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SUPREME COURT OF TEXAS
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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 AMICI CURIAE CENTER FOR PUBLIC POLICY PRIORITIES, EDUCATION LAW CENTER, MEXICAN-AMERICAN SCHOOL BOARD MEMBERS ASSOCIATION, SAN ANTONIO HISPANIC CHAMBER OF COMMERCE, TEXAS APPLESEED, TEXAS ASSOCIATION FOR BILINGUAL EDUCATION, TEXAS HOPE, AND TEXAS NAACP IN SUPPORT OF PLAINTIFFS-APPELLEES

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TO THE HONORABLE SUPREME COURT OF TEXAS:

INTEREST OF AMICI

Amici represent a diverse group of organizations invested in the support and success of Texas's at-risk student populations, including economically disadvantaged students and English Language Learners ("ELL"). *Amici* include business, policy and advocacy, school board, teacher, research, and civil rights organizations. *Amici* believe that their collective experience on issues related to educational opportunity and academic adequacy and excellence, especially with respect to Texas's economically disadvantaged and ELL students, will be of assistance to the Court.

The Center for Public Policy Priorities

The Center for Public Policy Priorities ("CPPP"), based in Austin, Texas, is a 501(c)(3) independent public policy organization. Established in 1985, CPPP believes in a Texas that offers everyone the chance to compete and succeed in life. CPPP envisions a Texas where everyone is healthy, well-educated, and financially secure. CPPP wants the best Texas—a proud state that sets the bar nationally by expanding opportunity for all. To advance its vision, CPPP uses data and analysis

to advocate for solutions that enable Texans of all backgrounds to reach their full potential. Because CPPP believes that education is a necessary prerequisite for economic security, it advocates for the right of all Texans to have access to a quality education.

Education Law Center

Education Law Center ("ELC") is a non-profit organization established in 1973 to advocate, on behalf of public school children, for access to fair and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action. ELC represented the plaintiff school children in the landmark case *Abbott* v. *Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990), and continues to advocate on their behalf to ensure effective implementation of the *Abbott* remedies, which have "enabled children in Abbott districts to show measurable educational improvement." *Abbott* v. *Burke (Abbott XX)*, 971 A.2d 989, 995 (N.J. 2009) (quoting *Abbott* v. *Burke (Abbott XIX)*, 960 A.2d 360 (N.J. 2008)). Using its expertise in education law and policy, ELC advances children's opportunities to learn, and assists advocates seeking better educational opportunities in states across the nation, by providing analyses and other support with regard to relevant

litigation, high quality preschool and other proven educational programs, resource gaps, education cost studies, and policies that assist states and school districts to gain the expertise needed to narrow and close achievement gaps. As part of its work, ELC has participated as *amicus curiae* in state educational opportunity cases in California, Colorado, Connecticut, Indiana, Maryland, Oregon, and South Carolina.

The Mexican-American School Board Members Association

The Mexican-American School Board Members Association ("MASBA") is committed to helping school board members come together to find solutions and discuss legislative and current affairs as they relate to education and Mexican-American culture. Texas school districts are experiencing unprecedented growth and in many cases lack the understanding and resources necessary to implement the most effective curriculum, especially as related to Mexican-American culture and special programs such as bilingual education. MASBA, united with Texas school districts, provides leadership, vision, and support for a growing number of school board members who sit on the boards of school districts with large Mexican-American student populations.

San Antonio Hispanic Chamber of Commerce

The San Antonio Hispanic Chamber of Commerce ("SAHCC") is San Antonio's leading resource and advocate for Hispanic businesses and Hispanics in business. SAHCC, originally chartered as the Mexican Chamber of Commerce in 1929, is the first organization of its kind in the United States. SAHCC has a keen interest in improving educational opportunities for all Texas students, including the three largest and fastest growing student populations: Latino, economically disadvantaged, and ELL students. SAHCC recognizes the urgency of improving the education system in San Antonio and in Texas as a whole. SAHCC further recognizes that the business community must be fully engaged on these issues if the educational and economic prospects of this state and country are to be fully realized. Because education is critical to the economic prosperity and vibrancy of our community, SAHCC advocates at multiple levels for greater educational opportunity for all Texas students.

Texas Appleseed

Texas Appleseed is a nonprofit public interest law center that pursues economic, social, and political justice for all Texans through

education, community empowerment, and innovative advocacy. As part of that effort, Texas Appleseed seeks systemic reform in areas that affect children's access to quality public education, with a focus on the administration of fair and equitable policies and research-driven practices proven to lead to positive outcomes for Texas students. Texas Appleseed recognizes that funding shortfalls stymie Texas schools in their efforts to avoid practices that push students into the "school to prison pipeline." Texas Appleseed's Board of Directors is comprised of distinguished legal practitioners from various sectors of the Texas Bar who are committed to achieving quality public education for all Texas children.

