

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

BRIEF OF CROSS-APPELLEES MICHAEL WILLIAMS, *ET AL.*

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General
for Civil Litigation

SHELLEY N. DAHLBERG
Associate Deputy Attorney General
for Civil Litigation

SCOTT A. KELLER
Solicitor General

RANCE CRAFT
Assistant Solicitor General
Texas Bar No. 24035655

KRISTOFER S. MONSON
BETH KLUSMANN
EVAN S. GREENE
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-2872
(512) 474-2697 [fax]
rance.craft@texasattorneygeneral.gov

IDENTITY OF PARTIES AND COUNSEL

Parties to the Trial Court's Judgment

Plaintiffs/Appellees/Cross-Appellees:

The Texas Taxpayer and Student Fairness Coalition; Alief ISD; Canutillo ISD; Elgin ISD; Greenville ISD; Hillsboro ISD; Hutto ISD; Lake Worth ISD; Little Elm ISD; Nacogdoches ISD; Paris ISD; Pflugerville ISD; Quinlan ISD; Stamford ISD; San Antonio ISD; Taylor ISD; Van ISD; Randy Pittenger; Chip Langston; Norman Baker; Brad King; and Shelby Davidson, individually and as next friend of XXXXXXXX XXXXXXXX, XXXXX XXXXXXXX, and XXXX XXXXXXXX

Edgewood ISD; Harlingen Consolidated ISD; La Feria ISD; McAllen ISD; San Benito Consolidated ISD; Yolanda Canales, individually and on behalf her minor children XX. XXXXXXXX and XX. XXXXXXXX; Arturo Robles, individually and on behalf of his minor child X. XXXXXXXX; Jessica Romero, individually and on behalf of her minor children X. XXXXXXXX and X. XXXXXXXX; and Araceli Vasquez, individually and on behalf of her minor children X.X. XXXXXXXX, XX. XXXXXXXX, and XX. XXXXXXXX

Fort Bend ISD; Abilene ISD; Albany ISD; Allen ISD; Amarillo ISD; Angleton ISD; Austin ISD; Balmorhea ISD; Beaumont ISD; Bluff Dale ISD; Brazosport ISD; Carthage ISD; Channelview ISD; Clear Creek ISD; Cleveland ISD; College Station ISD; Coppell ISD; Corsicana ISD; Crosby ISD; Cypress-Fairbanks ISD; Dallas ISD; Damon ISD; Decatur ISD; Deer Park ISD; Denton ISD; Dumas ISD; Duncanville ISD; East Central ISD; Ector County ISD; Edna ISD; Fort Worth ISD; Galena Park ISD; Goose Creek Consolidated ISD; Graford ISD; Hardin-Jefferson ISD; Hays Consolidated ISD; Hempstead ISD; Highland ISD; Houston ISD; Huffman ISD; Humble ISD; Katy ISD; Keller ISD; Kenedy ISD; Kerrville ISD; Kingsville ISD; Klein ISD; La Marque ISD; La Porte ISD; Lamar Consolidated ISD; Leggett ISD; Liberty ISD; McKinney ISD; Midland ISD; New Caney ISD; North East ISD; Northside ISD; Pampa ISD; Pasadena ISD; Pearland ISD; Perrin-Whitt Consolidated ISD; Pine Tree ISD; Pleasant Grove ISD; Rice Consolidated ISD; Rockdale ISD;

Plaintiffs/Appellees/Cross-Appellees (continued):

Round Rock ISD; Royal ISD; Santa Fe ISD; Schertz-Cibolo-Universal City ISD; Sharyland ISD; Sheldon ISD; Splendora ISD; Spring Branch ISD; Stafford Municipal School District; Sudan ISD; Sweeny ISD; Trent ISD; Troup ISD; Waco ISD; Weatherford ISD; West Orange-Cove Consolidated ISD; and Woodville ISD

Plaintiffs/Appellees/Cross-Appellants/Cross-Appellees:

Calhoun County ISD; Abernathy ISD; Aransas County ISD; Frisco ISD; Lewisville ISD; and Richardson ISD

Plaintiffs/Appellees/Cross-Appellants:

Texas Charter Schools Association; Mario Flores, individually and as parent and next friend of his minor child XXXXX XXXXXX; Christopher Baerga, individually and as parent and next friend of his minor child XXXX XXXXXX; Dana Allen, individually and as parent and next friend of her minor child XXXX XXXXXX XXXXX; Jason Christensen and Sarah Christensen, individually and as parents and next friends of their minor children XXXX XXXXXXXXXXXXX and XXXXX XXXXXXXXXXXXX; and Brooks Flemister, individually and as parent and next friend of his minor child XXXXX XXXXXXXXXXXX

Intervenors/Appellees/Cross-Appellants:

Joyce Coleman, individually and as next friend of her minor children; Danessa Bolling, individually and as next friend of her minor child; Lee Beall and Allena Beall, individually and as next friends of their minor children; Joel Smedhammer and Andrea Smedhammer, individually and as next friends of their minor children; Darlene Menn, individually and as next friend of her minor child; Texans for Real Efficiency and Equity in Education; and Texas Association of Business

Defendants/Appellants/Cross-Appellees:

Michael Williams, Commissioner of Education, in his official capacity;* Glenn Hegar, Comptroller of Public Accounts of the State of Texas, in his official capacity;* the State Board of Education; and the Texas Education Agency

Trial and Appellate Counsel

Counsel for Plaintiffs/Appellees/Cross-Appellees

The Texas Taxpayer and Student Fairness Coalition, et al.:

Richard E. Gray, III (rick.gray@graybecker.com)

Texas Bar No. 08328300

Toni Hunter (toni.hunter@graybecker.com)

Texas Bar No. 10295900

Richard E. Gray, IV (richard.grayIV@graybecker.com)

Texas Bar No. 24074308

GRAY & BECKER, P.C.

900 West Avenue

Austin, Texas 78701

(512) 482-0061

(512) 482-0924 [fax]

Randall B. Wood (buckwood@raywoodlaw.com)

Texas Bar No. 21905000

Doug W. Ray (dray@raywoodlaw.com)

Texas Bar No. 16599200

RAY & WOOD

2700 Bee Caves Road #200

Austin, Texas 78746

(512) 328-8877

(512) 328-1156 [fax]

* These consolidated suits initially named Robert Scott, then Commissioner of Education, and Susan Combs, then Comptroller of Public Accounts, as defendants. Michael Williams succeeded Scott as Commissioner on September 1, 2012, and Glenn Hegar succeeded Combs as Comptroller on January 2, 2015. *See* TEX. R. APP. P. 7.2(a).

Counsel for Plaintiffs/Appellees/Cross-Appellees Edgewood ISD, et al.:

Marisa Bono (mbono@maldef.org)

Texas Bar No. 24052874

Celina Moreno (cmoreno@maldef.org)

Texas Bar No. 24052874

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC.

110 Broadway Street, Suite 300

San Antonio, Texas 78205

(210) 224-5476

(210) 224-5382 [fax]

Roger L. Rice (rlr@shore.net)

admitted pro hac vice

MULTICULTURAL EDUCATION, TRAINING AND ADVOCACY, INC.

240A Elm Street, Suite 22

Somerville, Massachusetts 02144

(617) 628-2226

(617) 628-0322 [fax]

David G. Hinojosa*

Texas Bar No. 24010689

INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION

5815 Callaghan Road, Suite 101

San Antonio, Texas 78228

(210) 444-1710

(210) 444-1714 [fax]

Rebecca Couto da Silva*

Texas Bar No. 24082473

P.O. Box 131996

Dallas, Texas 75313

(310) 975-9185

* Mr. Hinojosa and Ms. Couto da Silva were associated with the Mexican American Legal Defense and Education Fund, Inc., when they appeared as counsel in the trial court. They are no longer counsel in this case. Their current contact information on file with the state bar is listed here.

***Counsel for Plaintiffs/Appellees/Cross-Appellees Edgewood ISD, et al.
(continued):***

Maribel Hernández Rivera*
admitted pro hac vice
IMMIGRANT JUSTICE CORPS
(212) 844-4600

Counsel for Plaintiffs/Appellees/Cross-Appellees Fort Bend ISD, et al.:

J. David Thompson, III (dthompson@thompsonhorton.com)
Texas Bar No. 19950600
Philip Fraissinet (pfraissinet@thompsonhorton.com)
Texas Bar No. 00793749
THOMPSON & HORTON LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027
(713) 554-6767
(713) 583-9668 [fax]

Holly G. McIntush (hmcintush@thompsonhorton.com)
Texas Bar No. 24065721
THOMPSON & HORTON LLP
400 West 15th Street, Suite 1430
Austin, Texas 78701
(512) 615-2350
(512) 682-8860 [fax]

* Ms. Hernández Rivera was associated with Fried, Frank, Harris, Shriver & Jacobson LLP when she appeared as counsel in the trial court. She is no longer counsel in this case. Her current contact information is listed here.

***Counsel for Plaintiffs/Appellees/Cross-Appellees Fort Bend ISD, et al.
(continued):***

Wallace B. Jefferson (wjefferson@adjtlaw.com)
Texas Bar No. 00000019
Rachel A. Ekery (rekery@adjtlaw.com)
Texas Bar No. 00787424
ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
(512) 482-9300
(512) 482-9303 [fax]

***Counsel for Plaintiffs/Appellees/Cross-Appellants/Cross-Appellees
Calhoun County ISD, et al.:***

Mark R. Trachtenberg (mark.trachtenberg@haynesboone.com)
Texas Bar No. 24008169
HAYNES AND BOONE, LLP
1 Houston Center
1221 McKinney Street, Suite 2100
Houston, Texas 77010
(713) 547-2000
(713) 547-2600 [fax]

John W. Turner (john.turner@haynesboone.com)
Texas Bar No. 24028085
Micah E. Skidmore (micah.skidmore@haynesboone.com)
Texas Bar No. 24046856
Michelle Jacobs (michelle.jacobs@haynesboone.com)
Texas Bar No. 24069984
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 2100
Dallas, Texas 75219
(214) 651-5000
(214) 651-5940 [fax]

***Counsel for Plaintiffs/Appellees/Cross-Appellants/Cross-Appellees
Calhoun County ISD, et al. (continued):***

Adam H. Sencenbaugh (adam.sencenbaugh@haynesboone.com)

Texas Bar No. 24060584

HAYNES AND BOONE, LLP

600 Congress Avenue, Suite 1300

Austin, Texas 78701

(512) 867-8489

(512) 867-8606 [fax]

Lacy Lawrence (llawrence@akingump.com)*

Texas Bar No. 24055913

AKIN GUMP STRAUSS HAUER & FELD LLP

1700 Pacific Avenue, Suite 4100

Dallas, Texas 75201

(214) 969-2894

(214) 969-4343 [fax]

***Counsel for Plaintiffs/Appellees/Cross-Appellants
Texas Charter Schools Association, et al.:***

Robert A. Schulman (rschulman@slh-law.com)

Texas Bar No. 17834500

Ricardo R. Lopez (rlopez@slh-law.com)

Texas Bar No. 24013059

Joseph E. Hoffer (jhoffer@slh-law.com)

Texas Bar No. 24049462

SCHULMAN, LOPEZ, HOFFER & ADELSTEIN, LLP

517 Soledad Street

San Antonio, Texas 78205-1508

(210) 538-5385

(210) 538-5384 [fax]

* Ms. Lawrence was associated with Haynes and Boone, LLP, when she appeared as counsel in the trial court. She is no longer counsel in this case. Her current contact information on file with the state bar is listed here.

***Counsel for Plaintiffs/Appellees/Cross-Appellants
Texas Charter Schools Association, et al. (continued):***

Leonard J. Schwartz (lschwartz@slh-law.com)
Texas Bar No. 17867000
SCHULMAN, LOPEZ, HOFFER & ADELSTEIN, LLP
700 Lavaca Street, Suite 1425
Austin, Texas 78701
(512) 962-7384
(512) 402-8411 [fax]

James C. Ho (jho@gibsondunn.com)
Texas Bar No. 24052766
Will Thompson (wtthompson@gibsondunn.com)
Texas Bar No. 24088531
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6912
(214) 698-3264
(214) 571-2917 [fax]

Betsy Hall Bender*
Texas Bar No. 08743800
P.O. Box 26715
Austin, Texas 78755-0715
(512) 346-7292

* Ms. Bender was associated with Schulman, Lopez, Hoffer & Adelstein, LLP, when she appeared as counsel in the trial court. She is no longer counsel in this case. Her current contact information on file with the state bar is listed here.

***Counsel for Intervenors/Appellees/Cross-Appellants
Joyce Coleman, et al.:***

Craig T. Enoch (cenoch@enochkever.com)
Texas Bar No. 00000026
Melissa A. Lorber (mlorber@enochkever.com)
Texas Bar No. 24032969
Shelby O'Brien (sobrien@enochkever.com)
Texas Bar No. 24037203
Amy Leila Saberian (asaberian@enochkever.com)
Texas Bar No. 24041842
ENOCH KEVER PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
(512) 615-1200
(512) 615-1198 [fax]

J. Christopher Diamond (christopherdiamond@yahoo.com)
Texas Bar No. 00792459
SPRAGUE, RUSTAM & DIAMOND, P.C.
11111 Katy Freeway, Suite 300
Houston, Texas 77040
(713) 647-3130
(713) 647-3137 [fax]

***Counsel for Defendants/Appellants/Cross-Appellees
Michael Williams, et al.:***

Trial and Appellate Counsel
Shelley N. Dahlberg (shelley.dahlberg@texasattorneygeneral.gov)
Associate Deputy Attorney General for Civil Litigation
Texas Bar No. 24012491
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2100
(512) 475-2994 [fax]

***Counsel for Defendants/Appellants/Cross-Appellees
Michael Williams, et al. (continued):***

Appellate Counsel

Rance Craft (rance.craft@texasattorneygeneral.gov)

Assistant Solicitor General

Texas Bar No. 24035655

Kristofer S. Monson (kristofer.monson@texasattorneygeneral.gov)

Assistant Solicitor General

Texas Bar No. 24037129

Beth Klusmann (beth.klusmann@texasattorneygeneral.gov)

Assistant Solicitor General

Texas Bar No. 24036918

Evan S. Greene (evan.greene@texasattorneygeneral.gov)

Assistant Solicitor General

Texas Bar No. 24068742

OFFICE OF THE ATTORNEY GENERAL

P.O. Box 12548 (MC 059)

Austin, Texas 78711-2548

(512) 936-2872

(512) 474-2697 [fax]

Trial Counsel

Robert B. O'Keefe (robert.okeefe@texasattorneygeneral.gov)

Chief, Financial Litigation, Tax, and Charitable Trusts Division

Texas Bar No. 15240950

Angela Colmenero (angela.colmenero@texasattorneygeneral.gov)

Chief, General Litigation Division

Texas Bar No. 24048399

Amanda J. Cochran-McCall

(amanda.cochran-mccall@texasattorneygeneral.gov)

Deputy Chief, General Litigation Division

Texas Bar No. 24069526

William T. Deane (bill.deane@texasattorneygeneral.gov)

Assistant Attorney General

Texas Bar No. 05692500

***Counsel for Defendants/Appellants/Cross-Appellees
Michael Williams, et al. (continued):***

Trial Counsel (continued)

Eric L. Vinson (eric.vinson@texasattorneygeneral.gov)

Assistant Attorney General

Texas Bar No. 24003115

Erika Kane (erika.kane@texasattorneygeneral.gov)

Assistant Attorney General

Texas Bar No. 24050850

Robin Sanders (robin.sanders@texasattorneygeneral.gov)

Assistant Attorney General

Texas Bar No. 09310900

OFFICE OF THE ATTORNEY GENERAL

P.O. Box 12548

Austin, Texas 78711-2548

(512) 463-2100

(512) 475-2994 [fax]

Daniel T. Hodge*

Texas Bar No. 16532400

Chief of Staff

OFFICE OF THE GOVERNOR

P.O. Box 12428

Austin, Texas 78711-2428

(512) 463-2000

David C. Mattax (david.mattax@tdi.texas.gov)*

Texas Bar No. 13201600

Commissioner of Insurance

TEXAS DEPARTMENT OF INSURANCE

P.O. Box 149104

Austin, Texas 78714-9104

(512) 676-6000

* Mr. Hodge and Mr. Mattax were associated with the Office of the Attorney General when they appeared as counsel in the trial court. They are no longer counsel in this case. Their current contact information on file with the state bar is listed here.

