

No. 14-0776

In the Supreme Court of Texas

MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION,
IN HIS OFFICIAL CAPACITY, *ET AL.*,
Appellants/Cross-Appellees.

v.

CALHOUN COUNTY INDEPENDENT SCHOOL DISTRICT, *ET AL.*,
Appellees/Cross-Appellants/Cross-Appellees,

v.

TEXAS CHARTER SCHOOLS ASSOCIATION, *ET AL.*; AND
JOYCE COLEMAN, *ET AL.*,
Appellees/Cross-Appellants,

v.

THE TEXAS TAXPAYER AND STUDENT FAIRNESS COALITION, *ET AL.*;
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, *ET AL.*; AND
FORT BEND INDEPENDENT SCHOOL DISTRICT, *ET AL.*,
Appellees/Cross-Appellees.

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

**BRIEF OF TEXAS CHARTER SCHOOLS ASSOCIATION, *ET AL.*
IN RESPONSE TO BRIEF OF STATE DEFENDANTS**

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ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The Court should grant oral argument in this case. The charter school plaintiffs recognize that there are a large number of parties in this case, and do not wish to overburden the Court. The claims presented by the charter school plaintiffs are relatively simple and should not require an extensive amount of time to present.

INTRODUCTION

Under this Court's established precedents, if any party is entitled to relief, it is the charter school plaintiffs, in light of the undisputed facts concerning charter school funding and performance on standardized tests. The only way the State can defeat the charter school claims is to overturn this Court's precedents. And that is precisely what the State sets out to do.

To begin, the State suggests (although it is not clear) that sovereign immunity may bar the charter school claims. But the State does not have sovereign immunity to violate the Constitution. This Court's precedents confirm what every high school civics class teaches—that our judiciary plays a vital role in protecting the constitutional rights of every citizen. And there is no basis in law or logic for uniquely denying this basic principle to charter school families, while allowing other students and parents their day in court. Likewise, this Court has repeatedly rejected the State's political question argument.

So there is no avoiding the merits of the charter school claims. The State argues that there can be only one, single, statewide constitutional claim—either every school is unconstitutionally inadequate, or none is. But this too violates the precedents of this Court, which have found some schools adequate and others not. The State also claims that courts may not analyze funding at all, because it is an

“input” rather than an “output.” But this Court rejected that very argument in the last school finance case.

The State has not articulated a valid basis for overturning this Court’s precedents. Accordingly, the charter school plaintiffs are entitled to judgment.

STATEMENT OF FACTS

Texas charter schools, like other public schools, “have the primary responsibility for implementing the state’s system of public education and ensuring student performance.”¹ TEX. EDUC. CODE § 11.002. They educate about two hundred thousand public school students annually. RR 290 at 1168, Ex. 9071 at 6.² That number will only grow over time, as charter schools continue to experience “exponential growth” at a rate of 15 percent per school year. CR 12 at 567, FOF 1507; RR 290 at 1168, Ex. 9071 at 6.

The charter school plaintiffs are the Texas Charter Schools Association, a non-profit association that represents about 90 percent of Texas charter school

¹ This brief uses “charter school” to refer to both open-enrollment charter schools and university charter schools—both of which are funded directly by the State of Texas. There are two other types of charter schools—home-rule school district charter schools and campus charter schools—which are funded through local school districts, and are not at issue in this case. *See* TEX. EDUC. CODE § 12.002.

² For purposes of this brief, “RR [volume number] at [page number]” refers to the Reporter’s Record and uses the page number of the pdf because the Reporter’s Record is not continuously paginated within a volume. “CR [volume number] at [page number] refers to the Clerk’s Record. “FOF” and “COL” refer to the district court’s findings of fact and conclusions of law, which can be found at Tab 3 of the appendix to the charter school plaintiffs’ opening brief.

students, and parents of charter students, who sue in both their individual capacities and as next friends of their children. CR 12 at 242, FOF 7; RR 244 at 56, 58, Ex. 9048 at 12, 14.

I. Charter Schools Are Funded Based On District Funding, But They Receive Even Less Money And Educate More Disadvantaged Students.

To deliver an adequate education, charter schools must receive adequate funding, as guaranteed under the Texas Constitution and this Court’s numerous precedents. “The amount of money spent on a student’s education has a real and meaningful impact on the educational opportunity offered that student.” *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 393 (Tex. 1989). *See also Neeley v. West Orange-Cove Consol. Indep. Sch. Dist. (WOC II)*, 176 S.W.3d 746, 788 (Tex. 2005); CR 12 at 400-01, FOF 641-647.