Texas Association for Bilingual Education

The Texas Association for Bilingual Education ("TABE") is a professional association for persons interested in bilingual education in Texas. Through a balanced program of research, professional development, and public education, TABE pursues the implementation of educational policies and effective bilingual-bicultural programs that promote equal educational opportunity and academic excellence for bilingual and ESL students throughout Texas.

Texas HOPE

Texas HOPE (Hispanics Organized for Political Education) is a nonprofit, nonpartisan, statewide organization whose mission is to educate the Hispanic community about the effects of proposed and existing legislation. Texas HOPE believes that equal educational opportunity and academic excellence, especially for economically disadvantaged and ELL students, are necessary to the well-being of Texas, where Hispanics play a growing role in all aspects of state governance and policy development.

Texas NAACP

The Texas NAACP is the Texas affiliate of the national NAACP. It has a goal of improving educational, economic and political opportunity and the elimination of unwarranted discrimination based on race or other inappropriate characterization. Among its members are parents, students, teachers and school board members, and it includes many units, branches, members and students negatively impacted by the current funding formula.

* * * * * *

In accordance with Texas Rule of Appellate Procedure 11, the undersigned attorneys represent to the Court that no fee has been or will be paid for preparing this brief.

SUMMARY OF THE ARGUMENT

Based on *Amicis*' experience with cases raising constitutional challenges to school finance systems in Texas and throughout the country, the State is mistaken on several critical issues it raises in this appeal. *Amici* respectfully submit this brief in support of Plaintiffs-Appellees to provide the Court with this important national perspective.

First, the State contends that the court below invented a never-before recognized constitutional violation in declaring the education system inadequate as applied to sub-populations of students, namely economically disadvantaged and ELL students.[1] The State is in error. Under the Texas Constitution, *all* Texas children have a right to an efficient, adequate, and suitable education. As of the 2012-2013 school year, economically disadvantaged students composed just over 60% of the total student population and ELL students just over 17%. Put simply, an

[1] ELL students, also identified as students of limited English proficiency (or LEP), are defined under Texas law as students "whose primary language is other than English and whose English language skills are such that the student has difficulty performing ordinary classwork in English." Tex. Educ. Code § 29.052 (West 2015).

education system that is unconstitutional with respect to a specific population of its students—indeed a majority of its students—is by definition unconstitutional as a whole.

The State's "as applied" argument fails for an additional, independent reason. Because *all* children have a right to a constitutional education, the Texas school funding system can be declared unconstitutional as applied to economically disadvantaged and ELL students even if the Court were to find that it is adequate with respect to non-economically disadvantaged and non-ELL students (which it is not). All Texas students are constitutionally entitled to a meaningful opportunity to achieve a general diffusion of knowledge. Here, Plaintiffs demonstrated at trial that providing such opportunity for economically disadvantaged and ELL students requires targeted programs and services, which these students are not currently receiving. Because economically disadvantaged and ELL students thus do not have a meaningful opportunity to succeed, the education system is unconstitutional as applied to them, regardless of whether it is constitutional as applied to other students.

Texas is not alone in recognizing these important rights. State high courts throughout the nation have held that economically disadvantaged and ELL students have a constitutional right to an adequate education independent of whether the system is adequate for non-economically disadvantaged and non-ELL students. Indeed, high courts across the nation—including in South Carolina, North Carolina, New Jersey, New York, Kansas, and other states—have conducted adequacy evaluations as applied to economically disadvantaged and/or ELL students and, like the court below, found school finance systems to be unconstitutional as a result.

Second, arguing that *outputs* are the only metric the Court can consider, the State contends that it was erroneous for the court below to consider *inputs* in determining that the public education funding system is inadequate. To the contrary, consideration of inputs such as teacher salary, teacher quality, class size, curriculum, technology, materials, facilities, tutors, and instructional coaches—in addition to outputs—is appropriate for a proper constitutional analysis. Indeed, adequacy cases throughout the country recognize that improving these inputs raises achievement and costs money. The State's oversimplified outputs-only

approach should be rejected in favor of an analysis that, consistent with high courts throughout the nation, considers both *inputs and outputs* in determining whether the education system is constitutionally adequate.

The State's contention that *Neeley* v. *West Orange-Cove Consol. Indep. Sch. Dist.* (*WOC II*), prohibits consideration of inputs is also incorrect. 176 S.W.3d 746 (Tex. 2005). Although this Court seemingly applied an outputs-oriented standard in *WOC II*, *id.* at 788, it also recognized that inputs, including funding, are linked to improved educational outcomes and therefore should not be ignored. Moreover, examining inputs is critical in determining whether students are receiving the "*meaningful opportunity*" that this Court held was necessary for an adequate education in *WOC II*. *Id.* at 787 (emphasis in original). This Court cannot assess the opportunities present in the school system—let alone assess whether they are "meaningful"—without first analyzing the inputs, such as teacher quality, class size, facilities, and materials, that drive the system. This Court's precedent does not require it to go against the weight of authority by adopting the narrow outputs-only standard suggested by the State here.