***Counsel for Defendants/Appellants/Cross-Appellees
Michael Williams, et al. (continued):***

Trial Counsel (continued)

Nichole Bunker-Henderson (nichole.bunker-henderson@tea.state.tx.us)*

Deputy General Counsel

Texas Bar No. 24045580

TEXAS EDUCATION AGENCY

William B. Travis Building

1701 North Congress Avenue

Austin, Texas, 78701

(512) 463-9734

(512) 463-9838 [fax]

James “Beau” Eccles (beau.eccles@tdhca.state.tx.us)*

General Counsel

Texas Bar No. 00793668

TEXAS DEPARTMENT OF HOUSING & COMMUNITY AFFAIRS

State Insurance Building Annex

221 East 11th Street

Austin, Texas 78701-2410

(512) 475-3800

Gunnar P. Seaquist (gseaquist@bickerstaff.com)*

Texas Bar No. 24043358

BICKERSTAFF HEATH DELGADO ACOSTA LLP

3711 South MoPac Expressway

Building 1, Suite 300

Austin, Texas 78746

(512) 472-8021

(512) 320-5638 [fax]

* Ms. Bunker-Henderson, Mr. Eccles, and Mr. Seaquist were associated with the Office of the Attorney General when they appeared as counsel in the trial court. They are no longer counsel in this case. Their current contact information on file with the state bar is listed here.

***Counsel for Defendants/Appellants/Cross-Appellees
Michael Williams, et al. (continued):***

Trial Counsel (continued)

Amy Penn (apenn@ebblaw.com)*

Texas Bar No. 24056117

EWELL, BROWN & BLANKE LLP

111 Congress Avenue, Suite 2800

Austin, Texas 78701

(512) 457-0200

(877) 851-6384 [fax]

Darren G. Gibson*

Texas Bar No. 24068846

O'HANLON MCCOLLOM & DEMERATH

808 West Avenue

Austin, Texas 78701

(512) 494-9949

Chari L. Kelly*

Texas Bar No. 24057939

OFFICE OF THE CRIMINAL DISTRICT ATTORNEY FOR COMAL COUNTY

150 North Seguin Avenue, Suite 307

New Braunfels, Texas 78130

(830) 221-1300

(830) 608-2008 [fax]

* Ms. Penn, Mr. Gibson, and Ms. Kelly were associated with the Office of the Attorney General when they appeared as counsel in the trial court. They are no longer counsel in this case. Their current contact information on file with the state bar is listed here.

***Counsel for Defendants/Appellants/Cross-Appellees
Michael Williams, et al. (continued):***

Trial Counsel (continued)

Henry Carl Myers*

Staff Attorney

Texas Bar No. 24046502

53RD JUDICIAL DISTRICT COURT

Heman Marion Sweatt Travis County Courthouse

1000 Guadalupe Street, Room 327

Austin, Texas 78701

(512) 854-9366

(512) 854-9332 [fax]

Kay Taylor “Kaycee” Crisp*

Texas Bar No. 24057368

4700 Trail Crest Circle

Austin, Texas 78735

Linda A. Halpern*

Texas Bar No. 24030166

9902 Brightling Lane

Austin, Texas 78750

(512) 917-1103

* Mr. Myers, Ms. Crisp, and Ms. Halpern were associated with the Office of the Attorney General when they appeared as counsel in the trial court. They are no longer counsel in this case. Their current contact information on file with the state bar is listed here.

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INDEX OF ACRONYMS

ADA	Average Daily Attendance
AEIS	Academic Excellence Indicator System
CEI	Cost of Education Index
FSP	Foundation School Program
I&S	Interest and Sinking Fund
M&O	Maintenance and Operations
NAEP	National Assessment of Educational Progress
NIFA	New Instructional Facilities Allotment
STAAR	State of Texas Assessments of Academic Readiness
TAKS	Texas Assessment of Knowledge and Skills
TEA	Texas Education Agency
WADA	Weighted Average Daily Attendance

STATEMENT OF THE CASE

Nature of the Case: Five groups of plaintiffs and one group of intervenors—which together include school districts, parents, children, taxpayers, and associations—claim that Texas’s public-education system violates the Texas Constitution. 6.CR.28-78; 7.CR.439-66, 489-565, 641-62.* They sued the Commissioner of Education, the Comptroller of Public Accounts, the State Board of Education, and the Texas Education Agency (collectively, “the State Defendants”) under the Uniform Declaratory Judgments Act, seeking declaratory and injunctive relief. *Id.*

Trial Court: 200th Judicial District Court, Travis County
The Honorable John K. Dietz (presiding)

Course of Proceedings: The court consolidated the five suits, 1.CR.142-46, 340-42, and conducted a bench trial on the merits, 2.RR.1-45.RR.180. Following trial, the court granted a motion to reopen the evidence “to consider the effect of changes to the public school finance and accountability systems made by the Texas Legislature in the 83rd Regular Session.” 5.CR.349-50. In accordance with that order, the court conducted a second bench trial. 54.RR.1-64.RR.91.

Trial Court Disposition: The court rendered a final judgment, 12.CR.188-208, and issued findings of fact and conclusions of law, 12.CR.209-591.

The court denied all pleas to the jurisdiction. 12.CR.198.

* Citations of the appellate record will appear as follows: clerk’s record = “[volume number].CR.[page number]”; reporter’s record = “[volume number or letter].RR.[page number]”; exhibits = “[volume number].RR(Ex. [exhibit number]).[exhibit page number].”

The court declared that the public-education system violates (1) article VIII, section 1-e's prohibition against a state property tax; and (2) article VII, section 1's "adequacy," "suitability," and "financial efficiency" mandates. 12.CR.193-97.

The court further declared that the system does not violate article VIII, section 1(a)'s "equal and uniform taxation" requirement. 12.CR.197-98.

The court denied the Intervenors' claim that the system violates article VII, section 1 on "qualitative efficiency" grounds. 12.CR.198.

The court denied the Charter School Plaintiffs' claims that the system, as applied to charter schools, violates (1) article VII, section 1's "suitability" and "efficiency" requirements; and (2) article I, section 3's guaranty of "equal rights." 12.CR.198.

The court enjoined the State Defendants from funding public education "until the constitutional violations are remedied." 12.CR.199. The court stayed the injunction until July 1, 2015, "to give the Legislature a reasonable opportunity to cure the constitutional deficiencies in the finance system." 12.CR.199.

The court ordered that the ISD Plaintiffs recover their attorneys' fees and costs from the State Defendants. 12.CR.200-08. The court denied the fee requests filed by the State Defendants, Charter School Plaintiffs, and Intervenors. 12.CR.200.

The court retained "continuing jurisdiction" over the case until it determines that the State Defendants "have fully and properly complied with its judgment and orders." 12.CR.208.

ISSUES PRESENTED

1. Do the Intervenors' and Charter School Plaintiffs' claims under article VII, section 1 of the Texas Constitution present non-justiciable political questions?
2. Does the relief sought by the Intervenors and Charter School Plaintiffs—declarations that the public-education system is unconstitutional and injunctions halting public-education funding—sufficiently redress their alleged injuries to give them standing to sue?
3. Are the Intervenors' and Charter School Plaintiffs' challenges to the current public-education system, as amended by the Legislature in 2013 (or any later session), unripe?
4. Does sovereign immunity bar the Charter School Plaintiffs' claims to the extent that they seek to alter the terms and conditions of charters and thus constitute contract claims against the State?
5. Does the public-education system violate article VII, section 1's "adequacy" requirement?
6. Does the public-education system violate article VII, section 1's "financial efficiency" requirement?
7. Does the public-education system violate article VII, section 1's "suitability" requirement?
8. Does the public-education system violate article VII, section 1 on "qualitative efficiency" grounds?
9. Should the Court affirm the judgment denying the Intervenors' and Charter School Plaintiffs' attorneys-fees requests?

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

BRIEF OF CROSS-APPELLEES MICHAEL WILLIAMS, *ET AL.*

TO THE HONORABLE SUPREME COURT OF TEXAS:

Although the Intervenors and the Charter School Plaintiffs bring new perspectives to school-finance litigation, their suits suffer from familiar jurisdictional problems and should be dismissed. If the Court reaches the merits, however, it should reverse the judgment for the Charter School Plaintiffs on their adequacy claim and render judgment for the State

Defendants on that claim; otherwise, it should affirm the judgment for the State Defendants on the Intervenors' and Charter School Plaintiffs' claims.

STATEMENT OF FACTS

The State Defendants incorporate by reference the Statement of Facts from their opening brief in this appeal. State Br. 7-43.

SUMMARY OF THE ARGUMENT

The Court should not entertain the Intervenors' "qualitative efficiency" claim because it suffers from the jurisdictional defects raised in the State Defendants' opening brief and, in particular, because it is neither justiciable nor cognizable. The Intervenors complain that the public-education system is "qualitatively" or "structurally" inefficient because, in their view, there are more efficient alternatives to some of the system's components. For example, they urge that a merit-based teacher-pay regime, a teacher-evaluation process tied more to student performance, and increased choice and competition among schools all would be more productive than the rules currently governing those areas. But that theory of the case assigns the courts a role that they can neither accept nor perform. This Court already has rejected the notion that it may substitute its policy preferences for the Legislature's or tell the Legislature *how* to satisfy the Constitution. And the Intervenors offered

no other way to resolve their claim, failing to identify any independent metric that a court could apply to decide whether specific regulations render the system inefficient. What's more, even if the Court could strike down the current system on "qualitative efficiency" grounds, that still would not redress the Intervenor's complaint because the Court cannot compel the Legislature to adopt the reforms that the Intervenor believe would make the system more efficient.

If the Court does entertain the Intervenor's "qualitative efficiency" claim, it should affirm the judgment for the State Defendants. To the extent any standard exists to assess that claim, it must require a showing that the Legislature's choices *arbitrarily* waste so many resources that the *entire* system is inefficient. The Intervenor did not make that showing. As to each component of the system they attack, the Intervenor failed to refute a principled basis for the Legislature's policy decision, failed to prove that the challenged regulation actually causes systemic inefficiency, or both. And the Intervenor are simply wrong in asserting that the district court's findings and conclusions support a judgment in their favor—the opposite of how the court ruled. The Intervenor find that support only by conflating their claim with

the ISD Plaintiffs' materially distinct causes of action and ignoring the court's findings rejecting their theory of the case.

The Charter School Plaintiffs' claims also suffer from the jurisdictional defects common to all claims in this case. Their focus on their allegedly unequal funding relative to school districts does not change the fact that their suit presents non-justiciable political questions that ultimately will not be redressed by an injunction shutting down the entire system. And to the extent that they seek to change the charter-school funding mechanism in particular, that claim amounts to a contract action against the State barred by immunity.

If the Court reaches the merits of the Charter School Plaintiffs' suit, it should reverse and render judgment for the State Defendants on the adequacy claim and affirm the judgment for the State Defendants on the remaining claims. The Charter School Plaintiffs' claims that the system is unconstitutional as applied to charter schools specifically are not cognizable. Again, the Court already has held that any claim under article VII, section 1 must establish a *systemic* violation.

On that score, the Charter School Plaintiffs failed to prove that the system as a whole is inadequate, inefficient, or unsuitable. As the State Defendants explained in their opening brief, an adequacy claim must

demonstrate inadequate results, not inadequate funding, and the Charter School Plaintiffs have not shown that student achievement in Texas is so wanting that the system violates the Constitution. The Charter School Plaintiffs cannot state an efficiency claim because that claim is predicated on tax effort, which is not part of charter-school funding. But even if charter schools were deemed to have the state average tax rate for efficiency purposes, the gap between school-district and charter-school funding is within constitutional bounds. And because the system is constitutionally adequate and efficient, its performance is suitable as well.

If the Court affirms the judgment as to the Intervenors' and Charter School Plaintiffs' claims, it also should affirm the order denying those parties' attorneys-fees requests. Affirming on the merits would mean that the district court's main reason for denying the fee requests—the Intervenors and Charter School Plaintiffs were largely non-prevailing parties—would remain intact. On the other hand, if the Court grants either party a more favorable judgment on appeal, the State Defendants agree with the Charter School Plaintiffs that a remand for reconsideration of the fee issue would be warranted.

STANDARD OF REVIEW

The State Defendants’ issues regarding the political-question doctrine, standing, ripeness, and sovereign immunity all implicate subject-matter jurisdiction. *See Neeley v. W. Orange-Cove Consol. ISD*, 176 S.W.3d 746, 772 (Tex. 2005) (“*WOC II*”) (political question); *Fin. Comm’n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013) (standing); *Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) (ripeness); *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012) (sovereign immunity). Subject-matter jurisdiction presents questions of law that the Court reviews de novo. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) (per curiam).