Under the current school finance system, charter schools are subject to the same funding formulas as school districts—known as the Foundation School Program (“FSP”). CR 12 at 565, FOF 1498 (explaining that charter schools receive both Tier 1 and Tier 2 funding). But there are two critical distinctions. First, charter schools are categorically ineligible for facilities funding. CR 12 at 566, FOF 1503. Second, unlike district funding, charter funding does not account for the particular characteristics of each charter school (*i.e.*, the cost of education and the size and sparsity of the local population). Instead, the funding formulas for charter schools rely on state-wide averages of each of these factors—even though

each factor varies widely across the State of Texas. TEX. EDUC. CODE § 12.106(a-1)-(a-2). These distinctions contribute to a significant funding gap: charter schools receive at least \$1,000 less per weighted student than school districts do. RR 290 at 1125, Ex. 9065.

This funding disparity is especially significant because charter schools tend to educate more economically disadvantaged students, who require additional resources. While 60 percent of students in school districts are economically disadvantaged, 71 percent of charter students are. RR 290 at 1169, Ex. 9071 at 7; *compare* CR 12 at 246, FOF 13, *with* RR 61 at 33:3-8. As the district court found, schools must spend additional resources to adequately educate economically disadvantaged students. CR 12 at 248, 260, 300, 309, FOF 23, 67, 209-10, 246. Thus, while all public schools face many of the same costs for achieving state standards, RR 42 at 77:8-79:21; RR 244 at 66, Ex. 9048 at 22, charter schools face the additional costs of educating a disproportionate number of economically disadvantaged students. RR 290 at 1169, Ex. 9071 at 7.

In sum, the same general formulas govern funding for charter schools and districts, but charter schools receive significantly less money to educate students with greater needs.

II. Charter Student Performance Suffers As A Result of Inadequate Funding.

Charter schools do not receive enough funding to accomplish a general diffusion of knowledge. Indeed, every single charter school in the state has received less funding than necessary.

According to the district court's findings of fact, a general diffusion of knowledge required FSP funding of *at least* \$6,404 per weighted student during the 2013-2014 school year. CR 12 at 398, FOF 635. A "credible range" estimating the cost of adequacy extended as high as \$6,818. CR 12 at 398-99, FOF 635-36; RR 289 at 1959, Ex. 6618 at 19. The State did not introduce an alternative estimate. CR 12 at 295, FOF 626-27.

The average charter school received only \$5,400-\$5,500 during the 2013-2014 school year—nearly \$1,000 less than minimally necessary. RR 290 at 1125, Ex. 9065. Indeed, the highest-funded charter school received only \$6,068, still hundreds of dollars short. RR 290 at 1179, Ex. 9071 at 17. Every charter school in the state received less money than required to meet constitutional standards.

As a result, charter schools, despite their best efforts, are unable to provide every child with an adequate education. CR 12 at 195, Final Judgment 8 ("All performance measures considered at trial, including STAAR tests, EOC exams, SATs, the ACTs, performance gaps, graduation rates, and dropout rates among others, demonstrated that Texas public schools [both charter schools and school

districts] are not accomplishing a general diffusion of knowledge due to inadequate funding.”).

At least six witnesses testified explicitly that charter schools are not achieving a general diffusion of knowledge, including school finance experts Dr. Anthony Rolle, Dr. R. Craig Wood, and Mr. Lynn Moak.³ Standardized test results supported this testimony. Only 42 percent of ninth graders in charter schools passed all of the STAAR end-of-course exams. RR 208 at 1482, Ex. 6349 at 26. Over time, the State will increase the requirements for passing STAAR exams. *See* CR 12 at 269, FOF 96.

Considering college readiness, no more than 31 percent of charter students tested “college ready” on the TAKS Math and Language Arts tests between 2006 and 2011. RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72. School districts, which receive significantly more funding, performed better but never had more than half of their students testing college ready in both subjects. RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72.

During the same time period, only 12-15 percent of charter school students reached “college ready” levels on the SAT or ACT. RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72. These inadequate results have continued. In 2013, an

³ *See* RR 44 at 61; RR 44 at 93-99; RR 7 at 70:1-72:15; RR 54 at 161-162; RR 61 at 31-33. *See also* RR 43 at 109-110; RR 42 at 192 (testimony of charter school operators). Notably, Dr. Wood testified for the state in *WOC II*.

even lower 11 percent of charter school students earned scores indicating college readiness (that is, 1110 out of 1600 on the SAT or 24 on the ACT composite). *See* RR 290 at 1200, 1202, Ex. 9071 at 38, 40. For 2006 through 2011, the average SAT score for charter students never exceeded 910 out of 1600. RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72.