Third, there is robust evidence nationwide that increased school funding leads to improved educational outcomes, especially for economically disadvantaged and ELL students. The State's position otherwise directly conflicts with numerous empirical studies, Texas precedent, and multiple state high court decisions across the country, all of which recognize that increases in school funding improve educational outcomes.

For these reasons, as discussed more fully below, the district court's decision should be affirmed.

ARGUMENT

I. THE COURT BELOW PROPERLY ANALYZED THE SCHOOL FINANCE SYSTEM AS APPLIED TO ECONOMICALLY DISADVANTAGED STUDENTS AND ENGLISH LANGUAGE LEARNERS.

The State's argument that the trial court invented a non-cognizable constitutional violation in declaring the education system inadequate as applied to sub-populations of students—namely, economically disadvantaged and ELL students—is irreconcilable with Texas law. Indeed, courts across the nation have conducted adequacy evaluations as applied to economically disadvantaged and ELL students and, like the

court below, found school finance systems to be unconstitutional as a result.

A. <u>The State's "As Applied" Argument Is Irreconcilable with Texas Law.</u>

The right to an efficient, adequate, and suitable education under the Texas Constitution is a right that belongs to each and every Texas child. *See WOC II*, 176 S.W.3d at 787 ("To fulfill the constitutional obligation to provide a general diffusion of knowledge, districts must provide '*all Texas children* . . . *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.'" (emphasis in original) (citation omitted)).

As in *WOC II*, state high courts throughout the country have expressly recognized that constitutional adequacy provisions require *all* students to receive an adequate education—even where the text of the constitution does not expressly prescribe it. *See, e.g.*, *Gannon* v. *State*, 319 P.3d 1196, 1236-37, 1239 (Kan. 2014) ("We hold [the Constitution's] adequacy component is met when the public education financing system . . . is reasonably calculated to have *all* Kansas public education students meet or exceed the standards . . . . Education in Kansas is not restricted

to that upper stratum of society able to afford it." (emphasis added)); *Abbeville Cnty. Sch. Dist.* v. *State*, 767 S.E.2d 157, 159 (S.C. 2014) ("The South Carolina Constitution requires that there be a system of free public schools that affords *each* student the opportunity to receive a minimally adequate education." (emphasis added)); *Hoke Cnty. Bd. of Educ.* v. *State*, 599 S.E.2d 365, 379 (N.C. 2004) (holding that the constitutional right to an adequate education is vested in *all* children); *Abbott* v. *Burke (Abbott IV)*, 693 A.2d 417, 445 (N.J. 1997) ("Our Constitution demands that every child be given an equal opportunity to meet his or her promise."); *Claremont Sch. Dist.* v. *Governor* (*Claremont I*), 635 A.2d 1375, 1376 (N.H. 1993) ("We hold that [the New Hampshire Constitution] imposes a duty on the State to provide a constitutionally adequate education to *every educable child* in the public schools in New Hampshire." (emphasis added)).

The State's contention that there can be no violation as applied to economically disadvantaged and ELL students is irreconcilable with this constitutional standard.

As an initial matter, the State does not dispute the lower court's finding that, as of the 2012-2013 school year, there were over three

million economically disadvantaged students enrolled in Texas public schools, comprising just over 60% of the total student population. *The Tex. Taxpayer & Student Fairness Coal.* v. *Williams* (*Texas Taxpayer*), No. D-1-GN-11-003130, 2014 WL 4254969, at *16 (Tex. Dist. Ct. Aug. 28, 2014). Nor does the State dispute that, as of 2012-2013, there were over 860,000 ELL students in Texas public schools, comprising just over 17% of the total student population. *Id.* In light of these statistics, if the public education system is failing with respect to these students specifically, it is by definition unconstitutional as a whole.

But even if Texas's school funding system were found to be adequate for some students, which it is not, it would still be unconstitutional as applied to economically disadvantaged and ELL students. As demonstrated through both Plaintiffs' and the State's evidence at trial, economically disadvantaged and ELL students require additional, targeted services and programs in order to achieve a general diffusion of knowledge. *See Texas Taxpayer*, 2014 WL 4254969, at *85-97. Due to inadequate funding, however, districts are unable to provide these necessary programs and services, and are consequently failing to provide economically disadvantaged and ELL students with a

meaningful opportunity to achieve a general diffusion of knowledge. In turn, economically disadvantaged and ELL students are performing miserably on state tests, among other metrics. *Id.* at *107.