The questions of whether the statutes establishing the public-education system violate the Texas Constitution are also subject to de novo review. *WOC II*, 176 S.W.3d at 785. To the extent those issues turn on disputed factual matters, the Court defers to the district court’s findings of fact. *Id.* “But in deciding ultimately the constitutional issues, those findings have a limited role.” *Id.* Specifically, the Court “must focus on the entire record to determine whether the Legislature has exceeded constitutional limitations.” *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995); *accord Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925

S.W.2d 618, 625 (Tex. 1996) (noting that, in reviewing a statute’s constitutionality, “we focus on the entire record presented to us rather than simply relying upon the fact findings of the district court”). And even to the limited extent to which the district court’s findings of fact may be relevant, the Court may review those findings for the legal sufficiency of the evidence supporting them. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

The Court reviews a ruling on a request for attorneys’ fees under the UDJA for an abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). A trial court abuses its discretion when its ruling is not equitable or just as a matter of law. *Id.*

ARGUMENT

I. THE COURT SHOULD NOT ENTERTAIN THE INTERVENORS’ “QUALITATIVE EFFICIENCY” CLAIM.

Like the State Defendants, the Intervenors lament the “unproductive” state of cyclical school-finance litigation in Texas. *See* Intervenors Br. 1-2 (suggesting that the litigation cycle *itself* results in an unconstitutionally inefficient public-education system). Ironically, the Intervenors propose to solve this problem by introducing a new type of “qualitative efficiency” challenge to the system that would expand judicial review—and the potential for endless litigation—by orders of magnitude.

Specifically, the Intervenors contend that “a number of current problems, considered individually or collectively,” result in an unconstitutionally inefficient system. 6.CR.66. These “problems” range from the cap on open-enrollment charters, 6.CR.66, to the alleged lack of financial-accountability information for school districts, 6.CR.67-68, to the entirety of Chapter 21 of the Education Code governing the retention and compensation of teachers, 6.CR.69-70. The Intervenors seek a declaration that the system is inefficient, 6.CR.73-74, and injunctive relief prohibiting the State Defendants from distributing any money for public schools, 6.CR.76-77.

At bottom, the Intervenors’ claim amounts to a laundry list of educational policy preferences that they seek to foist onto the public under the guise of constitutional efficiency. The district court rejected that claim on the merits, concluding that each challenge to the system involved a policy choice that did not raise “a question of constitutional dimension.” *See, e.g.*, 12.CR.561 (FOF 1476). The Court should hold that the district court lacked jurisdiction over the Intervenors’ claim or, alternatively, that no cause of action for “qualitative efficiency” exists.

A. The Intervenors’ “Qualitative Efficiency” Claim Is Improper, Standardless, and Non-Redressable.

The State Defendants repeat and incorporate the jurisdictional arguments set forth in their opening brief, State Br. 49-66, each of which applies to the Intervenors’ “qualitative efficiency” claim. Even assuming the Court determines that it has jurisdiction over any part of this case, it should not entertain the Intervenors’ claim.

1. The Intervenors’ claim is an improper attempt to set education policy in court.

Make no mistake: the Intervenors are asking the Court to enter into and resolve some of today’s fundamental educational policy debates. Arguing that the State must implement a “merit”-based teacher-pay system, Intervenors Br. 23-25, undo the cap on charter schools, *id.* at 27-29, eliminate class-size limits, *id.* at 29-30, and increase “market”-based competition in schools, *id.* at 33-35, is tantamount to asking the Court to enact an entirely new education system when the Legislature has specifically declined to do so, *see* 12.CR.558 (FOF 1464) (“Nearly every one of the Intervenors’ complaints about the current educational system and their suggested reforms have been made the subject of proposed legislation in past legislative sessions, but none of these proposals has yet attracted majority support.”).

Separation-of-powers principles limit the role of the judiciary in the educational sphere, however. *See* TEX. CONST. art. II, § 1; *WOC II*, 176 S.W.3d at 778. The Court has repeatedly confirmed that courts cannot prescribe *how* education is provided in Texas; they are limited to determining *whether* the constitutional standards embodied in Article VII, section 1 are satisfied. *E.g.*, *WOC II*, 176 S.W.3d at 777. In other words, “courts must not . . . substitute their policy choices for the Legislature’s, however undesirable the [Legislature’s choices] may appear.” *Id.* at 785.

The explicit limitation on judicial policymaking is also implicit in the objective, quantifiable tests the Court has devised to determine *whether* the Legislature has satisfied the three standards set forth in Article VII, section 1. Constitutional “adequacy” is a “result-oriented” test that is satisfied if the public-education system provides for a general diffusion of knowledge, as “measured in student achievement.” *Id.* at 788. Constitutional “efficiency” (termed “financial efficiency” by the Intervenors) requires “substantially equal access to similar revenues per pupil at similar levels of tax effort.” *Id.* at 790. Last, constitutional “suitability” is satisfied when “[n]either the structure nor the operation of the funding system prevents it from efficiently accomplishing a general diffusion of knowledge”—that is, when both adequacy

and financial efficiency are achieved. *Id.* at 793-94. These tests leave no room for courts to engage in subjective or comparative analyses of the methods the Legislature has employed to educate Texas students. *See also Edgewood ISD v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995) (“*Edgewood IV*”) (holding that a court shall “not dictate to the Legislature how to discharge its duty . . . [nor shall it] judge the wisdom of the policy choices of the Legislature, or . . . impose a different policy of [the court’s] choosing”).

The Intervenor should not be permitted to circumvent these carefully crafted limitations on judicial review by rebranding proposals for education reform as a constitutional “qualitative efficiency” claim. The “[s]tructural redesign” that the Intervenor seek through this lawsuit, Intervenor Br. 17, is appropriately debated in the Legislature, not litigated in the courts. *WOC II*, 176 S.W.3d at 753 (explaining that the judiciary’s role “is limited to ensuring that the constitutional [education] standards are met”).

Allowing this type of action to proceed would open the floodgates for litigants to challenge virtually any disliked component of the school system as causing the system to be inefficient. Even the Intervenor do not view this lawsuit as a one-time fix in which structural efficiency will be achieved. Rather, they envision a world in which the “qualitative efficiency” of the

system is regularly “included in the debate” going forward. Intervenor Br. 51-52. The Court should redirect the debate to the Legislature by declining to entertain the Intervenor’s claim.

2. The Intervenor’s claim is based on standardless conjecture.

The Intervenor’s “qualitative efficiency” claim is also non-justiciable, in that there is no judicially manageable standard for assessing it. *See, e.g., Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (“[A] controversy involves a [non-justiciable] political question where there is . . . a lack of judicially discoverable and manageable standards for resolving it.” (citations, internal quotation marks, and alterations omitted)).

The Intervenor and their experts failed to identify any metric by which the system’s qualitative efficiency could be judged. 12.CR.559 (FOF 1470). Conceding that there is no generally accepted measure of efficiency in the scientific community, one of the Intervenor’s key experts, Dr. Paul Hill, nonetheless opined that Texas’s current system would be unconstitutionally inefficient even if it was the most efficient public-education system in the country. *Id.*; 36.RR.196.

That sort of standardless conjecture cannot form the basis for proper expert testimony, *see E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d

549, 557 (Tex. 1995), much less a justiciable cause of action. Asserting (or even proving) that there is a more efficient way to educate Texas students cannot suffice to establish that the current system is unconstitutionally inefficient. *See WOC II*, 176 S.W.3d at 753 (“Whether public education is achieving all it *should* . . . involves political and policy considerations properly directed to the Legislature.”); *see also id.* at 784 (holding that the constitutional education standards “do not require perfection”).

The absence of any metric or test for assessing the system’s “qualitative efficiency” leaves the Court with no way to determine whether one supposedly wasteful component of the system (or a collection of inefficient components) results in systemic inefficiency. *See id.* at 790 (“Article VII, section 1 requires ‘*an* efficient system of free public schools’, considering the system as a whole, not a system with efficient components.” (quoting and adding emphasis to TEX. CONST. art. VII, § 1)). For example, assuming a litigant could prove that Texas’s teacher-certification requirement is itself “inefficient,” the Court would be left without any basis to determine if that individual requirement causes systemic inefficiency beyond accepting an expert’s *ipse dixit*.

Attempting to establish their efficiency claim by criticizing the State for failing to determine how much it costs to educate a child, *see* Intervenors Br.

5-6, 14-15, 40-45, the Intervenors have it exactly backwards. As parties challenging the school system, the Intervenors bore the burden of proving unconstitutional inefficiency under some identifiable and judicially-manageable standard. *See Edgewood IV*, 917 S.W.2d at 725 (“[W]e begin with the presumption that [the education system is] constitutional; the burden of proof is on those parties challenging this presumption.”). The Intervenors could not meet that burden because no such standard exists.³

3. The Intervenors’ claim is non-redressable.

The Intervenors also lack standing to maintain their “qualitative efficiency” claim because the Court cannot possibly alleviate their alleged injuries. *See Heckman v. Williamson County*, 369 S.W.3d 137, 155-56 (Tex. 2012) (holding that the “redressability” prong of standing requires the plaintiff to show a “substantial likelihood that the requested relief will remedy the alleged injury in fact” (internal quotation marks omitted)).

Although the Intervenors’ live petition seeks generic declaratory and injunctive relief upending Texas’s education system, 6.CR.76-77, the district court rightly observed that a cure for the deficiencies alleged by the

³ Indeed, the Court has already recognized that there is no “simple” or “direct” relationship between the resources spent on public education and the end results. *WOC II*, 176 S.W.3d at 788; *see also infra* Part II.B.1.e.

Intervenors “necessarily would require the Legislature to adopt some version of their preferred educational policy choices,” 12.CR.558 (FOF 1463). Invalidating the current system would do nothing to ensure that the Legislature “fixed” public education in ways that the Intervenors contend are necessary to achieve “qualitative efficiency.” Implicitly recognizing this, the Intervenors now ask the Court “to direct the Legislature to solve [the alleged] constitutional infirmity through statutory change so as to make the System constitutionally efficient.” Intervenors Br. 39; *see also id.* at 17 (“[The Court] can strike down the current System in the whole as unconstitutionally inefficient and direct the Legislature to return to the drawing table.”).

But courts cannot compel the Legislature to enact particular laws, even where the Legislature has a constitutional obligation to act. *Andrade v. NAACP*, 345 S.W.3d 1, 16 (Tex. 2011); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955). The Intervenors’ mere hope that the Legislature will respond to the Court’s judgment by enacting the specific types of educational reform they seek is insufficient to establish redressability and jurisdiction. *See, e.g., ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989). The district court should have dismissed the Intervenors’ claim. *Heckman*, 369 S.W.3d at 150 (“Standing is a constitutional prerequisite to suit.”).

B. The Court’s Precedents Do Not Suggest That the Intervenors’ “Qualitative Efficiency” Claim Is Justiciable.

The Court has never suggested, much less held, that courts are competent to entertain and adjudicate the type of policy debate the Intervenors have pursued in this lawsuit under the guise of “qualitative efficiency.”

When the Court first defined what the Constitution means by an “efficient” system, it stated that “[e]fficient’ conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste.” *Edgewood ISD v. Kirby*, 777 S.W.2d 391, 395 (Tex. 1989) (“*Edgewood I*”). And when the Court first alluded to the “qualitative component” of efficiency, it was referring to the “productive of results” part of that definition—specifically, article VII, section 1’s “explicit” reference to the need for “a general diffusion of knowledge.” *See Edgewood IV*, 917 S.W.2d at 729-30. But the Court has since isolated being “productive of results” as a distinct mandate imposed by the “general diffusion of knowledge” clause, labeling that standard “adequacy.” *WOC II*, 176 S.W.3d at 753, 788 (explaining that adequacy concerns whether the system “is achieving the general diffusion of knowledge the Constitution requires” in terms of “the *results* of the educational process measured in student achievement” (emphasis added)).

The Intervenors have not pleaded an adequacy claim in this suit. 6.CR.73-74 (seeking declarations only that the system is “not efficient”).

Although the Court mentioned “qualitative efficiency” in *West Orange-Cove Consolidated ISD v. Alanis*, 107 S.W.3d 558, 571 (Tex. 2003) (“*WOC I*”), and again in *West Orange-Cove II*, 176 S.W.3d at 753, it did not articulate an additional legal standard or test for assessing the public-education system. The Court certainly never intimated that the concept of “qualitative efficiency” authorizes courts to engage in comparative analyses of the educational policy choices selected by the Legislature. *Cf. WOC II*, 176 S.W.3d at 783 (“The standards of article VII, section 1—adequacy, efficiency, and suitability—do not dictate a particular structure that a system of free public schools must have. We have stressed this repeatedly.”).

And while the Court has reaffirmed that the term “efficiency” does “connote[] the use of resources so as to produce results with little waste,” *WOC II*, 176 S.W.3d at 752-53; *see also* Intervenors Br. 18-19, it has never suggested that there is a justiciable standard for determining what constitutes too much waste. And for good reason: no such standard exists, which the Intervenors effectively admit by failing to supply one themselves. *See supra* Part I.A.2; *see also City of Rockwall v. Hughes*, 246 S.W.3d 621, 639 n.38 (Tex. 2008)

(Willett, J., dissenting) (“[A]rguments . . . rooted in policy and prudential concerns . . . are quintessential legislative judgments, not judicial ones.”).

The district court correctly observed that the Intervenors’ lawsuit simply “reflect[s] their view of a better, more efficient public school system.” 12.CR.559 (FOF 1466). It should have dismissed the claim for lack of justiciability and redressability.

II. IF THE COURT ENTERTAINS THE INTERVENORS’ “QUALITATIVE EFFICIENCY” CLAIM, IT SHOULD AFFIRM.

If the Court does reach the merits of the Intervenors’ “qualitative efficiency” claim, it should affirm the district court’s judgment for the State Defendants on that claim.

Again, the Education Code provisions that establish and implement the public-education system are presumed to satisfy article VII, section 1’s “efficiency” mandate. *Edgewood IV*, 917 S.W.2d at 725. As the parties challenging the system as “qualitatively inefficient,” the Intervenors had the burden to overcome that presumption. *Id.*

To the extent any standard exists to determine whether the Intervenors met their burden, it must be the “arbitrariness” test that the Court has applied to other claims under article VII, section 1. *See WOC II*, 176 S.W.3d at 784-85. The Legislature acts arbitrarily when it enacts laws “without reference to

guiding rules or principles.” *Id.* at 784. Accordingly, “[i]f the Legislature’s choices are informed by guiding rules and principles properly related to public education—that is, if the choices are not arbitrary—then the system does not violate [article VII, section 1].” *Id.* at 785.

