280;[105]

- introduction of the recommended high school program two years before the State mandated that graduation be available;[106]

- high school magnet programs in the areas of liberal arts and science and government and humanities;[107]

- transportation to magnet schools to all students in the district;[108]

- International High School and English Language Learner Institute to provide intense English-language instruction to immigrants;[109]

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99. http://www.austinschool.org/kealing/magnet/subjects/subjects.html.

100. http://www.austinschool.org/fulmore/Magnet%20Prgram/magnet.html.

101. FOF 160; 4.CR.894; 5.RR.49-50.

102. 5.RR.199-200.

103. State Ex.15683 at 146.

104. *See* http://www.austinisd.org/academics/curriculum/cate/.

105. 5.RR.181, 184-85.

106. 5.RR.193-94.

107. *See* http://www.austinisd.org/schools/magnets/index.phtml.

108. *See* http://www.austinisd.org/schools/magnets/index.phtml.

109. 5.RR.22-23.

- full-day pre-kindergarten and kindergarten;[110]

- after-school instruction, by teachers, in sixty out of seventy-four elementary schools;[111]

- installation of security cameras on school buses and hiring of security guards;[112]

- bilingual-teacher-recruitment trips to Mexico instead of utilizing teacher recruitment services offered through the State at the Region XIII offices;[113]

- no outsourcing of transportation, copying, janitorial, or food service;[114]

- payment of most PSAT and SAT test fees and provision of preparation courses for those exams through Kaplan.[115]

Humble ISD

- elective classes including cosmetology, automotive technology, aquaculture, sculpture, advanced floral design, interior landscape development, hotel and restaurant management, apparel classes, adventure, scuba, and camping;[116]

- co-curricular and extra-curricular activities that total 1.9% the total operating budget;[117]

- building two new, smaller higher schools, rather than one larger, more cost-effective high school. In 2002, preparing for the growth of the district, the school board proposed a bond package that would have provided funds for the construction of one additional high school, for a total of three in the district. The bond proposal was initially limited to one new high school because a high school costs the district

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110. 5.RR.22.

111. State Ex. 15683 at 14.

112. 5.RR.186-87.

113. State Ex. 15683 at 112-13.

114. *Id.* at 65-68.

115. *Id.* at 152-53.

116. 7.RR.83-88; *see also* State Ex.15681 at 24-26 (Sconzo Depo).

117. FOF 182; 4.CR.897.

approximately $2.2 million dollars per year to operate. Notwithstanding the additional yearly cost—and necessary impact on the district's tax rate—the community rejected that bond proposal specifically because it only provided for one new high school instead of two. Later in 2002, the district passed a more expensive bond package that provided for the construction of the additional two high schools that the district, because of community preferences, must now pay more to operate;[118]

- AP classes in all high schools;[119]
- fine-arts classes in all four categories (art, music, theater, and dance),[120] and career and technology classes in eight subject areas;[121]
- languages other than English, including French, German, Latin, and Spanish through level IV, and American Sign Language through level III;[122]
- full-day kindergarten;[123]
- computer labs in all elementary schools;[124]
- Spanish-language immersion program at one elementary school;[125]
- a football and track stadium, swimming pools, tennis courts, and soccer fields at both high schools;[126]
- playing fields for middle and elementary schools;[127]

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118. FOF 179-180; *see also* 7.RR.38-42.

119. *See* Staff Responsibility Record, App. T.

120. *Id.*

121. *Id.*; *see also* CATE.htm.

122. *See* Staff Responsibility Record, App. T.

123. This page on the district's web site allows the reader to obtain information about each campus in the district.

124. *Id.*

125. *See* http://www.humble.k12.tx.us/BBE_profile.htm.

126. State Ex.15681 at 22.

127. *Id.*

- higher teacher salaries than required by the state-mandated salary schedule and, generally, above the statewide district average.[128] Extra compensation for teachers with masters or doctorate degrees, bilingual teachers, and teachers who sponsor student activities or coach athletic or academic teams.[129]

Spring ISD

- operation of the Westfield Performing Arts Center, a multi-purpose theater equipped with stage lighting, an orchestra pit, classrooms, and professionally lit dressing rooms;[130]

- non-required classes such as German through level IV honors, Latin, aquatic science, environmental systems, creative writing, humanities, literary genres, several advanced journalism classes, photojournalism, word power, nine different speech and debate classes, advanced computer languages, linear algebra, linear programming, number theory, advanced studies in the Holocaust, European history, psychology, and sociology;[131]

- co-curricular and extra-curricular activities totaling 2.2% of the district's budget;[132]

- classes in all four fine-arts areas,[133] and career and technology classes in nine subjects;[134]

- AP classes, including rhetoric and composition, Spanish IV and V, French IV, statistics, calculus, psychology, music theory, art III and IV in drawing and portfolio (two- and three-dimensional), and art history;[135]

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128. State Ex.13575 at 13; 13605 at 14; 13546 at 14; *see also* App. S.3 at §II.4.