This is a violation of the constitutional requirement that "*all Texas children* . . . [have] access to a quality education." *WOC II*, 176 S.W.3d at 787 (emphasis in original) (citation omitted). The constitutionality of the system for ELL and economically disadvantaged students cannot possibly be determined based on the performance of non-ELL and non-economically disadvantaged students who do not require the same additional programs and services to acquire an adequate education. The court below was therefore correct to find that the "education system is constitutionally inadequate as to economically disadvantaged and ELL students." *Texas Taxpayer*, 2014 WL 4254969, at *107.

B. Nationwide, Courts Consider Adequacy As Applied to Economically Disadvantaged Students and English Language Learners.

Like the court below, state courts across the country have consistently conducted adequacy evaluations as applied to economically disadvantaged and/or ELL student populations and found school finance

systems to be unconstitutional as a result—whether as a whole or as applied to a subgroup of students.[2]

For example, last year the Supreme Court of South Carolina found the entire state's school financing scheme unconstitutional on the ground that students in poor, rural districts were denied the opportunity for a minimally adequate education as required by the state constitution. *Abbeville*, 767 S.E.2d at 175. Each of the eight plaintiff school districts in *Abbeville* were largely rural and enrolled a high percentage of students living in poverty. *Id.* at 164. The *Abbeville* Court held that the state's education financing scheme "den[ied] students in the Plaintiff Districts the constitutionally required opportunity" for an adequate education. *Id.* at 173. Based on the experiences of these students specifically, the Court found the entire South Carolina school finance system to be unconstitutional. *Id.* at 180 (explaining that the state "failed in [its]

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[2] Notably, this Court, as well as high courts in school finance cases throughout the country, regularly look to decisions in sister states for guidance. *See, e.g.*, *WOC II*, 176 S.W.3d at 780-81 (looking to several other state high courts in holding that plaintiffs' constitutional claims were justiciable); *Gannon*, 319 P.3d at 1219-29 (looking to the Texas Supreme Court's decision in *WOC II*, among others, for "considerable . . . [and] valuable guidance"); *Abbeville*, 767 S.E.2d at 176-78 (noting that "[s]everal state appellate courts have addressed situations similar to this one" and looking in particular to two such opinions for guidance).

constitutional duty to ensure that *students in the Plaintiff Districts* receive the requisite educational opportunity" (emphasis added)).

The Supreme Court of North Carolina also held that the state failed to provide an adequate education as applied to at-risk students in certain counties. *Hoke*, 599 S.E.2d at 391. The *Hoke* Court first explained that, under the state Constitution, the legislative and executive branches have a duty to provide each and every North Carolina child—"[w]hether it be the infant Zoe, the toddler Riley, the preschooler Nathaniel, the 'at-risk' middle-schooler Jerome, or the not 'at-risk' seventh-grader Louise"—with the opportunity for a "sound basic education." *Id.* at 379. After concluding that the *overall* funding scheme was adequate on a statewide level, the Court determined that "the State's method of funding and providing *for individual school districts* such as Hoke County" did not comply with the State's constitutional mandate requiring that all children have the opportunity to receive a "sound basic education." *Id.* at 390 (emphasis added). Under *Hoke*, therefore, even if a state's school funding system is found to be adequate on a statewide level, it can still be unconstitutional as applied to specific subgroups of students.

Similarly, in New Jersey's *Abbott* v. *Burke* cases the state high court—faced with a legislature that repeatedly failed to fulfill its constitutional duty under the state's education clause—struck down the school finance system numerous times, not in total but as applied specifically to certain poor, urban school districts. Indeed, throughout the history of the *Abbott* litigation, the Court has consistently and explicitly held that the state's school finance system was inadequate "as applied to poorer urban school districts." *Abbott* v. *Burke (Abbott II)*, 575 A.2d 359, 363 (N.J. 1990)*; see also Abbott* v. *Burke (Abbott III)*, 643 A.2d 575, 576 (N.J. 1994) (finding that the Quality Education Act of 1990 was unconstitutional as applied to the special needs districts); *Abbott* v. *Burke (Abbott IV)*, 693 A.2d 417, 420-21 (N.J. 1997) (finding that the funding provisions in the Comprehensive Education Improvement and Financing Act of 1996 failed to "assure expenditures sufficient to enable students in the special needs districts to meet [state] standards" and that the act was accordingly "unconstitutional as applied to the special needs districts"). As the New Jersey Supreme Court explained, its "jurisprudence has recognized consistently that the exceptional needs of the [special needs

districts] must be addressed if the constitutional deprivation is to be remediated." *Id.* at 434.