The State rated 17.6 percent of charter schools academically unacceptable in 2010-2011, compared to only 4.4 percent of districts. CR 12 at 567, FOF 1508; RR 243 at 222, Ex. 9041 at 14. Indeed, the State has moved to revoke at least twenty charters in recent years,⁴ none of which received sufficient funding. RR 290 at 1179, Ex. 9071 at 17. Clearly, students pay the price when the State fails to provide adequate funding.

III. The Charter School Plaintiffs Prevailed On Their System-Wide Adequacy Claim.

The charter school plaintiffs filed this suit for declaratory and injunctive relief to remedy the inadequate school system for students and to prevent state officials from forcing charter schools to implement unconstitutional statutes. CR 7 at 641. They claimed that the system for financing charter schools violates the

⁴ Texas Education Association, *Charter Schools Identified for Mandatory Revocation under SB 2* (Dec. 9, 2014), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2014/Charter_schools_identified_for_mandatory_revocation_under_SB_2/; Texas Education Association, *Six Identified for Mandatory Revocation of Charters under SB 2* (Dec. 19, 2013), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2013/Six_identified_for_mandatory_revocation_of_charters_under_SB_2/.

Texas Constitution because it is inadequate, inefficient, and unsuitable. *See* TEX. CONST. art. VII, § 1.

The district court consolidated the case with related claims filed by school districts. CR 1 at 340. Both the charter school plaintiffs and the school districts presented compelling evidence that the state’s school finance system violates Article VII, § 1 of the Texas Constitution. The charter school plaintiffs prevailed on their claim that funding is unconstitutionally inadequate as a system-wide matter—that is, as applied to both charter schools and school districts alike. CR 12 at 195-96, Final Judgment 8-9; CR 12 at 586, COL 89.⁵

The State filed a direct appeal, and this Court noted probable jurisdiction on January 23, 2015. The State filed an opening brief on April 13, 2015.

STANDARD OF REVIEW

Both subject-matter jurisdiction and the constitutionality of a state statute are questions of law that this Court reviews *de novo*. *See Graber v. Fuqua*, 279 S.W.3d 608, 631 (Tex. 2009); *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001). This Court can rely on undisputed facts as well as the district court’s findings. *See WOC II*, 176 S.W.3d at 785.

⁵ The claims on which the charter school plaintiffs lost below are addressed in their opening brief, which was filed on April 13, 2015.

SUMMARY OF ARGUMENT

Sovereign immunity does not bar this suit. The charter school plaintiffs are seeking only the types of constitutional relief sought by the district plaintiffs, not the types of relief that the State argues are barred. Moreover, regardless of the type of prospective relief sought, sovereign immunity does not bar *ultra vires* claims to vindicate constitutional rights. This is not a suit to alter a contract; indeed, the parent plaintiffs are not even parties to a contract with the State.

The public school system is unconstitutionally inadequate. The district court correctly analyzed the charter school plaintiffs' system-wide adequacy claim along with the district plaintiffs' claim. The district court also properly conducted a factual analysis into both the educational results that the system produces as well as the level of funding required to meet constitutional standards. Overwhelming evidence, including numerous standardized tests and expert testimony, demonstrated that Texas students are not receiving an adequate education. The court correctly concluded that the system is unconstitutionally inadequate.

ARGUMENT

The Texas Constitution obligates the Legislature to create an adequate system of public schools. It 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 Court has construed this provision to require “adequate” funding sufficient to “achiev[e] the general diffusion of knowledge the Constitution requires.” *WOC II*, 176 S.W.3d at 753; *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 731 (Tex. 1995) (“the provision of funding necessary for a general diffusion of knowledgle”). The district court correctly ruled that the public school system is not adequate.

I. The District Court Correctly Ruled That Sovereign Immunity Does Not Bar The Charter School Plaintiffs’ Claims.

The district court had jurisdiction to decide this case. Sovereign immunity does not bar the charter school plaintiffs’ claims for two reasons. First, the State’s argument, by its own terms, does not apply to the claims at issue on appeal. Second, this suit prevents *ultra vires* enforcement of unconstitutional statutes; it does not alter a contract.⁶

⁶ The State raises multiple jurisdictional arguments, aside from sovereign immunity, that this Court has already rejected. The Calhoun County ISD Plaintiffs appropriately refute these arguments in their brief. Because those responses apply equally to charter schools and students, the charter school plaintiffs incorporate them by reference rather than burden the Court with duplicative briefing.