129. State Ex.15681 at 26-27.

130. *See* http://www.springisd.org/Project%20pictures/pac.html.

131. *See* Spring ISD Program of Studies, available at http://www.springisd.org/progstud/index.html.

132. FOF 52; 4.CR.870-71.

133. *See* Spring ISD Program of Studies, *supra* note 131.

134. *Id.* Classes include, among many others, veterinary-assistant technology, landscape design, apparel, interior design, textiles and apparel design, emergency medical technician training, pharmacy technician, and medical terminology.

135. *Id.*

- technology magnet school at the Wunsche Career Campus and Multipurpose School. In 2006, Wunsche will begin an academy program that will house academies of medical sciences, technology, culinary arts and hospitality. As part of the academy program, every student will have a laptop computer;[136]

- athletic facilities, including swimming pools, and tennis courts at its high schools;[137]

- the purchase of eighty acres of land for new high school construction, even though it could have constructed the school on as little as sixty-five acres;[138]

- teacher salaries above the state-mandated minimum salary schedule, and in general, above the average among districts, and stipends for certain areas;[139]

- owns and operates a fleet of buses instead of outsourcing;[140]

- continuation of block scheduling for some classes at one high school, allowing students to earn seven credits per school year.[141] The State does not require districts to offer seven credits a year. It requires only twenty-four credits (earned over four years) for graduation. Additionally, block scheduling is generally considered more expensive to operate than the traditional six- or seven-period schedule.[142]

Carrollton-Farmers Branch ISD

- teacher raise in 2002 funded by an unexpected increase of $15,000 per student in property values. Superintendent Griffin admitted that the district never considered lowering its tax rate based on the increase in property values, opting instead to allocate the funds to teacher raises.[143] The district pays teacher salaries above the

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136. *See* http://www.springisd.org/wun/.

137. State Ex.15680 at 51-52 (Hinojosa Deposition).

138. *See* State Ex. 15680 at 33.

139. State Ex. 15241 at 13; 15286 at 14; 152287 at 14; App. S.4 at §II.4; State Ex. 15680 at 109-11.

140. *See* State Ex. 15680 at 84.

141. *See* http://classroom.springisd.org/webs/whs.campus/about_westfield.html.

142. Carrollton-Farmers Branch ISD, for example, saved $1.5 million by eliminating block scheduling. *See* State Ex.1 6225 at 86 (Griffin Depo).

143. *See* State Ex. 16225 at 169.

state-mandated minimum and above the statewide district average, and pays stipends for certain subject areas and to teachers with master's degrees;[144]

- operation and maintenance of two gymnasiums at every high school but one. The district is presently in the process of adding a second gymnasium to that high school;[145]

- non-required classes, including advanced creative writing, advanced broadcast journalism, seven speech classes, photojournalism, power lifting, naval science, geology, meteorology, and oceanography, astronomy, environmental systems, European history, forensic science, foundations of the American legal system, sociology, and psychology;[146]

- pre-AP beginning in sixth grade and AP high-school classes including, among others, art history, music theory, calculus, statistics, French, German, Spanish, Japanese (each offered through level IV), economics, and psychology;[147]

- co-curricular and extra-curricular activities totaling 1.6% of the district's total budget;[148]

- classes in all four categories of fine arts,[149] and career and technical classes in eight subject areas;[150]

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144. State Ex. 10725 at 14; 10765 at 14; 10804 at 14; App. S.5 at §II.4; *see also* State Ex. 16225 at 137-38.

145. *See* State Ex. 16225 at 75.

146. *See* course descriptions contained in 2004-2005 Educational Planning Guide, at 79-162, available at http://www.cfbisd.edu/pub/highschoolcourses.pdf.