Courts in other states have similarly found school finance systems constitutionally inadequate based largely—or even solely—on evidence concerning the experiences of school districts with high percentages of impoverished and/or ELL students. *See, e.g.*, *Campaign for Fiscal Equity* v. *State* (*CFE II*), 801 N.E.2d 326, 329, 340 (N.Y. 2003) (holding the entire New York state school finance system unconstitutional based largely on the finding that students in New York City schools, 73% of which were living in poverty and 16% of which were ELL, were not receiving an adequate education); *Montoy* v. *State*, 120 P.3d 306, 310 (Kan. 2005) (per curiam) (holding the Kansas system unconstitutional where it failed, among other things, to account for the higher costs of bilingual education such that ELL students had the opportunity to achieve according to the state's performance standards); *Claremont Sch. Dist.* v. *Governor (Claremont III),* 794 A.2d 744, 752-56 (N.H. 2002) (holding that a New Hampshire statute excusing poor school districts from meeting state adequacy requirements was unconstitutional because a constitutionally adequate education must be provided for all students); *Idaho Sch. for*

Equal Educ. Opportunity v. *State*, 129 P.3d 1199, 1208 (Idaho 2005) (affirming the lower court's finding that the failure to adequately fund facilities for poor students violates Idaho's constitutional standard); *Rose* v. *Council for Better Educ., Inc.*, 790 S.W.2d 186, 189, 196-99 (Ky. 1989) (finding that the entire school financing system was unconstitutional, and noting particularly inadequate education for economically disadvantaged students as part of its analysis).

In sum, the trial court's extensive findings as applied to economically disadvantaged and ELL students are consistent with Texas law and the weight of authority nationwide. The court's ruling with respect to these students should be upheld.

II. COURTS NATIONWIDE GIVE SUBSTANTIAL WEIGHT TO INPUTS, IN ADDITION TO OUTPUTS, IN DETERMINING WHETHER SCHOOL SYSTEMS ARE ADEQUATE.

The State's argument that the district court erroneously focused exclusively on inputs rather than outputs in declaring the state education finance system inadequate is incompatible with rulings across the country that give substantial weight to both *inputs and outputs* in analyzing whether education systems are constitutionally adequate. In direct contrast to the State's position, while inputs and outputs "are often

connected," inputs such as funding, teacher quality, teacher pay, class sizes, curriculum, materials, and facilities are the "driving force" of adequacy cases nationwide. *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 Tex. L. Rev. 1223, 1233 (2008). The State's outputs-only approach grossly misstates the proper adequacy analysis that has been employed by multiple state high courts.

Indeed, courts throughout the nation recognize that consideration of inputs is critical to a proper adequacy analysis. As one commentator has explained, in determining adequacy courts have "focused primarily on disparities in inputs" such as "curricular and extracurricular offerings, qualified teachers, school facilities, and instructional materials" and have "spent less time focusing on disparities in outputs." *Id.*; *see also* Deborah A. Verstegen, *Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 St. Louis U. Pub. L. Rev. 499, 512 (2004) (explaining that courts in school finance cases focus on the evaluation of inputs such as "teachers, class sizes, technology, materials, curriculum, facilities, [and] budget flexibility").

For example, in *CFE II*, New York's high court evaluated the quality of various inputs—including teaching, facilities, classroom supplies, textbooks, libraries, and computers—in New York City schools. 801 N.E.2d at 332-36. The Court found that the schools contained "tens of thousands of students . . . placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment," which amounted to a "systemic failure." *Id.* at 336. The Court also examined outputs such as graduation rates and test results and affirmed the trial court's conclusion that "whether measured by the outputs or the inputs . . . schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education." *Id.* at 340.

Similarly, in *DeRolph* v. *State*, the Supreme Court of Ohio closely examined the quality of inputs and found that Ohio schools were "plagued with deteriorating buildings, insufficient supplies, inadequate curricula and technology, and large student-teacher ratios." 677 N.E.2d 733, 745 (Ohio 1997). The Court concluded from this evidence of insufficient inputs that it was "painfully obvious" that the state had

violated its duty under its Constitution to provide its students with an adequate education. *Id.*

In *Abbott II*, the Supreme Court of New Jersey rejected the state's argument that the Court should not consider inputs because they are not reliable indicators of the quality of education. 575 A.2d at 394-95. The Court held that ignoring inputs forced courts to rely on "only standardized tests that measure but a few of" the state's educational goals, which left the Court "without any feasible method of applying the State's measure" of adequacy. *Id.* at 395. The Court carefully examined several inputs, including the lack of student exposure to computers, crumbling physical facilities, and the unavailability of science, music, art, and physical education classes in the poorer urban district schools. *Id.* at 395-97. These inputs, the Court held, provided "more than sufficient" evidence of a constitutional deficiency. *Id.* at 399. The Court also concluded that the disparity between the poorer and wealthier schools was so "severe" that the students in poorer schools "simply cannot possibly enter the same market or the same society as their peers educated in wealthier districts." *Id.* at 400.