The Court has described this arbitrariness standard as “very deferential” to the Legislature. *Id.* at 790. It affords the Legislature “broad discretion to make the myriad policy decisions concerning education” and “much latitude in choosing among any number of alternatives that can reasonably be considered . . . efficient.” *Id.* at 784. A “mere difference of opinion” between the courts and the Legislature on education policy will not support a judgment that the system is arbitrary. *Id.* at 785 (citations and internal quotation marks omitted). Likewise, it is not enough to show merely that the system could be more efficient or is otherwise sub-optimal. *See id.* at 784 (noting that “[t]hese standards do not require perfection”); 36.RR.111-12 (Intervenors’ expert agreeing that evidence that a system could be more efficient does not prove that it is inefficient).

Under this deferential test, the district court’s judgment denying the Intervenors relief on their “qualitative efficiency” claim is correct. 12.CR.198.

A. To Prove a “Qualitative Efficiency” Claim, the Intervenors Were Required to Show That the System as a Whole Arbitrarily and Excessively Wastes Resources.

To the extent that a “qualitative efficiency” claim is cognizable, its contours must be grounded in the Court’s interpretation of article VII, section 1. But the Intervenors’ framing of their claim departs from the Court’s precedent in two key respects.

First, the Intervenors often blur the line that the Court has drawn between an “adequacy” claim—which the Intervenors did not bring, 6.CR.73-74—and an “efficiency” claim. *E.g.*, Intervenors Br. 20-21, 36-39. As discussed above, the Court has isolated the mandate that the system be “productive of results” as a distinct “adequacy” requirement flowing from article VII, section 1’s “general diffusion of knowledge” clause. *See supra* Part I.B. Thus, establishing that the system is not producing results at most proves an adequacy violation; an efficiency claim requires a separate showing that the system arbitrarily uses resources with too much waste. *See WOC II*, 176 S.W.3d at 752-53, 784, 788.⁴ For that reason, the Intervenors’ arguments that

⁴ The Intervenors have it wrong, then, in asserting that “it is the results of the education program that determine its efficiency.” Intervenors Br. 21. The results determine its *adequacy*. *WOC II*, 176 S.W.3d at 788. Indeed, given the Court’s distinct treatment of adequacy and efficiency claims, *id.* at 785-93, the system conceivably could produce the

the system is not achieving a general diffusion of knowledge, Intervenor Br. 16-17, 20-21, 36-38, do not advance their only claim—an efficiency claim, 6.CR.73-74.⁵

Second, the Intervenor erroneously suggest that they may seek to invalidate individual “statutes and regulations that cause unconstitutional efficiency” distinct from challenging “the current System in the whole.” Intervenor Br. 17; *see also id.* at 38. The Court has specifically rejected that possibility, holding that any efficiency claim must be a *systemic* one. *WOC II*, 176 S.W.3d at 790 (“Article VII, section 1 requires ‘*an* efficient system of free public schools’, considering the system as a whole, not a system with efficient components.” (quoting and adding emphasis to TEX. CONST. art. VII, § 1); *see also id.* at 784 (describing *Edgewood IV* as holding that exempting some hold-

required results and thus be constitutionally adequate, yet be inefficient because it arbitrarily wastes too many resources to achieve those results.

⁵ The Intervenor’s comments regarding the system’s adequacy are inaccurate in any event. Their contentions that the Legislature’s adjustments to the system over the years have “never been enough,” “produced no measurable results,” and “led to no improvement in educational achievement” or “measurable success,” Intervenor Br. 16, 17, 21, are belied by the Court’s precedent. Plaintiffs have been motivated to challenge the system’s adequacy only once, and that challenge failed. *WOC II*, 176 S.W.3d at 789-90 (noting the “undisputed evidence” that “standardized test scores have steadily improved over time” and “NAEP scores . . . show that public education in Texas has improved relative to the other states”). And in this case, it is *not* “undisputed” that there has been “no improvement in educational achievement.” Intervenor Br. 20-21. The State Defendants defended the current system’s adequacy at trial and are appealing the district court’s judgment that the system fails to provide for a general diffusion of knowledge. State Br. 75-117.

harmless districts from recapture during a phase-in period “was not so unreasonable as to render the entire system inefficient”).

To prove their case, then, the Intervenorers were required to show that the parts of the system they challenged are arbitrary, cause too much waste, and “make[] the entire system inefficient.” *Id.* at 752-53, 784-85, 790. As discussed below, they failed to do so.

B. The Public-Education System’s Structure Is Not Arbitrary.

The Intervenorers contend that two general features of the system’s structure make it qualitatively inefficient: “bureaucratic mandates” and “an inherent lack of competition.” Intervenorers Br. 20-35. And not only do they claim to have proven those constitutional violations at trial, but they also argue that the district court’s findings and conclusions actually support a judgment in their favor. *Id.* at 36-39, 50.

The Intervenorers are wrong on all counts. The challenged regulations and the scope of competition within the system reflect legitimate policy choices by the Legislature, not arbitrary dictates. Moreover, the Intervenorers failed to prove that those choices cause systemic inefficiency. Finally, the Intervenorers cannot overcome their own failure of proof by relying on the district court’s findings and conclusions on the ISD Plaintiffs’ materially different claims.

1. The system regulations challenged by the Intervenor are not arbitrary.

The Intervenor cite five state mandates that, in their view, make the public-education system unconstitutionally inefficient: (1) teacher employment rules; (2) the cap on the number of open-enrollment charters; (3) statutory class-size limits; (4) use of the Cost of Education Index in the system funding formula; and (5) financial accountability and reporting provisions. *Id.* at 21-33. Whether considered individually or collectively, however, those regulations do not violate the Constitution.

a. Teacher employment regulations are not arbitrary.

The Intervenor first attack various regulations regarding teacher employment as inefficient: (1) the minimum-salary schedule; (2) teacher-certification rules; and (3) the teacher-appraisal process. *Id.* at 22-27. In each instance, though, the Intervenor failed to prove a constitutional violation.

The Intervenor contend that the statutory minimum salary schedule for teachers causes inefficiency because it links pay to experience rather than effectiveness. *Id.* at 23-25. But the evidence showed that “[v]ery few districts follow the minimum salary schedule.” 189.RR(Ex. 5630).437-38. And while the Intervenor described that schedule as a “template” for school-district pay policies, 189.RR(Ex. 5630).437, their expert conceded that it was “hard to be

sure” that the schedule actually has that effect; that “there’s no law that prohibits [school districts] from setting up a salary schedule any way they want to as long as they’re above this really low minimum;” and that the lack of performance-based salary regimes “is not the fault of the state as much as it is the fault of the districts.” 37.RR.116-17; *accord* 39.RR.160 (conceding that the State does not control teacher salaries so long as they exceed the statutory minimum). The Intervenors thus failed to show that the minimum salary schedule is actually causing any systemic inefficiency.

To the extent the Intervenors blame the Legislature for not *mandating* performance-based pay in public schools, *see* Intervenors Br. 24, their expert further admitted that there is not yet strong empirical evidence supporting a performance-based pay system or showing how to structure one. 37.RR.176-83. Regardless of such a system’s potential merit, then, it was not arbitrary for the Legislature to decline to adopt an unproven teacher-pay regime.⁶

The Intervenors also urge that the statutory teacher-certification process inefficiently restricts access to teacher jobs without providing any

⁶ The Intervenors also failed to prove that the statutory procedures for terminating teachers cause systemic inefficiency. *See* Intervenors Br. 25. Their principal witness on this issue, Ms. Robyn Wolters, offered mostly hearsay evidence about the costs of complying with those procedures at a single school district, and she could not quantify the system-wide costs of compliance. 39.RR.157-59, 164-66, 169-70.

benefit for students. Intervenor Br. 25-26. Again, though, the Intervenor failed to prove any systemic inefficiency in that regard. Their primary expert on this issue, Dr. Hill, was not aware of section 21.055 of the Education Code, which allows school districts to employ non-certified teachers so long as they have bachelor degrees and are not found to be unqualified by the Commissioner of Education. 36.RR.135-38; TEX. EDUC. CODE § 21.055. And the Intervenor's Texas-specific evidence on non-certified teachers' effectiveness was limited to single districts and small samples. 162.RR(Ex. 3204).249-50 (relating only Pflugerville ISD's experience); 189.RR(Ex. 5630).437 (explaining that, if the number of non-certified Teach for America teachers in Texas schools were reduced or eliminated, "the impact would not be great systemically").

Finally, the Intervenor complains that the teacher-appraisal process is inefficient because "student educational improvement is not part of those evaluations" and parents do not receive the results. Intervenor Br. 26-27. The Education Code expressly requires teacher-appraisal criteria to include "the performance of teachers' students," but allows districts to decide how much to weigh that factor. TEX. EDUC. CODE §§ 21.351(a)(2), 21.352(a)(2)(B); *see also* 189.RR(Ex. 5630).309, 311. Given Texans' strong preference for local

governance of schools, 37.RR.117, and the concern voiced by advocates like the Intervenors over “excessive statewide controls,” Intervenors Br. 21, it was not arbitrary for the Legislature to take a measured approach—requiring local school boards to evaluate teachers in part on student performance but letting the boards decide how to balance that with other considerations. As for providing teacher evaluations to parents, the evidence showed that doing so “has drawn mixed results” in other states and that there is no consensus on its effectiveness. 189.RR(Ex. 5630).413. So, again, the Legislature has not acted arbitrarily in declining to embrace an unproven practice.

b. The charter cap is not arbitrary.

The Intervenors next argue that the cap on the number of open-enrollment charters imposes an “arbitrary restriction” that “creates systemic constitutional inefficiency” because “it does not allow the market . . . to determine how many charter schools are needed.” Intervenors Br. 27-29. That argument fails for several reasons.

First, setting a cap on open-enrollment charters is not an arbitrary decision. Like school districts, charter schools must be reviewed, monitored, and accredited by the Texas Education Agency (“TEA”). *See, e.g.*, TEX. EDUC. CODE §§ 12.101(b) (providing that charter schools must meet “financial,

governing, educational, and operational standards”), 12.1013 (requiring reports on charter-school performance), 12.104(b) (subjecting charter schools to certain recordkeeping, instruction, and accountability regulations). Consequently, former Commissioner of Education Robert Scott observed, “when you create a charter, it’s like creating a whole new school district” and “it adds that level of workload to the agency.” 189.RR(Ex. 5630).110. Reasonably limiting the number of charters ensures that TEA can adequately manage them, Scott explained, whereas without the cap, “an influx . . . of a large number” of charter schools could tax TEA’s resources. 189.RR(Ex. 5630).108-10.

Moreover, the Legislature has sensibly responded to the growth of charter schools in Texas by adjusting the cap. At the time of the trial’s first phase, the number of charters (209) was approaching the cap then in place (215). 41.RR.24-25. That year, the Legislature amended the Education Code to raise the cap to 225 and to increase it each year through 2019, when the limit will reach 305 charters. TEX. EDUC. CODE § 12.101(b-1), (b-2). That incremental approach helped “strike an important balance between encouraging the growth of high-quality charter schools and ensuring that the commissioner of education had the necessary tools to provide effective quality

control and oversight.” House Research Org., Bill Analysis at 7, Tex. S.B. 2, 83d Leg., R.S. (2013). In sum, the Legislature’s principled treatment of the charter cap cannot be called arbitrary.

In any event, the Intervenors cannot show that the current cap is actually causing any inefficiency. For years, the number of charters has remained below the cap. 41.RR.24-25. Also, the cap does not limit the number of school campuses that a charter holder may operate. TEX. EDUC. CODE § 12.101(b-4); 41.RR.25 (noting that, although the cap was then 215 charters, there were over 500 individual charter schools in Texas in 2013); 41.RR.53 (stating that the cap has not been a problem “because of the ability to open additional schools”); 189.RR(Ex. 5630).287 (explaining that charter-school waiting lists are not “a function of the cap”). And the Intervenors’ expert on this issue never analyzed why existing and potential charter holders do not provide enough capacity to meet charter-school demand. 36.RR.145-48. Thus, even accepting the Intervenors’ view that unmet demand for charter schools is inefficient, Intervenors Br. 28, they failed to show that the charter cap is to blame. Indeed, the Charter School Plaintiffs themselves have conceded that a challenge to the charter cap is unripe. Charter Br. 11 n.6.

The Intervenors further claim that charter schools' very existence proves that the current system is inefficient because, according to one study, charter schools on average achieve the same range of educational results as school districts but with fewer regulations and expenses. Intervenors Br. 29. But it does not inevitably follow that schools would attain the same performance and spending levels in an all-charter or similar model as charter schools do in the current system, in which they educate only 3.9% of public-school students. Indeed, the Intervenors' own expert conceded that "you can't really compare optional charter school performance and histories, whether in Texas or other states, to a system whereby all schools were chartered." 36.RR.143.

To be sure, the Legislature is moving public education in the direction championed by the Intervenors. Again, the system's charter component will steadily expand over the next several years as the charter cap rises. TEX. EDUC. CODE § 12.101(b-1), (b-2). And the 84th Legislature just enacted new provisions authorizing an academically acceptable school district to designate itself as a "district of innovation," which allows the district to opt out of many of the same regulations from which charter schools are exempt. *See* TEX. EDUC. CODE ch. 12A (eff. June 19, 2015). It is not arbitrary for the Legislature

to take these incremental steps toward innovation in public education, rather than reconstructing the entire system on charter-like principles, given that Texas has only two decades of limited experience with charter schools. *Cf. Dow Jones & Co. v. U.S. Postal Serv.*, 110 F.3d 80, 87 (D.C. Cir. 1997) (holding that agency did not act arbitrarily by taking “incremental steps” toward greater efficiency). As the Intervenors’ own expert acknowledged, “new ideas need to be tried out on small scale and brought in in small scale.” 36.RR.192.

c. The class-size limit is not arbitrary.

The Intervenors also urge that “[s]tatutes requiring small class sizes” render the system unconstitutionally inefficient. Intervenors Br. 29-30. But the Intervenors again failed to prove a constitutional violation in this regard.

To be clear, Texas law contains only one limit on class size: classes in kindergarten through fourth grade may enroll no more than 22 students. TEX. EDUC. CODE § 25.112(a). Even then, a school district may apply for a waiver of that limit if it creates an “undue hardship.” *Id.* § 25.112(d). Beyond that, if a district offers a physical-education class with a student-teacher ratio greater than 45:1, it need only identify how it plans to maintain student safety in that class. *Id.* § 25.114(b). And districts must maintain a minimum ratio of one

teacher per 20 students in average daily attendance, but that requirement does not dictate any particular class size. *Id.* § 25.114(a).