147. *Id.*

148. FOF 213; 4.CR.903.

149. 2004-2005 Educational Planning Guide, *supra* note 146. Examples of the fine arts selection include art I through IV (topics include printmaking, drawing, fibers, ceramics, jewelry, and sculpture), dance I through IV (topics include basic dance, dance company, dance theater, folklorico, and drill team), several types of band including, among others, stage/jazz band and philharmonic orchestra, and several choirs including men's and women's concert choir, select choir, and a cappella choir.

150. *Id.* These classes include such topics as home maintenance and improvement, agricultural metal fabrication technology, landscape design, floral design and interior landscape development, horticulture, business image, e-commerce, gerontology, pharmacology, emergency medical technician training, certified assistant nurse training, apparel, advertising, retailing, automotive technician I and II, cosmetology I and II, building maintenance I and II, and community service.

- magnet high schools offering studies in the areas of business law, criminal justice, media arts and technology, and biomedical professions;[151]

- full-day kindergarten;

- operation of a new $4.4 million pre-kindergarten center.[152]

Northside ISD[153]

- operation and natatorium and athletic complex in which district operates its nationally recognized water fitness program—one of the top sixty in the nation.[154] The program provides swimming lessons and boasts a diving and swimming program and a water polo program;[155]

- pre-AP in middle schools;[156]

- classes in all four categories of fine arts. Some of the fine arts classes offered by Northside ISD are mariachi, several types of choir, dance levels I through IV, several types of band, and theatre I through IV;[157]

- co-curricular and extra-curricular activities accounting for 1.8% of the district's budget;[158]

- AP classes including statistics, environmental science, comparative government and politics, psychology, Spanish IV, French IV, and Latin IV;[159]

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151. *See* State Ex. 16225 at 91-95.

152. *Id.* at 76.

153. Northside ISD is a "recognized" district under the TEA accountability ratings.

154. The district actually has two swimming centers. In 2001 the district passed a $12 million dollar bond package to build a new one. State Ex. 16256 at 107-08 (Folks Depo).

155. *Id.* at 57-58.

156. http://www.nisd.net/secww/math/index.htm.

157. Northside ISD High School Course Catalog, available at http://www.nisd.net/pdf/instruction/HSCourseCatalogWeb.pdf

158. FOF 222; 4.CR.904-05.

159. Northside ISD High School Course Catalog, *supra* note 157.

- seven categories of career and technology education subjects;[160]
- magnet high schools in the areas of health careers, business careers and communications;[161]
- an evening high school;[162]
- full-day kindergarten;[163]
- maintenance and operation of two gymnasiums at every high school but one,[164] and a field house for basketball and volleyball games;[165]
- payment of travel and lodging for out-of-town UIL events and all uniforms for sports, band, dance, and cheerleading;[166]
- teacher salaries above the state-mandated minimum, and generally above average among districts statewide. The district also pays stipends to coaches, club sponsors, and bilingual teachers;[167]
- no outsourcing of services. According to Superintendent John Folks, the district will not even consider outsourcing copying or janitorial services;[168]

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160. *Id.* Examples of the career and technology classes available at Northside ISD's various high schools include a variety of agriculture classes, banking and financial systems, travel and tourism, entrepreneurship, hospitality services, anatomy and physiology, medical microbiology/pathophysiology, nutrition, culinary sciences, auto collision repair, small engine repair, agricultural mechanics, aircraft mechanics, cosmetology, horticulture, floral design, and fashion and interior design.

161. State Ex. 16256 at 53-57.

162. http://www.nisd.net/cartecww/sunset.html.

163. http://www.nisd.net/instruction/kinder/kinder.htm.

164. State Ex. 16256 at 164.

165. *Id.*

166. *Id.* at 109-10.

167. State Ex. 14603 at 13; 14603 at 14; 14689 at 14; 14778 at 14; App. S.6 at §II.4 ; *see also* State Ex. 16256 at 125-29.

168. *See* State Ex. 16256 at 149.

- eight-period block scheduling instead of seven-period daily schedule at five out of seven high schools.[169] A student enrolled in this program has the opportunity to obtain eight credits per year, allowing participation in additional electives and areas of interest.