The Montana Supreme Court similarly examined inputs in determining adequacy. In *Columbia Falls Elementary School Dist. No. 6* v. *State*, the Court reasoned that although students in the state "perform quite well" on standardized achievement tests, "current test scores do not tell the whole story." 109 P.3d 257, 263 (Mont. 2005). The Court instead looked to evidence of inputs—such as low teacher salaries, failure to retain qualified teachers, crumbling facilities, and program cuts—to conclude that Montana's school system "cannot be deemed constitutionally sufficient." *Id.*

Numerous other courts have relied on inputs, in addition to outputs, in determining that state public education systems are inadequate. *See, e.g.*, *Roosevelt Elementary School Dist. No. 66* v. *Bishop*, 877 P.2d 806, 808, 815-16 (Ariz. 1994) (considering disparities in the condition and age of schools and quality of classrooms and equipment to find that the school capital funding system was unconstitutional); *McDuffy* v. *Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 553-54 (Mass. 1993) (finding the school system unconstitutional when poorer districts had inferior curriculum offerings and higher student-teacher ratios); *Tenn. Small Sch. Sys.* v. *McWherter*, 851 S.W.2d 139, 141, 144-46

(Tenn. 1993) (finding the school system unconstitutional after examining disparities in teacher qualifications, educational programs, and facilities between school districts); *Rose* v. *Council for Better Educ., Inc.*, 790 S.W.2d 186, 196-98, 213 (Ky. 1989) (comparing levels of inputs such as teacher salaries, materials, student-teacher ratios, curriculum, and facilities and concluding that "no other decision [wa]s possible" than that the state's schools were inadequate); *Abbeville*, 767 S.E.2d at 175 (holding that the "measurable inputs and outputs show that Defendants have failed to provide students in the Plaintiff Districts the requisite constitutional opportunity"); *Hoke*, 599 S.E.2d at 386 (considering both "outputs evidence" and "inputs evidence" in determining that the North Carolina school finance system was inadequate as applied to certain at-risk students).[3]

Not only have courts deciding this issue held that states must improve inputs in order to fulfill their constitutional duty and meet

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[3] Even if the Court were to agree with the State and look only at outputs, Plaintiffs would still prevail. The record is replete with evidence of "substantial and persistent performance gaps and low overall academic performance" for economically disadvantaged and ELL students, such that these students are not acquiring a general diffusion of knowledge. *See Texas Taxpayer*, 2014 WL 4254969, at *70-78, 80-84. Thus, the education system would be unconstitutional as applied to economically disadvantaged and ELL students no matter which metric—inputs or outputs—is used.

adequacy standards, but they have also recognized that one of the ways to do so is to increase funding. *See, e.g.*, *Abbott II*, 575 A.2d at 399, 408 (requiring increased funding for schools to meet adequacy standards despite the costs of improving inputs); *CFE II*, 801 N.E.2d at 340 (finding plaintiffs established that "increased funding can provide better teachers, facilities and instrumentalities of learning" which in turn "yield better student performance"). Similarly, based on the substantial trial record below, achieving an adequate system in Texas will require increased funding for inputs—that is, resources—which are critical to improving student performance and preparation for civic participation and employment, especially for economically disadvantaged and ELL students.

Texas precedent does not prohibit this Court from looking at inputs. Although this Court seemingly applied an outputs-oriented standard in *WOC II*, it expressly recognized that inputs, including funding, are linked to improved educational outcomes. 176 S.W.3d at 788. Indeed, the Court explained that "it is useful to consider how funding levels and mechanisms relate to better-educated students" and that public

education "can and often does improve with greater resources, just as it struggles when resources are withheld." *Id.*[4]

Moreover, examining inputs is crucial in determining whether students receive the "meaningful opportunity" that this Court held was necessary for an adequate education. *See id.* at 787 ("Districts satisfy this constitutional obligation when they provide all of their students with a *meaningful opportunity* to acquire the essential knowledge and skills reflected in . . . curriculum requirements." (quoting district court)). Outputs, such as test scores and graduation rates, do not reveal what opportunities and resources students lack because they do not point to the factors that cause an inadequate education. The best way to determine whether students have a "meaningful opportunity" is to look at the resources—the *inputs*—available to them. Analysis of inputs is therefore critical if this Court is to determine whether the opportunities

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[4] Even the State's own experts have acknowledged the salience of increased resources. *Texas Taxpayer*, 2014 WL 4254969, at *129. State expert Dr. Michael Podgursky testified at trial that "resources are required to provide a quality education" and that "additional resources may be required as the State increases its expectations for students." *Id.* State expert Dr. Whitehurst testified that "[i]f you want to close gaps, you need to provide services to the children who need those services." *Id.* And the State's own Commissioner of Education, Robert Scott, "recognized that additional resources will be needed" to implement Texas's education initiatives. *Id.*

provided to economically disadvantaged and ELL students are in fact "meaningful." *See, e.g.*, *CFE II*, 801 N.E.2d at 333-36 (holding that "essential" resources such as qualified teachers, small class sizes, and books are required if the state is to provide the opportunity for a "meaningful" education).