A. The Charter School Plaintiffs Are Not Seeking The Type Of Relief That The State Argues Is Barred.

The State’s sovereign immunity argument is limited in scope—so limited that, by its own terms, it does not apply in this case. The State argues that the charter school plaintiffs’ claims are barred “[t]o the extent [they] seek to declare the statutory cap on charter schools unconstitutional, change the funding formula for charter schools, or create an entitlement to facilities funding.” State Br. 70 (emphasis added). The charter school plaintiffs do not seek those three types of relief.

First, the charter school plaintiffs are not pursuing a claim against the statutory cap. Charter School Plaintiffs Opening Br. 11 n.6. Second, the charter school plaintiffs are seeking the traditional declaratory and injunctive relief that this Court has previously approved. *See* CR 7 at 660-61, Plaintiffs’ Fifth Am. Orig. Pet. & Request for Declaratory Judgment 20-21. This is the same type of relief that the school districts seek. As the State readily concedes, the charter school “plaintiffs may bring a suit challenging the constitutionality of the system to the extent that other individuals and school districts may do so.” State Br. 74-75.⁷

⁷ The charter school plaintiffs sued the same defendants that school districts have sued in the past: the Commissioner of Education, the Texas Education Agency, the Comptroller of Public Accounts, and the State Board of Education. *Compare WOC II*, 176 S.W.3d at 754 n.16, *with* CR 7 at 641, Plaintiffs’ Fifth Am. Orig. Pet. & Request for Declaratory Judgment 1.

No judicial relief would directly change any funding formulas or create any entitlements. The charter school plaintiffs did not seek such relief. Instead, their petition prayed for an “injunction prohibiting Defendants from giving any force and effect to the unconstitutional sections of the Texas Education Code relating to the financing of open-enrollment charter schools until the constitutional violation is remedied.” CR 7 at 660, Plaintiffs’ Fifth Am. Orig. Pet. & Request for Declaratory Judgment 20. In seeking such an injunction, and related declaratory relief regarding the meaning of the constitution, the charter school plaintiffs recognize that this Court “do[es] not dictate to the Legislature how to discharge its duty” but instead “decide[s] whether [the constitutional] standard has been satisfied.” *WOC II*, 176 S.W.3d at 726. It will be up to the Legislature to consider new statutes in light of the injunction and declaratory relief.⁸

⁸ Even the most specific relief requested, which the district court denied, does no more than ask that the district court “find” as a factual matter that the constitutional standards “require[] facility funding for open-enrollment charter schools.” CR 7 at 660, Plaintiffs’ Fifth Am. Orig. Pet. & Request for Declaratory Judgment 21. Thus, the charter school plaintiffs asked that the district court apply this Court’s determination that “facilities [are] necessary for an adequate system” to charter schools. *WOC II*, 176 S.W.3d at 792. Such a finding would be analogous to findings about the amount of money required to meet constitutional standards. *E.g.*, CR 12 at 398, FOF 635; *see also Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 731 (Tex. 1995) (describing “the funds necessary for a general diffusion of knowledge”). It would not “change the funding formula” or “create an entitlement.” State Br. 70. Those tasks are left to the Legislature. Although the distinction is admittedly nuanced, it is one the State has already invoked in the jurisdictional context. *See* State Br. 61 (distinguishing between the relief sought in this case and an injunction ordering the Legislature “to enact particular laws or appropriate a specific amount of funding” for purposes of redressability).

B. Sovereign Immunity Does Not Bar Ultra Vires Claims Against State Officers.

Sovereign immunity does not bar prospective relief against the *ultra vires* enforcement of unconstitutional statutes. See *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 9-10 (Tex. 2015); *City of El Paso v. Heinrich*, 284 S.W.2d 366, 372 (Tex. 2009).

The charter school plaintiffs’ “rights have been violated by the unlawful action of a State official,” the enforcement of unconstitutional statutes, so they “may bring suit to remedy the violation or prevent its occurrence.” *Dir. of Dep’t of Agric. & Env’t v. Printing Indus. Ass’n of Tex.*, 600 S.W.2d 264, 265-66 (Tex. 1980). “[U]ltra vires suits do not attempt to exert control over the state—they attempt to reassert the control of the state” over its officers. *Heinrich*, 284 S.W.3d at 372. The charter school plaintiffs may sue state officials for constitutional violations.