The Intervenors attack the statutory limit primarily with evidence that larger class sizes and class-size flexibility generally can offer advantages in costs and instruction. Intervenors Br. 30. But as former Commissioner Scott explained, “there’s research on both sides of that [class-size] issue.” 189.RR(Ex. 5630).198-99; *accord* 26.RR.76 (describing the class-size-reduction research as “a small number of good studies that produce variable results.”).

For example, one “influential and credible study” found that reduced class sizes in early grades positively affected academic achievement “with the economic benefits of the program outweighing the costs.” 120.RR(Ex. 1195).5-6; 26.RR.76-77. By contrast, “two credible studies” revealed “no positive effects” of class-size reduction to offset the associated costs of more teachers and classrooms. 120.RR(Ex. 1195).8-9; 26.RR.77-79, 80. Still other studies produced “mixed results.” 120.RR(Ex. 1195).7-8; 26.RR.79-80. While the Intervenors may favor one extreme in this policy debate, the Legislature did not act arbitrarily by choosing a middle course, mandating moderate class sizes in grades K-4 but not thereafter. *WOC II*, 176 S.W.3d at 784 (acknowledging the Legislature’s “latitude in choosing among any number of

alternatives that can reasonably be considered . . . efficient”); *see also* 37.RR.250-51 (Intervenors’ expert agreeing that, in light of the mixed research and costs involved, implementing class-size reduction is ultimately “a policy choice”).

Moreover, the Legislature has provided for flexibility by authorizing the Commissioner to waive the K-4 class-size limit in cases of hardship. TEX. EDUC. CODE § 25.112(d). And the evidence showed that the Commissioner has liberally granted those waivers for cost-savings and other reasons. 189.RR(Ex. 5630).389-95, 449.

In any event, the Intervenors presented no evidence that Texas’s waivable K-4 class-size limit actually causes systemic inefficiency. Their only Texas-specific evidence is a report estimating that “[t]he cost savings by raising the current class-size average of 19.3 students to 22 students would be \$558 million statewide.” Intervenors Br. 30. But that report did not show that the 19.3-student average was *caused by* the 22-student class-size limit rather than campus or district policies, population variation, or other factors. 69.RR(Ex. 32).17; 189.RR(Ex. 5630).455 (noting that “we don’t know why they’re at 19.3”). Thus, the Intervenors failed to advance or prove their efficiency claim by challenging the statutory class-size limit.

d. Use of the Cost of Education Index is not arbitrary.

The Intervenors further contend that the system inefficiently allocates funding among school districts using the Cost of Education Index (“CEI”) because that index is “based on data collected over a quarter of a century ago.” Intervenors Br. 31. But as the State Defendants explained in their opening brief, the CEI is only one factor among many other adjustments, special allotments, weights, guaranties, recapture provisions, and revenue targets that affect the maintenance-and-operations (“M&O”) component of a district’s funding. State Br. 26-32, 34-35. And as the State Defendants showed, the formula as a whole does not result in an inefficient distribution of funds among districts. *Id.* at 117-51. Given that the outcome remains within constitutional parameters, it was not arbitrary for the Legislature to continue to use the pre-existing CEI as one component of the funding formula.

e. Financial reporting and accountability measures are not arbitrary.

The last mandates challenged by the Intervenors are the system’s financial reporting and accountability requirements. Intervenors Br. 31-33. The Intervenors generally assert that those provisions do not facilitate the kind of cost-benefit analysis that they believe is necessary to make the system constitutionally efficient—one that “would link how much students learned per

dollar spent” and “allow tracking of how money was spent on each student’s education and each student’s annual learning.” *Id.* at 33, 40-41. Again, the Intervenor’s are wrong.

As an initial matter, the Court already has rejected the premise of this challenge by recognizing that “[w]hile the end-product of public education is related to the resources available for its use, the relationship is neither simple nor direct.” *WOC II*, 176 S.W.3d at 788; *see also* 30.RR.61-62 (explaining that no one knows “the best relationship between inputs and outputs” or “the truly efficient way to raise student achievement and use the inputs in the most efficient way”). So even if the system could, for example, assign a dollar amount to each student’s score on an end-of-course algebra exam, that data would not necessarily reflect whether the money was effectively spent. Accordingly, the Legislature reasonably has not incorporated that sort of granular cost-benefit analysis into its financial-reporting regime.

Moreover, the Intervenor’s failed to establish that the financial reporting and accountability measures currently in place are arbitrary. Through the Academic Excellence Indicator System (“AEIS”), TEA generates publicly available reports containing extensive information at the campus, district, region, and state levels on students, staff, programs, and operating

expenditures. 29.RR.66-67; 30.RR.80-81, 162; 131.RR(Ex. 1344); *see also Academic Excellence Indicator System*, TEX. EDUC. AGENCY, <http://ritter.tea.state.tx.us/perfreport/aeis/> (last visited July 1, 2015). The Intervenors at most identified additional reporting that might be useful, but they did not prove that the Legislature acted arbitrarily by not requiring it.

One of the Intervenors' experts, Dr. Hill, was unaware of the data available through AEIS when forming his opinion about the system's financial-accountability measures. 36.RR.123, 125, 159. And he ultimately conceded that he could use the AEIS information to compare spending and results at individual schools and that otherwise he "could make pretty good use of this data." 36.RR.124, 159-62. Dr. Hill did criticize AEIS for failing "to attach a given teacher or a given amount of expenditure to a student," 36.RR.160, but it was not arbitrary for the Legislature to exclude that level of detail from the system. As discussed above, that information would not necessarily reflect the effectiveness of the money spent. Further, Dr. Hill did not know how much it would cost to gather and report that additional detail. 36.RR.162-64.

Another Intervenor expert, Mr. Mark Hurley, admitted that the system generates "oceans" of data about school finances, 233.RR(Ex. 8145).262, 266, yet he found it both insufficiently detailed and insufficiently general. For

example, Mr. Hurley believed that it was not useful to report a full-time teacher's exact salary without allocating it by time spent on teaching, supervising extracurricular activities, coaching athletic teams, and performing other staff functions. 233.RR(Ex. 8145).260-61, 282. At the same time, Mr. Hurley complained that TEA and the school districts do not synthesize the detail that already exists into a "coherent" picture in the districts' annual financial reports. 233.RR(Ex. 8145).292-93, 306. But Mr. Hurley conceded that he did not know how much work is required to determine what a district spends on various functions under the current reporting system or how much more work it would take to generate the additional detail he believes is important. 233.RR(Ex. 8145).193-94, 297.

The Intervenors' third expert on this topic, Dr. Donald McAdams, stated that he was not aware of any statute or regulation that prevented school districts from tracking or unbundling financial information in the way that he believed was necessary to increase productivity. 38.RR.93. He also agreed that the additional financial reporting he recommended would add "a lot of work" for school districts. 38.RR.134.

In sum, the Intervenors failed to show that the Legislature acted arbitrarily in imposing the current financial reporting and accountability requirements and not generating more detail or different information.

2. The level of competition within the system is not arbitrary.

The Intervenors also claim the system is unconstitutionally inefficient because, as a “monopoly,” it inherently lacks the competitive mechanisms that could drive improvements in productivity. Intervenors Br. 33-35. As with their challenges to various system regulations, however, they failed to show that the Legislature has acted arbitrarily in this area.

The Intervenors’ premise that the system is a monopoly is incorrect. An education system is an effective monopoly if it “does not provide virtual education, doesn’t provide open enrollment, has no charter schools, [and] has no available private schools.” 26.RR.242. Texas offers virtual education to all students in all districts, 28.RR.159; it creates open-enrollment charter schools, TEX. EDUC. CODE § 12.101; and, of course, it has private schools.

To this point, the Legislature has instituted competition within the system largely through charter schools. TEX. EDUC. CODE § 12.001(a)(2) (declaring that one purpose of the charter-school program is to “increase the choice of learning opportunities within the public school system”). As

discussed above, the Legislature has chosen a measured course, steadily expanding the number of authorized charters to accommodate charter-school growth while ensuring that the system has sufficient resources to oversee those schools. *See supra* Part II.B.1.b. And, again, that choice has not actually prevented the addition of more charter schools to the system. *See supra id.* The Legislature monitors this charter-centric approach to competition by requiring the Commissioner to “designate an impartial organization with experience in evaluating school choice programs to conduct an annual evaluation of open-enrollment charter schools.” TEX. EDUC. CODE § 12.118(a). Accordingly, the Legislature’s handling of competition in the system through charter schools has not been arbitrary, and thus, is not unconstitutional. *See supra* Part II.B.1.b.

As for other proposals that might create more competition among schools, even the Intervenors’ expert acknowledged that “we’re just experimenting with how to introduce competition into the system.” 37.RR.86 (describing “nascent experiments” in which “some states are moving toward more voucher-like systems”). Those proposals might result in beneficial competition that indeed would improve the system, but that remains a policy choice within the Legislature’s discretion. It cannot possibly be arbitrary for

the Legislature to decide that Texas will not yet participate in an education “experiment.”

Finally, to the extent the Intervenors argue that the term “efficient” in article VII, section 1 *requires* more competition or school choice as a matter of the Framers’ original intent, Intervenors Br. 34-35, the Court never has adopted that construction. To the contrary, reading “efficient” to impose a mandate that specific would contravene the Court’s holding that article VII, section 1 establishes a “very deferential” standard that affords the Legislature “broad discretion to make the myriad policy decisions concerning education” and “much latitude in choosing among any number of alternatives that can reasonably be considered . . . efficient.” *WOC II*, 176 S.W.3d at 784, 790. The level of competition that the Legislature has opted for in the current system surely meets that standard.

3. The district court’s findings and conclusions do not support a judgment for the Intervenors.

The Intervenors further contend that the district court’s findings of fact and conclusions of law actually support a judgment in their favor on their claim. Intervenors Br. 36-39. That is incorrect.

The Intervenors first point to the court’s findings that the system is not accomplishing a general diffusion of knowledge. *Id.* at 36. As discussed above,

however, the Intervenors’ reliance on those findings mistakenly conflates an adequacy claim, which they did not bring, with an efficiency claim. *See supra* Part II.A. Again, the court’s (erroneous) findings that the system is not achieving the necessary outputs do not establish or support an efficiency violation. *See supra id.*

The Intervenors next cite the court’s findings about the importance of teacher quality and its relationship to teacher salaries. Intervenors Br. 37. While the Intervenors may agree with those ultimate findings, the court specifically rejected their theories and evidence that allegedly inefficient regulations cause deficiencies in teacher quality and pay. 12.CR.406-09 (FOF 664-679), 559 (FOF 1468), 561-62 (FOF 1475-1479), 564 (FOF 1489), 580 (COL 60), 585 (COL 87-88).

The Intervenors also herald the court’s findings that the CEI is outdated. Intervenors Br. 37. But the court did not find that the CEI was wasteful—a necessary element of an efficiency claim. *See supra* Part II.A. Rather, the court determined that the CEI should be updated to provide *more* funding to school districts—an outcome the Intervenors vigorously opposed. 12.CR.388 (FOF 598) (favorably citing testimony that “an updated index should provide approximately \$1 billion more to school districts”). For that

reason, the court believed that the CEI contributed to the system's alleged inadequacy and unsuitability, not its inefficiency. 12.CR.389 (FOF 602). In any event, as discussed above, the Legislature's continued use of the pre-existing CEI is not arbitrary, and thus does not support a judgment for the Intervenors. *See supra* Part II.B.1.d.

Relatedly, the Intervenors also misplace reliance on the court's conclusions that the State defaulted on a duty to calculate the costs of achieving a general diffusion of knowledge. Intervenors Br. 37. Again, the court held that this alleged default caused underfunding, not waste, leading it to find the system inadequate and unsuitable, not inefficient. 12.CR.573, 575, 583 (COL 30, 40, 78). Of course, as the State Defendants explained in their opening brief, the court's conclusions do not support adequacy or suitability violations either. State Br. 99-100, 153.

C. The Intervenors' Issue Regarding Education Costs Is Not Germane to the Legislature's Compliance with Article VII, Section 1.

In a separate issue, the Intervenors contend that the system is inefficient because school districts may bring claims for inadequate funding without first showing that it costs them a certain amount to educate students, they are efficiently spending the funds they already receive, and those

efficiently spent funds do not meet their demonstrated education costs. Intervenor Br. 40-45.

To the extent the Intervenor blame the system's financial-reporting and accountability regulations for this purported inefficiency, *id.* at 40-41, the State Defendants reiterate that (1) the relationship between inputs and outputs cannot be captured by a simple cost figure, and (2) the system regulations are not arbitrary. *See supra* Part II.B.1.e.

More importantly, the school districts cannot bring claims for inadequate funding in the first place. As the State Defendants explained in their opening brief, funding levels are not a proper metric for the system's constitutionality under article VII, section 1. State Br. 94-102. Accordingly, this issue is not germane to the Intervenor's efficiency challenge.

III. CHARTER SCHOOLS ARE AN IMPORTANT PART OF THE PUBLIC-EDUCATION SYSTEM, BUT THEY ARE FUNDAMENTALLY DIFFERENT FROM SCHOOL DISTRICTS.

As discussed above, the State Defendants agree with the Intervenor and the Charter School Plaintiffs that charter schools are an important part of Texas's public-education system. *See supra* Part II.B.1.b. The Charter School Plaintiffs rightly observe that, over the past two decades, charter schools have

achieved “remarkable success” and “impressive results” in Texas. Charter Br. 23, 25-26.

The Charter School Plaintiffs’ claims in this suit cannot be properly understood, however, without viewing them in the context of the legislative design for the charter-school part of the system. The Legislature adopted the charter-school scheme to “(1) improve student learning; (2) increase the choice of learning opportunities within the public school system; (3) create professional opportunities that will attract new teachers to the public school system; (4) establish a new form of accountability for public schools; and (5) encourage different and innovative learning methods.” TEX. EDUC. CODE § 12.001(a). To achieve those goals, the Legislature devised a tradeoff: in exchange for accepting accountability and funding mechanisms that differ from those applicable to school districts, charter schools are exempt from certain state mandates and thereby gain flexibility to provide innovative educational programs. The elements of that tradeoff are described below.

A. Charter Schools Are Accountable Under the Terms of Their Contracts with the State.

As discussed above, the charter-school component of the system aims to “establish a new form of accountability for public schools.” *Id.* § 12.001(a)(4).

That novel accountability derives substantially from the contractual nature of charter schools' relationship with the State.