Lubbock ISD

- elementary magnet schools with programs in fine arts, communications, technology, and global studies. Classes are offered in Spanish, French, computer literacy, broadcast journalism, humanities, ancient civilizations, environmental science, geography, government and economics;[170]

- elementary magnet school extra-curricular activities including after school programs in ice skating, steel drum/percussion ensemble, guitar, ballet folklorico, violin and cello instruction, broadcast journalism, newspaper club, cross country, girls basketball, honor choir, and girl scouts;[171]

- middle school magnets offering pre-AP classes and courses in media literacy, video production, computer explorations, beginning or advanced piano lab, mariachi and advanced mariachi, beginning electronic media, broadcast journalism, computer technologies, engineering, integrated environmental physical science, integrated environmental life science, integrated environmental earth science, forensic science classes, genetics and genetic engineering, astronomy and space travel, first aid and basic healthcare, ecological research, archaeology and anthropology, applied math and engineering, lego robotics, structures and bridge design, dance, gymnastics, several levels of theater arts and theater production, the history of drama, set design and construction, makeup techniques, costume design, acting, ceramics, art photography, sports medicine, athletic trainers training, ballet, modern dance, and jazz, nutrition and wellness, and gymnastics;[172]

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169. State Ex. 16256 at 81-82. Superintendent Folks testified to his opinion that block scheduling costs less than the traditional seven-period day. *Id.* This belief is not supported by any evidence and it is disproved by CFB ISD's experience—$1.5 million dollars in savings. State Ex. 16225 at 86.

170. *See* Magnet Programs Information and Procedural Guidelines, at 1-4, available at http://www.lubbockisd.org/Magnet/Documents.htm; *see also* http://www.lubbockisd.org/Magnet/Iles2.htm; http://www.lubbockisd.org/Magnet/Tubbs2.htm; http://www.lubbockisd.org/Magnet/Williams2.htm; http://www.lubbockisd.org/Magnet/RWilson2.htm.

171. *See id.*

172. *See* Magnet Programs Information and Procedural Guidelines, *supra* note 170, at 5-15; *see also* http://www.lubbockisd.org/Magnet/Cavazos2.htm; http://www.lubbockisd.org/Magnet/Dunbar2.htm; http://www.lubbockisd.org/Magnet/Hutchinson2.htm; http://www.lubbockisd.org/Magnet/Slanton2.htm.

- elementary outdoor learning centers;[173]

- an aquatic center and an athletic playing field;[174]

- AP classes including environmental science, Latin, Spanish, French, and German, and statistics;[175]

- classes in all four fine arts subjects,[176] and career and technology education in seven areas;[177]

- non-required classes in creative/imaginative writing, Latin, practical law, sociology, the Vietnam War, humanities, literary genres, ceramics, hospitality services, cosmetology, debate I through III, and advanced journalism I through IV;[178]

- high school magnet schools focusing on areas including army junior ROTC, engineering, law and justice, medical professions,[179] and exemplary academics;[180]

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173. *See* Magnet Programs Information and Procedural Guidelines, *supra* note 170, at 2-3.

174. *See* http://www.lubbockisd.org/DistrictInfo/Demographics.htm; State Ex. 15671 at 106-07 (Havens Depo).

175. *See* course listings available at http://www.lubbockisd.org/HighSchools.htm.

176. *See id.* At the high school level, dance is only offered at Lubbock High School. *See* http://www.lubbockisd.org/Magnet/Lubbock2.htm.

177. *See* http://www.lubbockisd.org/HighSchools.htm. The district offers classes in agricultural science, business education, career orientation, health science technology education, family and consumer science, technology education, and trade and industry.

178. *See* http://www.lubbockisd.org/Magnet/Lubbock2.htm; *see also* http://www.lubbockisd.org/Magnet/Estacado2.htm; http://www.lubbockisd.org/chs/courses/index.html.

179. *See* Magnet Programs Information and Procedural Guidelines, *supra* note 170, at 16-24. Each magnet area offers, in addition to the state-required courses, a wide variety of subject-area classes including, among others, anatomy and physiology, courts and criminal procedures, forensic investigation, law and justice, medical microbiology, sports medicine, and veterinary and equine science.

180. At the exemplary academic magnet, classes are available in fashion illustration, sculpture, advanced gymnastics, advanced ballet, jazz, modern dance, horticulture, aquatic science, astronomy, geology, meteorology, and oceanography. *Id.* at 21-24; *see also* http://www.lubbockisd.org/Magnet/Lubbock2.htm.