In sum, the fact that numerous state courts heavily weigh inputs evidence in their adequacy analysis belies the State's contention that outputs "are the only proper adequacy metric," *see* State Br. at 95, and demonstrates that the lower court's decision to consider inputs was well-reasoned, in harmony with this Court's precedent, and aligned with the high courts in other states.

III. INCREASED SCHOOL FUNDING LEADS TO BETTER EDUCATIONAL OUTCOMES FOR ECONOMICALLY DISADVANTAGED AND ELL STUDENTS.

The district court also properly determined that "money, if spent well, improves educational outcomes." *Texas Taxpayer*, 2014 WL 4254969, at *128. The Court's conclusion that "money matters" is supported by a wealth of empirical literature and state high court precedent—both within Texas and across the nation—concluding that increased funding has a positive impact on student outcomes.

A. **Empirical Studies Show That Increased Funding Improves Outcomes for Economically Disadvantaged and ELL Students.**

In 2014, a team of researchers published a landmark longitudinal analysis of school finance changes in 28 states from 1970 through 2010. *See* C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 3-5 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014) ("Jackson Report").[5] Due to newly available data, they were able to conduct a detailed analysis of the timing of changes in educational outcomes in relation to the timing of changes in school funding. The results reveal that, for economically disadvantaged students in particular, there is a significant causal relationship between school funding and improvements in long-term educational outcomes. Specifically, a 20% increase in per-pupil spending "for a child's entire K-12 schooling career increases high school completion by 22.9 percentage points, increases the overall number of years of education by 0.928, increases adult earnings by about 24.6 percent, increases annual family

[5] To examine the effect of school funding reform over a 40-year period, the Jackson Report analyzed "the longest district-level panel [of data] on school spending that has ever been used." Jackson Report at 3.

income by 52.2 percent, and reduces the incidence of adult poverty by 19.7 percentage points." *Id.* at 44.[6] In addition, these improvements are "larger with larger spending increases," and "the timing of improvements in outcomes track the timing of the increases in spending." *Id.* at 35.

The Jackson Report found that the effects of increased school funding are strongest on poor students, explaining that improvements in educational outcomes resulting from increased funding were "large enough to eliminate" gaps in education, and eventually income, between rich and poor students. *Id.* at 37, 38. The Jackson Report concludes: "many have questioned whether increased school spending can really help improve the educational and lifetime outcomes of children from disadvantaged backgrounds. Our findings show that it can." *Id.* at 44.

The Jackson Report lends robust support to an already crowded field of studies that have reached the same basic conclusion that money matters. *See, e.g.*, Whitney C. Allgood, *The Need for Adequate Resources for At-Risk Children* 73-103 (Econ. Policy Inst., Working Paper No. 277,

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[6] As set forth in the report, "[a]ll of these effects are statistically significant and are robust to a rich set of controls for confounding policies and trends. The magnitudes of these effects are sufficiently large to eliminate between two-thirds and all of the gaps in these adult outcomes between those raised in poor families and those raised in non-poor families." Jackson Report at 44.

2006) (reviewing extensive studies correlating pre-kindergarten programs, lower class sizes, teacher qualifications, teacher working conditions, and other academic supports with improved student outcomes); David Card and A. Abigail Payne, Abstract, *School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores* 83 J. Pub. Econ. 49, 49 (2002) (finding that court declarations of unconstitutionality "increased the relative funding of low-income districts," which led to "a narrowing of test score outcomes"); Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 Rev. Educ. Res. 361, 362 (1996) (peer-reviewed study concluding that "a broad range of school inputs are positively related to student outcomes, and that the magnitude of the effects are sufficiently large to suggest that moderate increases in spending may be associated with significant increases in achievement"); Kristen Harknett et al., *Do Public Expenditures Improve Child Outcomes in the U.S.? A Comparison Across Fifty States* 17 (Ctr. for Policy Research, Maxwell Sch. of Citizenship and Pub. Aff., Syracuse Univ., Working Paper Series No. 53, 2003) (finding "particularly strong and positive effects" between additional educational expenditures and student test scores and adolescent behavior).

Numerous studies have also analyzed the effect of state court-orders requiring increased school funding. These studies have consistently found that increases in per-pupil spending lead to improved educational outcomes.