That a charter “is in the form of a contract” is a red herring. State Br. 73. First, contracts do not create or trigger sovereign immunity. As Chief Justice Hecht has explained, the rule is not “that the State is always immune from suit for breach of contract absent legislative consent”; the rule is “only that the mere execution of a contract for goods and services, without more, does not waive immunity from suit.” *Federal Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 413 (Tex. 1997) (Hecht, J., concurring). “The existence of a contract is not talismanic, but

merely leaves the state’s immunity from suit intact; it does not build an impenetrable wall nullifying the possibility of other waivers of and exceptions to that immunity.” *Tex. Parks & Wildlife Dep’t v. Callaway*, 971 S.W.2d 145, 150 (Tex. App.—Austin 1998, no pet.). Because no sovereign immunity is implicated by this suit, the existence of a contract is irrelevant.

Second, no relief requested by the charter plaintiffs would “alter the terms and conditions of charters.” State Br. 70. The individual student and parent plaintiffs are not parties to a contract with the State. In addition, no charter provision will change as a result of this suit. *See* RR 244 at 29-32, Ex. 9043 (sample contract). That a contract incorporates by reference “all applicable state and federal laws” does not prevent courts from ruling on the constitutionality of state statutes. *Id.*⁹ “[T]he mere existence of a contract between parties does not transform any possible legal claim between the parties into a contract claim.” *Scott v. Alphonso Crutch Life Support Center*, 392 S.W.3d 132, 139 (Tex. App.—Austin 2009, pet. denied) (refusing to bar a charter school’s claim based on sovereign immunity).

⁹ The State itself has previously recognized this logic. In other litigation about the nature of charters, the State has argued that “nothing in the statute or in the schools’ charters prohibits the Legislature from changing” state law governing charter schools. Brief of Appellants, *T.E.A. v. Am. YouthWorks, Inc.*, Nos. 03-14-00283-CV, 03-14-00360-CV, 2014 WL 3539915, at *24 n.5 (Tex. App.—Austin, July 8, 2014). If nothing in a charter prevents changes in state law, then a change in state law must not alter the terms of a charter.

In any event, sovereign immunity does not bar claims based on constitutional obligations that happen to coincide with contractual obligations. *See Callaway*, 971 S.W.2d at 150 (refusing to apply sovereign immunity when the state, “apart from its contractual obligations, has a duty not to” violate the Takings Clause). This remains true regardless of whether the defendant is an official or an agency. *Id.* at 146 (noting that the defendant was a state department, not an official).

II. The District Court Properly Ruled That The Public School System, Including Charter Schools, Is Unconstitutionally Inadequate.

The district court’s ruling in favor of the charter school plaintiffs on system-wide adequacy carefully follows well-established precedent. The State’s arguments on appeal essentially attack this Court’s previous opinions, not anything novel about the district court’s judgment. Recalling the importance of *stare decisis* in school finance law, this Court should reject the State’s proposed approaches. As this Court has observed:

For fourteen [now twenty-six] years the Legislature has worked to bring the public school finance system into conformity with constitutional requirements as declared by this Court. To announce now that we have simply changed our minds on matters that have been crucial to the development of the public education system would not only threaten havoc to the system, but would, far more importantly, undermine the rule of law to which the Court is firmly pledged.

West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis (WOC I), 107 S.W.3d 558, 585 (Tex. 2003).

A. The State’s Theory That Adequacy Can Be Enforced Only State-Wide Is Both Irrelevant And Wrong—It Contradicts Precedent, Original Intent, And The Legislature’s Interpretation Of The Constitution.

The district court properly granted relief to the charter school plaintiffs when it determined that the public school system as a whole is inadequate.¹⁰ Because the State does not provide adequate funding to districts and “because charter schools are financed based on state averages of ISD funding levels,” charter schools necessarily receive inadequate funding as well. CR 12 at 580, 586, COL 61, 89. The State argues this ruling must be reversed because it applied adequacy “to only a *part* of the system.” State Br. 107. First, the district court did not treat charter schools as a stand-alone part of the system; its ruling reflects an analysis of the system as a whole. Second, and in any event, because the constitutionally required diffusion of knowledge must be “general,” each part of the system must be adequate. Thus, any separate analysis of charter schools was entirely permissible.