The types of charter schools represented by the Charter School Plaintiffs—"open enrollment" and "university" charter schools—function under contracts called "charters" issued by the Commissioner of Education. *Id.* §§ 12.112 (requiring an open-enrollment charter to be "in the form of a written contract"), 12.156(a) (subjecting university charter schools to the open-enrollment-charter requirements).⁷ Among other things, a charter must "describe the educational program to be offered" and any "enrollment criteria" for students; specify "the academic, operational, and financial performance expectations" by which the charter's schools will be evaluated; set forth the charter program's governing structure; and describe the program's facilities and geographical coverage. *Id.* § 12.111(a).

Charters are issued for a fixed term. *Id.* § 12.101(b-5) (setting initial term at five years). During the charter term, TEA annually evaluates the

⁷ Chapter 12 contemplates two other charter-school arrangements. A campus charter school operates at an existing school-district campus where the parents and teachers have agreed to change the governance structure to one based on a contract with the school district. TEX. EDUC. CODE §§ 12.051-12.065. Chapter 12 further provides for the creation of home-rule school district charters, *id.* §§ 12.011-12.030, but no such district has yet been created.

schools operated by the charter holder under charter-specific performance frameworks. *Id.* § 12.1181; 19 TEX. ADMIN. CODE § 100.1010. At the term’s conclusion, the charter holder may petition to renew the charter. TEX. EDUC. CODE § 12.1141; 19 TEX. ADMIN. CODE § 100.1031.

The Commissioner’s authority to impose sanctions for violations of a charter’s terms, to decline to renew a charter, or even to cancel a charter provides the “new form of accountability” the Legislature envisioned. *See* TEX. EDUC. CODE § 12.001(a)(4). For example, if a charter school materially violates the charter’s terms, the Commissioner may withhold funding or suspend the school’s operation. *Id.* § 12.1162. The Commissioner also may decide not to renew a charter based on a charter school’s annual evaluations. *Id.* § 12.1141(c). And a charter school’s academic and financial performance under the system’s accreditation regime may preclude renewal. *Id.* § 12.1141(d). For more severe or recurring charter violations, the Commissioner may revoke a charter or force the reconstitution of a charter’s governing body. *Id.* § 12.115(a)(1).

B. The State Funds Charter Schools Directly Using a Method Related to, but Distinct from, School-District Funding.

In addition to accepting an accountability mechanism that differs from that of school districts, charter schools also agree to a different form of

funding. Like school districts, charter schools are funded primarily through the Foundation School Program (“FSP”). TEX. EDUC. CODE § 12.106; 19 TEX. ADMIN. CODE § 100.1041. But unlike school districts, charter schools lack taxing authority and thus cannot raise local revenue. TEX. EDUC. CODE § 12.102(4); 119.RR(Ex. 1188).14. Accordingly, the State fully funds charter schools, employing a formula adapted from the framework for funding school districts. *See infra* Part III.B.1. Although that adjusted formula results in different funding for charter schools, the differences are not as significant as the Charter School Plaintiffs suggest, and they certainly do not violate the Constitution. *See infra* Part III.B.2.

1. Charter-school funding uses both state averages and charter-specific details.

As described in the State Defendants’ opening brief, FSP funding has two tiers: Tier I is the sum of the regular program allotment and a series of special allotments, while Tier II is based on a guaranteed yield per penny of tax effort. State Br. 26-31. Charter schools receive funding at both tiers, but the calculations differ from those applicable to school districts.

For Tier I funding, the regular program allotment begins with the basic allotment, which is adjusted for several factors, including the CEI, the small- and mid-sized district adjustments, and the sparsity adjustment. TEX. EDUC.

CODE §§ 42.101-42.105. When calculating the regular program allotment for charter schools specifically, the Legislature has instructed TEA to use the state average of these adjustments. *Id.* § 12.106(a-1); 12.CR.566 (FOF 1499); 32.RR.90-91. As to the special allotments, though, charter-school funding is individually tailored. Each charter school receives additional funds for students who qualify for a special allotment, such as those in gifted-and-talented programs, those who are economically disadvantaged, and those who are English-language learners. 12.CR.566 (FOF 1500); TEX. EDUC. CODE § 12.106(a).

For Tier II funding, the Legislature must account for the fact that charter schools do not tax. To that end, the Legislature has instructed TEA to use the state average M&O tax effort when computing charter schools' Tier II funds. TEX. EDUC. CODE § 12.106; 12.CR.566 (FOF 1501).

Charter schools do not receive separate facilities funding. TEX. EDUC. CODE §§ 46.012, 46.036; 12.CR.566 (FOF 1503); 32.RR.89; 41.RR.14-15. But they may pay for facilities out of their per-student allocations. *See* 32.RR.95. Indeed, the Legislature contemplated that charter schools will spend part of their per-student funding on facilities. *E.g.*, TEX. EDUC. CODE § 12.128 (providing that facilities purchased with per-student funding become public

property). Thus, whereas school districts must convince their voters to support separate Interest and Sinking Fund (“I&S”) taxes for facilities, charter schools may use as much or as little of their FSP funding on facilities as they choose. *See* 244.RR(Ex. 9048).28 (finding that the average charter school spends \$829 per student on facilities, and one third of charter schools were choosing to save over \$1600 per student to purchase or renovate facilities).⁸

Moreover, as part of their Tier I special allotments, charter schools are eligible for the “new instructional facility allotment” (NIFA), which provides additional funding to defray the costs associated with opening new school buildings. TEX. EDUC. CODE § 42.158; 32.RR.91-92. Although the Legislature did not fund the NIFA for several years due to budget cuts, 10.RR.166, the 84th Legislature appropriated \$23.75 million in NIFA funding per year for the next biennium to furnish and equip new campuses. General Appropriations Act, 84th Leg., R.S., art. III, rider 3, p. III-6.

⁸ In addition, if a charter holder meets further financial requirements, it may be designated as a “charter district” for purposes of issuing bonds guaranteed by the Permanent School Fund. TEX. EDUC. CODE § 12.135. That designation gives charter schools access to lower interest rates. *See id.* Charter schools also are eligible for certain federal programs offering tax credits to lenders that issue bonds for construction and renovation of school facilities. 244.RR(Ex. 9048).25.

2. The Charter School Plaintiffs present an incomplete picture of charter-school funding.

The Charter Schools Plaintiffs' opening brief glosses over this statutory framework and ignores that the differences in funding for charter schools are a reasonable trade-off for their increased educational flexibility. Regardless, the funding differences are simply not as large as the Charter School Plaintiffs suggest.

It is by no means "undisputed" that charter schools "receive \$1000 less per student" than school districts. Charter Br. xi, xii, xiii, 1, 6, 12, 15. The Charter School Plaintiffs have simply focused on that statistic to the exclusion of all others. The \$1000 figure concerns FSP revenue per "weighted" student (specifically, "weighted average daily attendance" or "WADA"). Charter Br. 7; 290.RR(Ex. 9065). When considered on a "per student" basis ("average daily attendance" or "ADA"), the gap is only \$299 in 2015. 293.RR(Ex. 11476).²² (displaying statistics from 293.RR(Ex. 11470)). In fact, under an ADA analysis, charter-school students actually received *more* FSP revenue than school-district students in 2010 and 2011. 290.RR(Ex. 9065).

Other statistical analyses demonstrate that charter-school students have access to similar, or greater, amounts of revenue than their school-district counterparts. As the district court found, charter schools received

over \$1200 more per student in general-fund revenue than school districts in 2011. 12.CR.566-67; 119.RR(Ex. 1188).16. In 2011-2012, charter-school operating expenditures per pupil exceeded those of the rest of the State by almost \$500. *See Snapshot 2013 Summary Tables: State Totals*, TEX. EDUC. AGENCY, <http://ritter.tea.state.tx.us/perfreport/snapshot/2013/state.html>. And in total instructional expenditures per pupil, charter schools were only \$400 behind the rest of the State. *Id.* In short, the Charter School Plaintiffs' \$1000 figure seizes on one isolated statistic (FSP revenue per WADA) without taking the whole funding picture into account.

Moreover, nothing makes funding per WADA more legally or factually relevant than funding per ADA. To the contrary, the Court's first school-finance decision, *Edgewood I*, focused entirely on funding "per student." 777 S.W.2d at 392-93. Likewise, Tier I funding, which can constitute over 89% of FSP funding, is based primarily on ADA. TEX. EDUC. CODE § 42.101(c); 56.RR.161-62 (discussing 292.RR(Ex. 11454)). Although weights are eventually added, those are also based on ADA. *See* TEX. EDUC. CODE §§ 42.151-42.160. Further, because much of the Charter School Plaintiffs' argument revolves around facilities funding, the amount per ADA matters more because (1) school-district facilities funding is based on ADA, *id.*

§§ 46.001-46.003, 46.032-46.034; and (2) students have the same facilities needs regardless of how they are weighted, 32.RR.87-88. The Charter School Plaintiffs cannot force the Court to accept only one statistic when many others are also relevant.

The Charter School Plaintiffs also claim that they are harmed by the use of state averages, rather than individually tailored calculations, in the determination of their FSP funding. Charter Br. 5, 21-22. They focus on the CEI, which is only one of several factors used to adjust the basic allotment, and then only on one element of the CEI, the percentage of economically disadvantaged students. *Id.* Because charter schools educate a higher percentage of economically disadvantaged students, the Charter School Plaintiffs assert that they are being short-changed by the use of a state average. *Id.* at 21-22. But they offer (1) no alternative calculations to prove their theory; (2) no evidence that using a charter-specific calculation would benefit charter schools overall, given that they also receive the state average of other adjustments; and (3) no explanation of how to apply a charter-specific calculation to the various adjustments (such as sparsity), given that some charter schools have campuses across the State. In short, they have not proven any harm by the use of a state average.

Finally, charter schools *do* receive funding for facilities, contrary to their repeated claims. *Id.* at 1, 13, 18, 21. As discussed above, it just isn't labeled as "facilities" funding. *See supra* Part III.B.1. If charter schools truly received "zero" dollars for facilities, as the Charter School Plaintiffs claim, Charter Br. 1, charter schools could not exist, as they would have no facilities in which to carry out their programs. The record contains no evidence of a single charter school that was unable to operate because it lacked adequate facilities. *See WOC II*, 176 S.W.3d at 792 (rejecting a claim regarding facilities funding because there was no evidence that a lack of facilities prevented schools from providing a general diffusion of knowledge).

C. Charter Schools Are Exempt from Certain State Mandates.

In return for agreeing to a different accountability and funding structure, the system relieves charter schools from several educational mandates applicable to school districts. *See* TEX. EDUC. CODE § 12.103. For example, charter schools are not subject to the contract requirements for administrators, teachers, and staff, *see id.* § 21.002(a); the conditions for hiring a non-certified teacher, *see id.* § 21.055(a); or the minimum salary schedule, *see id.* § 21.402(a). Charter schools need not observe the statewide school start-date requirements and limitations on year-round education. *See id.*

§§ 25.0811, 25.084. The minimum student-teacher ratios and class-size limits do not apply. *See id.* §§ 25.111, 25.112. And charter schools may adopt campus-specific conduct policies, rather than applying the statewide disciplinary code. *See id.* § 37.001. That increased flexibility paves the way for charter schools to experiment with alternative education models and pedagogical theories.⁹

* * *

The crux of the Charter Schools Plaintiffs’ complaints is that the State should increase their funding to more than the current average student funding and that they also should receive facilities funding. *See* Charter Br. 18-26. They justify those complaints by asserting that they are an “equal part” of the public-education system, apparently implying that equality is measured by precisely equal funding. *See id.* at 13. But charter schools are different by design. The Legislature intends for charter schools to be a *distinct* component of the public-education system, a “part” of the greater whole. TEX. EDUC. CODE § 12.105. Charter schools differ from school districts for the very

⁹ To be sure, charter schools still must comply with open-government laws, *e.g.*, TEX. EDUC. CODE §§ 12.1051 (open meetings), 12.1052 (open records), and anti-corruption requirements, *id.* §§ 12.1054 (conflicts of interest), 12.1055 (nepotism). And, like all educators in the system, they must administer the statewide student assessments. *See id.* § 39.021 (requiring statewide testing standards for all students).

reasons—new accountability regime, separate funding method, and freedom from certain mandates—that they are able to provide educational innovation.

IV. THE CHARTER SCHOOL PLAINTIFFS' CLAIMS ARE JURISDICTIONALLY BARRED.

The State Defendants repeat and incorporate the jurisdictional arguments set forth in their opening brief, State Br. 49-75, each of which applies to the Charter School Plaintiffs' claims. In response to the Charter School Plaintiffs' opening brief, a few of those arguments bear emphasis here.

The Charter School Plaintiffs' focus on the differences between charter-school and school-district funding squarely implicates the political-question and redressability problems previously raised by the State Defendants. No standard exists by which the Court can assess the Legislature's policy decision to fund charter schools differently in exchange for offering them more flexibility in carrying out state educational objectives. *See id.* at 55-60. Moreover, declaring the system unconstitutional because charter schools do not receive a certain level of funding would amount to an impermissible directive to the Legislature to spend more money. *See id.* at 60-61. And even if the Charter School Plaintiffs preserve the injunction striking down and defunding the entire system, that provides no assurance that the Legislature

will respond by equalizing charter-school and school-district funding, and thus no redress for their claimed injury. *See id.* at 61-66.

In addition, the Charter School Plaintiffs’ framing of their case on appeal still does not entirely avoid the immunity bar to contract claims against the State. *See id.* at 70-75. To reiterate, to the extent that the Charter School Plaintiffs generally assert claims as education providers, parents, and children that the system as a whole violates article VII, section 1 and should be enjoined prospectively for that reason, their suit does not implicate sovereign immunity. But to the extent their claims rest on arguments that the Legislature must change the charter program’s particulars for the system to pass constitutional muster—for example, intimating that the system is constitutionally defective because it does not separately fund charter-school facilities, *see* Charter Br. 18-21—they are seeking to alter the terms and conditions of contracts, and their suit accordingly is barred. *See* State Br. 70-75.

V. ASSUMING JURISDICTION EXISTS, THE CHARTER SCHOOL PLAINTIFFS’ CLAIMS FAIL ON THE MERITS.

The Charter School Plaintiffs bring two sets of claims under article VII, section 1 of the Texas Constitution: “charter-specific” claims and system-wide

claims. Charter Br. 15.¹⁰ The charter-specific claims fail because a claim that challenges only part of the system is not cognizable under article VII, section 1. The system-wide claims fail for the reasons stated in the State Defendants’ opening brief and because the Charter School Plaintiffs’ evidence is not sufficient to show a constitutional violation. If the Court does not dismiss the Charter School Plaintiffs’ claims for lack of jurisdiction, it should reverse the judgment in their favor on their adequacy claim and affirm the judgment for the State Defendants on their efficiency and suitability claims.