- unique scheduling at the exemplary academics magnet, offered in conjunction with Texas Tech University, operating on a "four-day academic week, with Friday devoted to enriched activities which augment core course content;"[181]

- block scheduling of some middle school science classes;[182]

- several field trips per year for high-school and middle-school magnet programs including out-of-town trips;[183]

- lower student/teacher ratios than state law requires in some magnet elementary schools;[184]

- full-day kindergarten;

- payment of student travel and lodging for UIL events;[185]

- teacher salaries in excess of the state-mandated minimum.[186]

North East ISD[187]

- operation of the Blossom Athletic Center. The center is an 11,000 seat football stadium and track. It has a new press box and Astroturf field. It also has a 5,000 seat basketball/volleyball arena. The center also includes the Josh Davis Natatorium, which has space for 1,500 spectators and an athletic center. The Blossom Athletic Center also has a baseball stadium, two soccer fields, and thirteen tennis courts;[188]

- non-required classes include film critique, geology, meteorology, oceanography, medical microbiology, anatomy and physiology, molecular genetics, sociology,

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181. *See* Magnet Programs Information and Procedural Guidelines, *supra* note 170, at 21.

182. *See id.* at 9.

183. *See id.* at 7, 11, 20.

184. *See id.* at 2-4.

185. *See* State Ex. 15671 at 32.

186. State Ex.14033 at 14; 13975 at 13; 14063 at 14; App. S.7 at §II.4.

187. North East ISD is an "exemplary" rated district under the TEA's accountability rating system.

188. State Ex.16111 at 76-77 (Middleton Depo); *see also* http://www.neisd.net/athletics/facilities.html.

psychology, the history of San Antonio, French V, German V, Spanish V,[189] Japanese,[190] Roman civilization and culture, humanities, creative writing, aerospace academy I and II, fundamentals of criminal law, criminal investigations, pharmacology, mental health, pathophysiology, interior design, nutrition and food sciences, apparel and fashion, fashion design, and junior ROTC;[191]

- central office personnel auto allowances;[192]
- co-curricular and extra-curricular activities totaling 2.2% of the district's budget;[193]
- pre-AP and AP classes;[194]
- classes in four fine-arts subjects,[195] and seven career and technoloy education subjects;[196]

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189. Spanish is offered through level VII at Winston Churchill High School. *See* http://www.neisd.net/churchill/cousecatalog/coursecatalog05-06-OfficialCopy.pdf.

190. Japanese is only offered at Lee High School. *See* http://www.neisd.net/lee/counsell/HANDBK03.pdf.

191. *See, e.g.*, http://www.neisd.net/curriculum/dual_credit_program.html; http://www.neisd.net/churchill/cousecatalog/coursecatalog05-06-OfficialCopy.pdf; http://www.neisd.net/lee/counsell/HANDBK03.pdf; http://www.neisd.net/mac/catalog/; http://ww

192. *See* State Ex. 16111 at 174.

193. FOF 249; 4.CR.908-09.

194. *See, e.g.*, http://www.neisd.net/curriculum/dual_credit_program.html; http://www.neisd.net/churchill/cousecatalog/coursecatalog05-06-OfficialCopy.pdf; http://www.neisd.net/lee/counsell/HANDBK03.pdf; http://www.neisd.net/mac/catalog/; http://ww

195. *See, e.g.*, http://www.neisd.net/curriculum/dual_credit_program.html; http://www.neisd.net/churchill/cousecatalog/coursecatalog05-06-OfficialCopy.pdf; http://www.neisd.net/lee/counsell/HANDBK03.pdf; http://www.neisd.net/mac/catalog/; http://www.neisd.net/isa/curriculum/curriculum.htm.

196. *See* http://www.neisd.net/career/CAMPUS_CAREER_&_TECH.html.

- magnet programs in design and technology,[197] agriscience,[198] and performing arts;[199]
- payment of meals and lodging for students participating in UIL trips;[200]
- middle-school athletic facilities including a football field, two gymnasiums, and tennis courts;[201]
- construction of a new school instead of implementing the more cost-effective option of moving to an multitrack year-round school program;[202]
- non-essential district personnel including a district translator and a consultant;[203]
- community education classes;[204]
- teacher salaries in excess of the state-mandated minimum and the district average;[205]
- block scheduling;[206]
- depositing funds into district fund balance instead of decreasing tax rate when district experienced unexpected increase in property values.[207]

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197. *See* http://www.neisd.net/data/index.html.

198. *See* http://www.neisd.net/amp/amp_career/pathways.htm.

199. *See* http://www.neisd.net/nesa/admin/majors.htm.