1. The district court granted relief to the charter school plaintiffs by declaring “that funding for open-enrollment charter schools also is inadequate”

¹⁰ Because this ruling extends relief to the entire public school system, the charter school plaintiffs have referred to the underlying violation as “system-wide.” Charter School Plaintiffs Opening Br. 26; *see also* CR 12 at 196, Final Judgment 9; CR 12 at 586, COL 89.

because “charter schools are financed based on state averages of school district M&O funding levels.” CR 12 at 196, Final Judgment 9.

The State criticizes this analysis for including charter school students as a “disaggregated student group[,]” which represents “only a *part* of the system.” State Br. 107-08. But the State mischaracterizes the import of the district court’s ruling. Rather than separate out charter schools, it analyzed them together with districts precisely because the evidence showed they are similarly situated for this claim. Both are part of the system and suffer from inadequate formulas. Reversing this part of the final judgment, as the State proposes, would create the very division the State seeks to avoid: it would create an artificial distinction in a system-wide claim rather than treat “the public-education system *as a whole*.” State Br. 108.

2. In any event, analyzing the adequacy of distinct parts of the system is permissible because the right to an adequate education belongs to all Texas students individually. *See WOC II*, 176 S.W.3d at 790 (“all students”). After all, adequacy “is simply shorthand for the requirement that public education accomplish a *general* diffusion of knowledge.” *Id.* at 753 (emphasis added). A diffusion of knowledge cannot be “general” if it is “limited and unbalanced.” *Edgewood I*, 777 S.W.2d at 396. Of course, to determine whether the diffusion of

knowledge is “limited and unbalanced,” courts must assess individual educational opportunities in each part of the public school system.

In contrast, the State proposes an all-or-nothing theory of the constitution that would ignore the adequacy of charter schools as long as “the public-education system *as a whole* is” adequate. State Br. 108. The State’s argument contradicts precedent, not to mention both the original intent as well as the Legislature’s understanding of the constitution.

First, this Court’s precedents could not stand if adequacy could be assessed only system-wide. In *WOC II*, this Court recognized that funding for some schools can be inadequate even if other schools receive plenty of funding. *See* 176 S.W.3d at 798 (distinguishing between “districts [that] needed no additional revenue to provide an adequate education” and “districts that need additional revenue”). Similarly, *Edgewood I* was premised on the finding that property-poor districts, unlike property-rich districts, could not “generate sufficient revenues to meet even minimum standards.” 777 S.W.2d at 397.

To support its all-or-nothing theory of adequacy, the State erroneously relies on this Court’s unrelated explanation that efficiency considers both instructional funding and facilities funding together. *See WOC II*, 176 S.W.3d at 790. A single school district receives both instructional funding and facilities funding. Because efficiency focuses on available funding, it makes sense to analyze both types of

state funding. But this Court does not treat funding made available to one school as if it were available to other schools. *See, e.g., Edgewood I*, 777 S.W.2d at 393 (contrasting the funding available to property-poor and property-rich school districts). Similarly, there is no reason to treat the superior education offered to a district student in Dallas as an offset for the inadequate education offered to a charter school student in El Paso. That one school may provide an excellent education does nothing to help the other students deprived of educational opportunity.

Second, important originalist evidence confirms that the Education Clause creates individual rights in each Texas student. “At the Constitutional Convention of 1875, delegates spoke at length on the importance of education for *all* the people of this state, rich and poor alike.” *Id.* at 395. The Chairman of the Education Committee declared “that the means of a common school education should, if possible, be placed within the reach of *every child* in the State.” *Id.* (quoting S. McKay, *Debates in the Texas Constitutional Convention of 1875* 198 (1930)) (emphasis added). Of course, an individual right to an adequate education is meaningless if adequacy can be enforced only on a state-wide, all-or-nothing basis.

Third, the Legislature itself has rejected the State’s view by linking *individual* educational opportunity to the general diffusion of knowledge:

The mission of the public education system of this state is to ensure that *all* Texas children have access to a quality education

that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. That mission is grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens.

TEX. EDUC. CODE § 4.001 (emphasis added). Notably, the Legislature focused on “all Texas children” receiving adequate education rather than the system doing well enough “as a whole.”