A. “Charter-Specific” Claims Are Not Cognizable Under Article VII, Section 1.

The Charter School Plaintiffs’ “charter-specific” claims fail because challenges to a *part* of the public-education system or as-applied claims are not cognizable under article VII, section 1. To the extent plaintiffs may assert claims for violations of article VII, section 1, they must establish that the *entire* system is invalid. *See* State Br. 107-08, 144-45, 154; *see also supra* Part II.A.

Article VII, section 1 assigns the Legislature the duty “to establish and make suitable provision for the support and maintenance of an efficient system

¹⁰ The Charter School Plaintiffs explicitly dropped their claim that the cap on the number of charters rendered the system unconstitutional, Charter Br. 11 n.6, and implicitly dropped their equal-rights claim under article I, section 3 by failing to brief it, *Nall v. Plunkett*, 404 S.W.3d 552, 556 (Tex. 2013) (per curiam).

of public free schools.” TEX. CONST. art. VII, § 1. As discussed above, because this provision compels the Legislature to establish “an efficient system,” the Court has held that an “efficiency” claim must show that the system *as a whole* is inefficient, not merely that parts of the system are inefficient. *WOC II*, 176 S.W.3d at 790; *see supra* Part II.A.

The same logic extends to “adequacy” and “suitability” claims. As the State Defendants explained in their opening brief, the constitutional “adequacy” standard measures whether the system is achieving a “*general* diffusion of knowledge,” not a diffusion of knowledge among certain student populations or students enrolled in charter schools. State Br. 107-08. And article VII, section 1 charges the Legislature to “make *suitable* provision for . . . *an efficient system* of public free schools,” not suitable provision for the system’s parts. *Id.* at 154.

Indeed, in *West Orange-Cove II* the Court necessarily rejected the concept of “as applied” or non-systemic challenges under article VII, section 1. The district court had issued over 250 findings and conclusions regarding adequacy, efficiency, and suitability specific to “property-poor districts.” Trial Order, *W. Orange-Cove Consol. ISD v. Neeley*, No. GV-100528, 2004 WL 5719215 (250th Dist. Ct.—Travis Cnty. Nov. 30, 2004) (FOF 294, finding the

system inadequate, inefficient, and unsuitable as to “property-poor districts”; COL 23-24, concluding that the system is inadequate, inefficient, and unsuitable as to “property-poor districts”). Despite those focused rulings, on appeal this Court did not separately analyze the system as applied to property-poor districts. Instead, it considered the adequacy, efficiency, and suitability of the system only *as a whole*. *WOC II*, 176 S.W.3d at 787-94.

In short, the Charter School Plaintiffs’ “charter-specific” claims proceed from a faulty premise. There is no such thing as inadequate, inefficient, or unsuitable “charter funding,” or a cognizable challenge to “[t]he charter school finance system,” under article VII, section 1. Charter Br. 22.

B. The Charter Schools Did Not Prove a System-Wide Constitutional Violation.

Because “charter-specific” claims are not viable, the Charter School Plaintiffs’ arguments regarding charter-school performance and funding are relevant only to the extent that they show that the “the entire system” is unconstitutional. *See WOC II*, 176 S.W.3d at 790. The Charter School Plaintiffs do not attempt to make that showing, nor could they. By definition, charter schools are only a “part” of the public education system. TEX. EDUC. CODE § 12.105. They educate only around 3.9% of public-school students. TEX. EDUC. AGENCY, 2014 COMPREHENSIVE BIENNIAL REPORT ON TEXAS PUBLIC

SCHOOLS 231 (Jan. 2015), *available at* http://tea.texas.gov/acctres/comp_annual_index.html. Even accepting the Charter School Plaintiffs' case in full, then, would not establish the systemic defects necessary to prove a violation of article VII, section 1. For that reason alone, the Court should reverse the judgment for the Charter School Plaintiffs on their adequacy claim and affirm the judgment for the State Defendants on their efficiency and suitability claims.

In any event, the Charter School Plaintiffs' arguments do not undermine the State Defendants' position in their opening brief. No parties in this case met their burden to overcome the presumption that the system is constitutionally adequate, efficient, and suitable. State Br. 75-154.

1. The Charter School Plaintiffs did not show that the system fails to provide a general diffusion of knowledge.

In claiming that the system is inadequate, the Charter School Plaintiffs incorrectly base their arguments on inputs (funding) when the Court has stated that the constitutional test for adequacy depends on outputs (student performance). *See WOC II*, 176 S.W.3d at 788. And the evidence showed that charter schools are keeping pace with, and in some instances exceeding, their school-district counterparts. Because the system is achieving a general

diffusion of knowledge, the Charter School Plaintiffs' adequacy claim should be rejected.

a. Constitutional adequacy is measured by outputs, not funding.

To meet article VII, section 1's adequacy requirement, the system must provide a "general diffusion of knowledge," which means that schools "are reasonably able" to provide their students (1) "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"; and (2) "a meaningful opportunity to acquire the essential knowledge and skills reflected in curriculum requirements such that upon graduation, students are prepared to continue to learn in postsecondary educational, training, or employment settings." *Id.* at 787 (internal quotation marks, citations, and ellipses omitted).

Whether the system is achieving those goals "depends entirely on 'outputs'—the results of the educational process measured in student achievement." *Id.* at 788 (agreeing with that description of the standard). Stated differently, "the constitutional standard is plainly result-oriented." *Id.*

Failing to reference that result-oriented standard, the Charter School Plaintiffs make numerous arguments about their perceived lack of funding.

Charter Br. 18-22. But article VII, section 1 “creates no duty to fund public education at any level other than what is required to achieve a general diffusion of knowledge.” *WOC II*, 176 S.W.3d at 788. Any perceived lack of funding, then, is irrelevant to the constitutional adequacy inquiry. *See* State Br. 94-100.

The district court’s findings and conclusions offer the Charter School Plaintiffs no help in this regard. Although the court granted the Charter School Plaintiffs relief on their system-wide adequacy claim, it did so solely on the basis of insufficient funding: “[b]ecause the school finance system for independent school districts under the statutory formulas is constitutionally inadequate and because charter schools are financed based on state averages of school district M&O funding levels, this Court declares that funding for open-enrollment charter schools also is inadequate.” 12.CR.586 (COL 89). The court made no finding or conclusion that charter-school students were not achieving results commensurate with a general diffusion of knowledge.

b. Charter-school performance does not show that the system is inadequate.

The Charter School Plaintiffs wrongly assert that it is “undisputed” that “charter student performance suffers as a result” of an alleged lack of funding. Charter Br. xii, 6, 23. To the contrary, the record shows that charter schools

and their students have continued to excel in terms of school accountability and student performance.

The Court presumes, in deference to the Legislature, that an “accredited education” under the system’s accountability regime accomplishes a general diffusion of knowledge. *WOC II*, 176 S.W.3d at 787. The Charter School Plaintiffs offer no argument to rebut that presumption. Therefore, the Court should conclude that meeting State accountability standards represents the achievement of a general diffusion of knowledge.¹¹

As noted in the State Defendants’ opening brief, over 90% of school districts and charters combined achieved a “met standard” rating in 2013 and 2014. State Br. 108-09. Although the charters’ “met standard” rate is lower than school districts’ (around 78-79%), charter schools generally enroll a higher proportion of students who are economically disadvantaged or otherwise more difficult to educate. *See* Charter Br. 10-11, 22; 265.RR(Ex. 10946).1; 290.RR(Ex. 9071).7. Moreover, approximately 30% of charter schools are rated under an alternative education accountability standard, which may apply to residential facilities, juvenile detention centers, and

¹¹ To the extent that other plaintiff groups disagree that the system’s accountability regime measures the provision of a general diffusion of knowledge, the State Defendants addressed those arguments in their opening brief. *See* State Br. 82-94.

schools with a large population of at-risk students. 41.RR.47. Charter schools voluntarily accept these more challenging student populations, and the system should not be enjoined simply because charter schools are still working toward their goal of educating those students. *See WOC II*, 176 S.W.3d at 789.

Even looking beyond the accountability ratings, the State Defendants' opening brief showed that Texas students, including charter-school students, were achieving a general diffusion of knowledge. State Br. 109-17. For example, toward the end of the previous assessment regime (TAKS), students generally were "topping out" on the test, and charter-school students were no exception. *Id.* at 110-13. A 2011 Snapshot published by TEA showed that, summed across all grades, charter schools' students were passing the TAKS test at rates on par with school districts' students. 265.RR(Ex. 10946).1 (showing charter-school passing rates equal to or within 4% of the rest of the State). And in writing and social studies, charter-school students achieved over 90% passing rates. 265.RR(Ex. 10946).1. The Snapshot also confirmed the Texas Charter School Association's announcement that charter schools using standard accountability measures could boast higher percentages of

African-American and Hispanic students passing all TAKS core subjects than school districts. 143.RR(Ex. 1804).1; 265.RR(Ex. 10946).1.¹²

As the State Defendants also explained, TEA expected that the transition to the more rigorous STAAR test would temporarily lower passing rates as students adjusted. State Br. 17-21, 112-13. But students already have begun to show improvement, *id.* at 112-13, and charter schools continue to keep pace with school districts in that regard. In 2013, charter-school passing rates on STAAR subjects were within 1-6 percentage points of the rest of the State at the current phase-in level, with 74% of charter-school students meeting the phase-in level in all subjects. *See Snapshot 2013 Summary Tables: State Totals*, TEX. EDUC. AGENCY, <http://ritter.tea.state.tx.us/perfreport/snapshot/2013/state.html>. Moreover, Hispanic and economically disadvantaged students in charter schools continue to outpace their counterparts in school districts. *Id.* When compared to how students were faring at a similar transition point during the *West Orange-Cove II* litigation,

¹² Witnesses from two charter schools (YES Prep and Wayside Schools (f/k/a Eden Park Academy)) also agreed that their students were excelling on state tests. 42.RR.193-94; 150.RR(Ex. 1941).3 (showing that YES Prep achieved a 100% passing rate on TAKS in 2011 and 2012); 43.RR.15, 70-71; 133.RR(Ex. 1370).3-5 (showing that Wayside's 2010-2011 passing rates for TAKS surpassed the state average in most categories, with many at a 99% passing rate).

charter-school students, like all other Texas students, are achieving a general diffusion of knowledge. State Br. 113.

c. The Charter School Plaintiffs' arguments do not support a systemic adequacy violation.

The Charter School Plaintiffs offer minimal evidence to support their claim that charter schools cannot provide a general diffusion of knowledge. First, they cite data from 2006-2011 as showing that, on average, only 30% of charter-school students were college-ready in math and 31% were college-ready in language arts. Charter Br. 9-10. But by averaging the data, the Charter School Plaintiffs obscure the progress charter schools made. In the same period, the percentage of charter-school students who tested college-ready in math increased from 25.2% to 40.5%, 244.RR(Ex. 9052).11A-E, and the percentage who tested college-ready in language arts almost doubled, rising from 26.1% to 49.7%, 244 RR(Ex. 9052).11A-E. These results show that many charter schools have succeeded in progressively enabling more students to graduate ready for college.¹³

¹³ The Charter School Plaintiffs claim that six witnesses “testified explicitly that charter schools are not achieving a general diffusion of knowledge.” Charter Br. 9. Even if inadequacy could be proved by a witness’s opinion, the evidence does not support the Charter School Plaintiffs’ claim. Two of the referenced witnesses worked at charter schools that achieved 90-100% passing rates on TAKS, 42.RR.193-94; 43.RR.70-71; Lynn Moak

Next, the Charter School Plaintiffs note that only 42% of ninth graders in charter schools passed all STAAR end-of-course exams in 2012. Charter Br. 10. But that passing rate fell only five points below the state average of 47%. 208.RR(Ex. 6349).26. Again, considering that charter schools overall enroll students who are more difficult to educate, many have fared well. And more recent data show that STAAR passing rates have improved across the state. 276.RR(Exs. 11345, 11346, 11347). There is no reason to think that charter-school students have not also improved.

Finally, the Charter School Plaintiffs state that only 11% of charter-school students scored above 1110 on the SAT or above 24 on the ACT during the 2012-2013 school year. Charter Br. 10 (citing 290.RR(Ex. 9071).38). School districts' students met those standards at a 19% rate. 290.RR(Ex. 9071).38. But that data set included students in charter schools rated under the alternative education accountability standards. 61.RR.104-05; *see supra* Part V.B.1.b. When those more difficult student populations are removed from the calculations, charter-school students exceed the standards at a 15% rate.

based his testimony solely on funding, 7.RR.70-72; 54.RR.161-62; and Toni Templeton never testified about adequacy or a general diffusion of knowledge, 61.RR.31-33.

290.RR(Ex. 9068 – Tab SAT ACT 1213).¹⁴ And the gap in SAT scores between charter-school and school-district students narrows to 46 points. 290.RR(Ex. 9068 – Tab SAT ACT 1213).

* * *

As the State Defendants explained in their opening brief, the system is currently transitioning to a more rigorous curriculum and assessment program. State Br. 110-13. And in that context, the evidence of education outputs shows that the system passes constitutional muster because it is “working to meet [its] stated goals” even if “it has not yet succeeded in doing so.” *WOC II*, 176 S.W.3d at 789.

Charter-school performance aligns with that progress, particularly in view of the fact that charter schools frequently serve a more challenging student population. If charter schools were not doing their job, there likely would not be over 100,000 students on waiting lists seeking to enroll in them. 41.RR.52. The record simply does not support a claim that charter-school performance falls so far below a general diffusion of knowledge that the entire education system must be shut down.

¹⁴ The record contains two different exhibits numbered 9068. This reference is to the Excel spreadsheet offered by the Charter School Plaintiffs and admitted by the district court. 61.RR.58-59, 79.

2. The Charter School Plaintiffs have not described or proven an efficiency claim.

The Charter School Plaintiffs cannot state an efficiency claim under article VII, section 1. The Court has always defined constitutional efficiency in funding by reference to tax rates. Specifically, efficiency requires “a direct and close correlation between a district’s *tax effort* and the educational resources available to it.” *Edgewood I*, 777 S.W.2d at 397 (emphasis added); *accord WOC II*, 176 S.W.3d at 790 (“For the system to be efficient, districts must have substantially equal access to similar revenues per pupil *at similar levels of tax effort*.” (emphasis added) (citations and internal quotation marks omitted)). Because charter schools lack the power to tax, TEX. EDUC. CODE § 12.102(4), they fall outside of the efficiency analysis. For that reason alone, the Court should affirm the judgment for the State Defendants on the Charter School Plaintiffs’ efficiency claim. 12.CR.198.