200. *See* State Ex.16111 at 174.

201. *See* http://www.neisd.net/athletics/facilities.html.

202. *See* State Ex. 16111 at 74-76.

203. *See id.* at 179-80.

204. *See* http://www.neisd.net/ComEd/.

205. State Ex.14361 at 13; 14429 at 14; 14472 at 13; App. S.8 at §II.4.

206. *See* State Ex. 16111 at 158.

207. *Id.* at 123.

Kaufman ISD

- maintenance of small schools, each with only *two* grades, thus losing potential to save by economies of scale;[208]

- non-required classes such as anatomy and physiology, creative and imaginative writing, content mastery, discipline management, floral design, interior landscape, preparation for parenting, psychology, and sports medicine;[209]

- co-curricular and extra-curricular activities totaling 3.4% of the district's budget;[210]

- teacher salaries in excess of the state-mandated minimum and in general, above the district average;[211]

- AP classes;[212]

- classes in all four fine arts areas,[213] and career and technology classes in five subjects;[214]

- full-day pre-kindergarten and kindergarten;[215]

- no outsourcing of services.[216]

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208. *See* State Ex. 15678 at 32-33 (Wood Depo). Pre-kindergarten and kindergarten are at one facility; first and second grade are in one school; third and fourth in another; then fifth and sixth in one school; and seventh and eighth in one school. Finally at the high school level, the district has ninth through twelfth grade in one school.

209. *See* Staff Responsibility Record, App. T.

210. FOF 265; 4.CR.911.

211. State Ex. 13722 at 12; 13728 at 13; 13735 at 13; App. S.9 at §II.4.

212. *See* Staff Responsibility Record, App. T.

213. *Id.*

214. *Id.*

215. http://kaufman.ednet10.net/Edwards/parent_guide_p6.htm.

216. *See* State Ex. 15678 at 46.

3. The WOC Districts are not "forced" to make more costly choices.

The WOC Districts claimed, and the trial court made extensive findings that, they were "forced" to make all of the expenditures that they made—in effect that they had no real discretion. The districts claim, for example, that market forces compel them to pay teachers above the state-mandated minimum salary and that their communities desire extensive lists of electives and extra-curricular activities. They also point to the fact that their accountability ratings depend, in part, on their drop-out rate and claim that a wide variety of interesting classes and activities is necessary to keep students in school.[217]

None of those reasons, or any others that the districts have offered, has anything to do with *state requirements*. The test for determining whether the State has created an unconstitutional state property tax cannot, consistent with the Court's jurisprudence, depend upon forces beyond the State's control. The WOC Districts were required to demonstrate that *state* requirements, and not market forces for teacher salaries (which, in large part, are district driven as the districts continually bid against each other for teachers, *see, e.g.*, 7.RR.108-09) or student and community preferences, caused the tax floor to equal the tax ceiling. The State does not dispute that the districts are faced with difficult policy or political choices and that they will in many cases not be able to offer every single class or service that the community might desire or that might be beneficial to students. But the districts' difficult choices do not leave them without meaningful discretion in setting their tax rate.

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217. Although dropout rates are a factor in accountability ratings, and co-curricular and extra-curricular activities could be helpful in keeping students interested in school, the districts introduced no evidence beyond the *ipse dixit* of their superintendents that they would be unable to meet the accountability standards for dropout rates without their broad and extensive array of extracurricular activities.

The Court should hold the WOC Districts to their burden to prove that the State, and not some other entity or local consideration, forced them to tax at the maximum rate. Because the districts have failed to satisfy their burden as a matter of law, the Court should reverse and render judgment for the State on this claim.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's judgment and render judgment dismissing the districts' adequacy, suitability, and efficiency claims, or render judgment in the State's favor.

Respectfully submitted,

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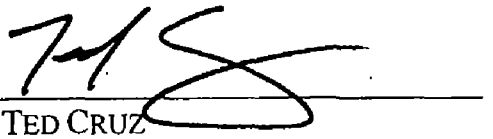

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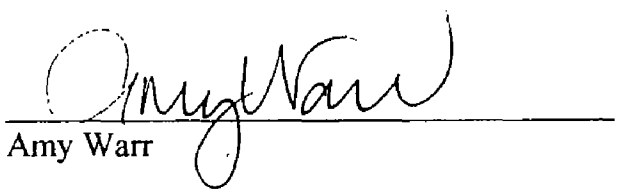

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