Finally, the State implies that adequacy refers to the condition of the system as a whole because there is only one system. State Br. 107 (“*an* efficient system,” “the system”). As the Texas Code Construction Act illustrates, that a phrase is worded in the singular rather than the plural is of no interpretive significance. *See* TEX. GOV’T CODE § 311.012(b) (“The singular includes the plural and the plural includes the singular.”). For example, “[t]he right of the people” in the Fourth Amendment, despite being phrased in the singular, secures individual rights. For that reason, Fourth Amendment cases analyze particular searches of particular individuals, not whether the police as a whole tend to perform reasonable searches. Similarly, “the right of the people” protected by the Second Amendment is enforceable for particular individuals, not the people as a whole. *See District of Columbia v. Heller*, 554 U.S. 570, 579-81 (2008) (explaining that “right of the people,” as used in the First, Second, and Fourth Amendments, “unambiguously refer[s] to individual rights, not ‘collective’ rights”). As the State has previously

recognized, individual rights are enforceable by individual plaintiffs; “the people” need not sue “as a collective . . . to enforce such rights.” Brief of the State of Texas, et al., *District of Columbia v. Heller*, No. 07-290, 2008 WL 405558, at *6-9 (U.S. Feb. 11, 2008).

In short, precedent, original intent, and the Legislature’s stated policies all demonstrate that adequacy is an individual right of particular students. This Court’s enforcement of adequacy rights need not be limited to state-wide claims.

B. The System Is Inadequate Because It Does Not Achieve A General Diffusion Of Knowledge And Because The Legislature Has Not Provided The Funding To Do So.

The district court correctly ruled that the public education system is inadequate, that is, not achieving a general diffusion of knowledge. The State has not met its burden of showing that this ruling was incorrect as a matter of law.

1. The District Court Followed This Court’s Precedent By Analyzing Both Educational Outcomes And The Funding Necessary To Achieve Those Outcomes, Not Funding For Its Own Sake.

In analyzing adequacy, the district court considered both educational outcomes and expert testimony regarding the amount of funding needed to achieve those outcomes. *See* CR 12 at 277, FOF 126 (“Statewide performance results using a variety of metrics reveal that the State is far from meeting its objectives relating to college and career readiness.”); CR 12 at 396, FOF 628 (assessing

“funding required to accomplish the constitutionally-mandated general diffusion of knowledge”).

Mischaracterizing the opinion below, the State recycles an argument rejected in *WOC II*. The State argues that the court based its ruling on “deficiencies in educational ‘inputs’—chiefly, funding—rather than the educational ‘outputs’ that are the only proper adequacy metric.” State Br. 95. But the district court neither ignored outputs (that is, educational outcomes) nor inappropriately focused on inputs.

First, the district court focused intently on educational outcomes. *See* CR 12 at 277-300, FOF 126-209. Indeed, it declared “that Texas public schools *are not accomplishing a general diffusion of knowledge* due to inadequate funding.” CR 12 at 195, Final Judgment 8 (emphasis added). Thus, the district court determined that outputs were not constitutionally adequate, and then found that deficiency was caused by a lack of funding.

Second, the district court did not analyze funding for its own sake. The court instead assessed how much funding is necessary to achieve a general diffusion of knowledge. *See* CR 12 at 398, FOF 635 (“[T]he Court finds that achieving a level of funding adequate to meet the State’s performance standards requires, at a minimum, the \$6,404 per WADA in FSP funding dollars.”). It also knew that charter schools were not receiving that level of funding. RR 290 at

1125, Ex. 9065 (showing that charter schools receive about \$5,600 on average); RR 290 at 1179, Ex. 9071 at 17 (showing that the highest-funded charter school received only \$6,068).

This Court has expressly approved that approach. *WOC II* approved the district court “consider[ing] how funding levels and mechanisms relate to better-educated students” precisely because adequacy is “result-oriented.” 176 S.W.3d at 788. In doing so, the Court rejected the State’s argument that “the district court focused too much on ‘inputs’ to the public education system—that is, available resources.” *Id.*¹¹ Similarly, this Court has itself relied on quantifications of the amount of “fund[ing] necessary for a general diffusion of knowledge.” *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 731 (Tex. 1995); *see also id.* at 733 (discussing “sufficient revenue to satisfy the requirement of a general diffusion of knowledge”).

Finding that a certain amount of money is necessary for a general diffusion of knowledge is no more remarkable than this Court’s observation that “facilities [are] necessary for an adequate system.” *WOC II*, 176 S.W.3d at 792. Facilities,

¹¹ In its opening brief, the State claims that the *WOC II* Court “agree[d] with” the State’s argument that adequacy “depends *entirely* on outputs.” State Br. 80. That is false. *WOC II* rejected the State’s argument against analyzing inputs. The Court “agree[d] that the constitutional standard is plainly result-oriented” but nonetheless allowed the consideration of inputs that contribute to outputs. *WOC II*, 176 S.W.3d at 788.

like funding, are an input for a system that is supposed to produce an adequate education.