The Charter School Plaintiffs try to dodge that problem by asserting a novel efficiency claim: a free-standing right to substantially the same funding that school districts receive. Charter Br. 24-25. That theory clashes with the Court’s consistent holdings that “constitutional efficiency does not require absolute equality of spending.” *WOC II*, 176 S.W.3d at 790; *accord Edgewood I*, 777 S.W.2d at 397 (explaining that “[e]fficiency does not require a per capita

distribution” of funding). The Court should not abandon this precedent to create a new constitutional claim just for charter schools. Moreover, recognizing this new equal-funding claim would encroach upon the Legislature’s policy choice to craft a different education model for charter schools, trading the traditional funding and accountability framework for less regulation. *See supra* Part III.

To the extent charter schools may assert a financial-efficiency right at all, they should be deemed to employ the state average tax rate, which the system uses to calculate their Tier II funding. TEX. EDUC. CODE § 12.106(a-2); 12.CR.566 (FOF 1501). But even that fiction does not help the Charter School Plaintiffs because, in that scenario, charter schools’ tax “rate” and funding would align with school districts. Using only the M&O tax rate, TEA estimates that charter schools will receive \$5607 per ADA in 2015, while school districts will receive \$5862 per ADA—only a \$255 difference. 293.RR(Ex. 11476).26 (displaying statistics from 293.RR(Ex. 11470)).

Finally, as discussed above, the actual differences in charter schools’ and school districts’ funding are not as significant as the Charter School Plaintiffs contend. *See supra* Part III.B.2. Again, considered on an ADA basis, the FSP revenue gap is only \$299 in 2015. 293.RR(Ex. 11476).22 (displaying statistics

from 293.RR(Ex. 11470)). In 2011, charter schools received over \$1200 more per student in general-fund revenue than school districts received. 12.CR.566-67 (FOF 1505); 119.RR(Ex. 1188).¹⁶ And charter operating expenditures per pupil exceeded those of the rest of the State by almost \$500 in 2011-12. *See Snapshot 2013 Summary Tables: State Totals*, TEX. EDUC. AGENCY, <http://ritter.tea.state.tx.us/perfreport/snapshot/2013/state.html>. These gaps are all within constitutional bounds. *See WOC II*, 176 S.W.3d at 761-62 (finding gaps of \$300, \$584, \$1127, and \$1678 constitutional); *Edgewood IV*, 917 S.W.2d at 731 (finding the system efficient despite a potential gap of \$600).

3. The Charter School Plaintiffs have not shown that the system is unsuitable.

The Charter School Plaintiffs assert two theories of recovery on their suitability claim. The Court should reject both.

As discussed in the State Defendants' opening brief, a "suitability" violation may follow from the system's failure to meet article VII, section 1's other requirements. State Br. 152-53. Specifically, the system is unsuitable if the funding scheme's structure or operation "prevents [the system] from efficiently accomplishing a general diffusion of knowledge" such that improvement is impossible. *WOC II*, 176 S.W.3d at 794.

The Charter School Plaintiffs first argue that the system’s failure to tailor charter funding to local conditions and the alleged funding gap between charter schools and school districts “structurally prevent[]” charter schools “from receiving adequate and efficient funding.” Charter Br. 25. Because the Charter School Plaintiffs failed to prove an adequacy or efficiency violation, however, this suitability theory necessarily fails. *See supra* Part V.A, B.1-2.

The Charter School Plaintiffs also urge that they should have prevailed on their suitability claim because the ISD Plaintiffs prevailed on theirs. Charter Br. 26. The district court declared that the system is inadequate because school districts receive insufficient funding, and that it is unsuitable because the school-finance formulas cause that funding deficiency. 12.CR.194-96. The court further declared that the Charter School Plaintiffs should recover on their adequacy claim because charter-school funding is based on what school districts receive and, consequently, that funding also must be inadequate. 12.CR.196. Given that reasoning, the Charter School Plaintiffs argue that they should have recovered on their suitability claim as well. Charter Br. 26-27. If the Court affirms the judgment for the ISD Plaintiffs on their suitability claims, then the Charter School Plaintiffs surely are correct. But, as the State Defendants explained in their opening brief, *no* plaintiff

should recover on an adequacy or suitability claim based on funding levels. State Br. 94-100, 153. And because the system is both adequate and efficient under the proper constitutional standards, it is necessarily suitable. *Id.* at 75-154.

VI. THE COURT SHOULD AFFIRM THE JUDGMENT DENYING THE INTERVENORS' AND CHARTER SCHOOL PLAINTIFFS' FEE REQUESTS.

If the Court reaches the merits and affirms the judgment on the Intervenor's and Charter School Plaintiffs' claims, it likewise should affirm the denial of those parties' requests for attorneys' fees.

A. The District Court Did Not Abuse Its Discretion in Denying the Intervenor's and Charter School Plaintiffs' Fee Requests.

Under the UDJA, a court "may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. The statute thus "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet*, 972 S.W.2d at 21. Whether a fee award under the UDJA is equitable and just is "a matter of fairness in light of all the circumstances." *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162 (Tex. 2004). A trial court abuses

its discretion when it awards fees “arbitrarily, unreasonably, or without regard to guiding legal principles.” *Bocquet*, 972 S.W.2d at 21.

Here, the district court rejected the Intervenors’ and Charter School Plaintiffs’ fee requests primarily because they “were predominantly non-prevailing parties” at trial. 12.CR.200. The Intervenors did not prevail on any of their claims. 12.CR.198; *see also supra* Part II.B.3. The Charter School Plaintiffs prevailed only on their adequacy claim, and even that ruling did not rest on their showing at trial, but rather on the derivative nature of that claim. 12.CR.196. Again, the district court reasoned that, because it had found that school-district funding was inadequate, and because charter-school funding is based on school-district funding, TEX. EDUC. CODE § 12.106, it followed as a matter of law that charter-school funding also was inadequate. 12.CR.196.

Given those results, the district court did not abuse its discretion in denying the Intervenors’ and Charter School Plaintiffs’ fee requests. While a party need not prevail on the merits to obtain a fee award under the UDJA, *Barshop*, 925 S.W.2d at 637, the parties’ ultimate success or failure in a UDJA suit still matters. This Court has recognized as much by reversing and remanding fee awards under the UDJA when reversing the judgment on the merits so that the trial court may reassess whether the award remains

equitable and just in light of the Court’s ruling. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 646 (Tex. 2013); *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 405 (Tex. 2009); *WOC II*, 176 S.W.3d at 799. Because the Intervenors did not prevail on any of their claims and the Charter School Plaintiffs prevailed only on a single, derivative claim, the district court did not abuse its discretion in denying those parties’ fee requests.

The Charter School Plaintiffs contend that the district court abused its discretion by improperly considering the parties’ purported contributions “to the public debate on school finance law” in assessing their respective fee requests. Charter Br. 28-29; 12.CR.200, 203, 205-08. The State Defendants agree that consideration was erroneous for the reasons stated in their opening brief. State Br. 186-87. But the error was harmless as to the Intervenors and Charter School Plaintiffs because their status as predominantly non-prevailing parties provided independent grounds to deny their fee requests. 12.CR.200; TEX. R. APP. P. 61.1(a).

The Intervenors embrace the district court’s “public debate” standard but argue that the court abused its discretion in finding that their contribution to the debate was not sufficient to support a fee award. Intervenors Br. 51-53. In support, the Intervenors cite the extent of their participation in this case,

the uniqueness of their claim, and the court’s remark that their trial presentation “should bear the Legislature’s scrutiny.” *Id.* at 46 (quoting 45.RR.179). But because applying the “public debate” metric was wrong to begin with, the district court’s measure of the Intervenors’ voice in the debate is irrelevant. Moreover, for all the Intervenors’ complaints about litigiousness in this area, their reasoning here—a losing party should recover its fees so long as it worked a lot and offered a unique perspective—would only encourage more litigation. And, of course, the Intervenors did not have to file a UDJA suit to present their concerns to the Legislature.

B. This Appeal’s Outcome Should Dictate the Disposition of the Intervenors’ and Charter School Plaintiffs’ Fee Requests.

If the Intervenors and Charter School Plaintiffs remain “predominantly non-prevailing parties” when this appeal is over, there will be no grounds to disturb the district court’s decision to decline their fee requests on that basis. That is, if the Court affirms the judgment on the Intervenors’ and Charter School Plaintiffs’ claims, it also should affirm the denial of their fee requests.

But if the Court renders a more favorable judgment for the Intervenors or Charter School Plaintiffs on appeal, the State Defendants agree with the Charter School Plaintiffs that the proper course would be to reverse and remand the fee issue to the district court for reconsideration. Charter Br. 28;

State Br. 185-86; *cf. Barshop*, 925 S.W.2d at 637-38 (reversing and remanding a fee award under the UDJA where the trial court based the award on its finding that the plaintiffs had “substantially prevailed” in that court and the judgment for the plaintiffs was reversed on appeal).

The Court should reject the Intervenors’ invitation to go further and render judgment on their fee request. Doing so would improperly bypass the district court’s discretion to consider the fee request in light of the changed judgment in the first instance, *see Bocquet*, 972 S.W.2d at 21, and would unjustifiably depart from this Court’s established practice. *See City of Lorena*, 409 S.W.3d at 646; *Edwards Aquifer Auth.*, 291 S.W.3d at 405; *WOC II*, 176 S.W.3d at 799.

PRAYER

The district court's final judgment should be reversed and the case dismissed for want of subject-matter jurisdiction. In the alternative, the final judgment should be affirmed in part insofar as it grants judgment in favor of the State Defendants on the Intervenors' and Charter School Plaintiffs' claims.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

SCOTT A. KELLER
Solicitor General

CHARLES E. ROY
First Assistant Attorney
General

/s/ Rance Craft
RANCE CRAFT
Assistant Solicitor General
Texas Bar No. 24035655

JAMES E. DAVIS
Deputy Attorney General
for Civil Litigation

KRISTOFER S. MONSON
BETH KLUSMANN
EVAN S. GREENE
Assistant Solicitors General

SHELLEY N. DAHLBERG
Associate Deputy Attorney
General for Civil Litigation

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-2872
(512) 474-2697 [fax]
rance.craft@texasattorneygeneral.gov

*Counsel for Cross-Appellees
Michael Williams, et al.*

CERTIFICATE OF COMPLIANCE

According to Microsoft Word, this brief contains 15,561 words, excluding the portions of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1). **A motion to exceed the word limit is being filed contemporaneously with this brief.**

/s/ Rance Craft
Rance Craft

CERTIFICATE OF SERVICE

On July 2, 2015, the foregoing **Brief of Cross-Appellees Michael Williams, et al.** was served by File & Serve Xpress and/or electronic mail on:

Robert A. Schulman
Joseph E. Hoffer
SCHULMAN, LOPEZ, HOFFER
& ADELSTEIN, LLP
517 Soledad St.
San Antonio, TX 78205-1508
rschulman@slh-law.com
jhoffer@slh-law.com

James C. Ho
Will Thompson
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Ave., Ste. 1100
Dallas, TX 75201-6912
jho@gibsondunn.com
wtthompson@gibsondunn.com

Leonard J. Schwartz
SCHULMAN, LOPEZ, HOFFER
& ADELSTEIN, LLP
700 Lavaca St., Ste. 1425
Austin, TX 78701
lschwartz@slh-law.com

Counsel for Texas Charter Schools Association, et al.

Craig T. Enoch
Melissa A. Lorber
Amy Leila Saberian
Shelby L. O'Brien
ENOCH KEVER PLLC
600 Congress Ave., Ste. 2800
Austin, TX 78701
cenoch@enochkever.com
mlorber@enochkever.com
asaberian@enochkever.com
sobrien@enochkever.com

Counsel for Joyce Coleman, et al.

Mark R. Trachtenberg
HAYNES AND BOONE, LLP
1 Houston Center
1221 McKinney St., Ste. 2100
Houston, TX 77010
mark.trachtenberg@haynesboone.com

J. Christopher Diamond
SPRAGUE, RUSTAM & DIAMOND, P.C.
11111 Katy Freeway, Suite 300
Houston, Texas 77040
christopherdiamond@yahoo.com

John W. Turner
Micah E. Skidmore
Michelle C. Jacobs
HAYNES AND BOONE, LLP
2323 Victory Ave., Ste. 2100
Dallas, TX 75219
john.turner@haynesboone.com
micah.skidmore@haynesboone.com
michelle.jacobs@haynesboone.com

Counsel for Calhoun County ISD, et al.

Marisa Bono
Celina Moreno
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND, INC.
110 Broadway St., Ste. 300
San Antonio, TX 78205
mbono@maldef.org
cmoreno@maldef.org

Roger L. Rice
MULTICULTURAL EDUCATION,
TRAINING AND ADVOCACY, INC.
240A Elm St., Ste. 22
Somerville, MA 02144
rlr@shore.net

Counsel for Edgewood ISD, et al.

Richard E. Gray, III
Toni Hunter
Richard E. Gray, IV
GRAY & BECKER, P.C.
900 West Ave.
Austin, TX 78701
rick.gray@graybecker.com
toni.hunter@graybecker.com
richard.grayIV@graybecker.com

Randall B. Wood
Doug W. Ray
RAY & WOOD
2700 Bee Caves Rd. #200
Austin, TX 78746
buckwood@raywoodlaw.com
dray@raywoodlaw.com

Counsel for The Texas Taxpayer & Student Fairness Coalition, et al.

J. David Thompson, III
Philip Fraissinet
THOMPSON & HORTON LLP
Phoenix Tower, Ste. 2000
3200 Southwest Freeway
Houston, TX 77027
dthompson@thompsonhorton.com
pfraissinet@thompsonhorton.com

Holly G. McIntush
THOMPSON & HORTON LLP
400 W. 15th St., Ste. 1430
Austin, TX 78701
hmcintush@thompsonhorton.com

Wallace B. Jefferson
Rachel A. Ekery
ALEXANDER DUBOSE JEFFERSON &
TOWNSEND LLP
515 Congress Ave., Ste. 2350
Austin, TX 78701-3562
wjefferson@adjtlaw.com
rekery@adjtlaw.com

Counsel for Fort Bend ISD, et al.

/s/ Rance Craft _____
Rance Craft
Assistant Solicitor General