Because the adequacy analysis allows courts to consider funding, the State's argument amounts to nothing more than a challenge to findings of fact. CR 12 at 398, FOF 635 (finding that "a level of funding adequate to meet the State's performance standards requires" at least "\$6,404 per WADA in FSP funding dollars"); CR 12 at 398-99, FOF 635-36; RR 289 at 1959, Ex. 6618 at 19. This factual challenge is insufficient, especially in light of the State failure to offer an alternative estimate. CR 12 at 295, FOF 626-27.

"[T]he State has appeared at times to question the relationship between money and student performance," CR 12 at 400, FOF 642, but this Court has long recognized that funding is crucial to an adequate education. *See Edgewood I*, 777 S.W.2d at 393 ("The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student."); CR 12 at 400-01, FOF 641-47; CR 12 at 580, 586, COL 61, 89.¹²

¹² Moreover, the State's argument does not implicate the propriety of the injunction against the unconstitutional system, which applies regardless of whether funding or anything else causes the violation. *See* CR 12 at 199, Final Judgment 12 (enjoining "the State Defendants from giving any force and effect to the financing of public school education . . . and from distributing any money under the current Texas school financing system until the constitutional violations are remedied" without requiring any particular solution). If the Legislature creates a new school finance system that achieves adequacy, the defendants will not be enjoined from implementing it regardless of whether the Legislature does so by increasing funding.

2. Numerous Measures Of Educational Outcomes Demonstrate That The System Is Inadequate, Even Apart From Funding Evidence.

The district court correctly held that the public school system is inadequate. As a factual matter, the court specifically identified numerous indicators of failing to achieve a general diffusion of knowledge. *See* CR 12 at 277-300, FOF 126-209. Of course, the record is filled with additional evidence supporting the district court's judgment.¹³

Standardized tests confirm that Texas students, including charter school students, are not receiving an adequate education. Among charter school ninth graders, only 42 percent passed all of their STAAR end-of-course exams. RR 208 at 1482, Ex. 6349 at 26. This problem will not disappear on its own. The State raises the requirements for passing these tests over time. CR 12 at 269, FOF 96.

Contrary to the State's contention, this low performance trend is not a new phenomenon related to the relatively recent adoption of STAAR. Under the TAKS Math and Language Arts tests between 2006 and 2011, no more than a third of charter students tested "college ready." RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72; *see also* CR 12 at 266, FOF 87 ("[T]he mission of Texas public

¹³ Due to separate briefing and page limitations, each of the various plaintiff groups will probably highlight different pieces of record evidence. Because the district court ruled on adequacy as a system-wide matter, all such evidence supports the adequacy claim of each plaintiff group.

schools is to produce college or career-ready graduates.”). School districts, which received significantly more funding, never had more than half of their students testing college ready in both subjects. RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72.

Similarly, for college entrance exams in 2013, only 11 percent of charter school students earned scores indicating college readiness (that is, 1110 out of 1600 on the SAT or 24 on the ACT composite). *See* RR 290 at 1200, 1202, Ex. 9071 at 38, 40. That is even lower than the 12-15 percent of charter school students who reached “college ready” levels in previous years. RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72. For 2006 to 2011, the average charter SAT score never exceeded 910 out of 1600. RR 244 at 160-165, Ex. 9052 at Tables 11A-11E, 68-72.

Even focusing on the accountability regime, as the State suggests, State Br. 80, reveals inadequacy. The State rated 17.6 percent of charter schools academically unacceptable in 2010-2011, compared to only 4.4% of districts. CR 12 at 567, FOF 1508; RR 243 at 222, Ex. 9041 at 14. The higher rate at which charter schools are found academically unacceptable was evident in previous years as well. RR 272 at 916-18, Ex. 11245 at 8-10. The State even sought revocation of twenty charters since December 2013. *See, supra*, n.4. Without additional

funding, the current public school system will continue to produce inadequate results.

This is not what a general diffusion of knowledge looks like.

PRAYER

The Court should affirm the district court insofar as it denied the pleas to the jurisdiction and awarded relief to the Charter School Plaintiffs on their system-wide adequacy claim.

Respectfully submitted,

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This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because it contains 6,413 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

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I certify that a true and correct copy of the foregoing Brief of Texas Charter Schools Association, *et al.* in Response to Brief of State Defendants has been served on July 2, 2015 by electronic copy and/or certified mail, return receipt requested upon:

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