For example, a peer-reviewed article evaluating eleven particularly "well-crafted" recent studies found that they "constitute a considerable research base and support the conclusion that greater funding equity and adequacy is linked to greater student achievement." Bruce Baker & Kevin Welner, *School Finance and Courts: Does Reform Matter, and How Can We Tell?* 113 Tchr. C. Rec. 2374, 2390 (2011). The studies revealed that court-ordered funding reforms resulted in increased and more equitable spending and student growth on the National Assessment of Educational Progress ("NAEP") at a rate greater than the national average growth on NAEP. *Id.* at 2403. The authors also found that the two states that sustained their funding reforms beat the national average growth rate by a significant margin on NAEP in all 16 categories for fourth and eighth grade reading and math. *Id.*

In Massachusetts, overall student performance substantially improved following "infusions of new state aid" from legislative reforms

developed in tandem with adequacy litigation in the state court. Paul Reville, *The Massachusetts Case: A Personal Account*, 2-3 (Nov. 12-13, 2007) (working paper) (on file with Tchr. C. Columbia Univ.) (finding that failure rates on state assessments dropped from 45% to 15% in math, and from 34% to 11% in English); *see also* Jonathan Guryan, *Does Money Matter?* 25 (Nat'l Bureau of Econ. Research, Working Paper No. 8269, May 2001) (finding that increases in Massachusetts test scores after an influx of funding resulted primarily from improved performance by students formerly at the bottom of the spending distribution).

Empirical studies in the wake of New Jersey's *Abbott* rulings further demonstrate the positive effect of increased school funding on student success, especially for economically disadvantaged students. Funding increases in the *Abbott* school districts, which have that state's highest concentrations of economically disadvantaged students, phased in beginning in 1998. By 2005, *Abbott* districts were spending more per pupil than all other districts in the state. Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey* 1 Educ. Equity and the Law 20 & Fig. 1 (Nov. 2009). Between 1999 and 2007, as funding levels in *Abbott* districts were rising, there

was "significant closure in the achievement gap" between *Abbott* districts and all other districts in the state. *Id.* at 23. (explaining that, on New Jersey state assessments, the gap between *Abbott* and non-*Abbott* districts fell from 30 to 19 points during this time period). A recent peer-reviewed study of *Abbott* schools further found that increased resources for high quality preschool in low-income school districts, identified by the court below as an important resource for low-income and ELL students, *see Texas Taxpayer*, 2014 WL 4254969, at *67, resulted in test score gains for these students across language arts, math, and science. *See* W. Steven Barnett, et al., *Abbott Preschool Program Longitudinal Effects Study: Fifth Grade Follow-Up* 1, 16, 21 (Nat'l Inst. for Early Educ. Research, 2013).

Critically, the studies cited above have particular relevance to African-American and Hispanic students. As set forth in the 2012-2013 Texas Academic Performance Report, there remains a substantial achievement gap between African-American/Hispanic students and the rest of the state. (*See* Ex. 4258 (Texas Education Agency, 2012-2013 Texas Academic Performance Report)). Because African-American and Hispanic students are "more likely to have lower incomes than

NonHispanic Whites and NonHispanic Asians," (Ex. 3228 at 84 (Steve H. Murdock, *Demographic and Socioeconomic Change in Texas: Implications for Education and Economic Development*) ("Murdock Report")), the race-based achievement gap correlates to the achievement gap based on socioeconomic status. *See Texas Taxpayer*, 2014 WL 4254969, at *16-17 (citing Murdock Report at 34, 78). Increased school spending would therefore help to reduce not only socioeconomic gaps in education and income, but race-based gaps as well.[7]

In response to the wealth of school finance research discussed above, the State falls back on the notion that "more money does not guarantee better schools." *See* State Br. at 81 (citing *WOC II*, 176 S.W.3d at 788). This argument fails for two reasons. First, even if the State is correct that funding cannot *guarantee* better educational outcomes, it has

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[7] This is especially important considering that minority student populations in Texas are growing rapidly. *See Texas Taxpayer*, 2014 WL 4254969, at *17 ("Hispanic enrollment in Texas public schools is projected to increase by 148% from 2010 to 2050, while non-Hispanic White enrollment is projected to decrease by 7% during that same time period.") (citing Murdock Report at 72-75)). As explained at trial by Dr. Steve Murdock, the former state demographer and former director of the U.S. Census Bureau, the economic future of Texas depends largely on closing these gaps. *See Texas Taxpayer*, 2014 WL 4254969, at *4 ("[I]f existing [racial and socioeconomic] gaps in educational attainment and household income levels remain in place, Texas faces a stark future with declining income, higher rates of poverty, reduced consumer spending, reduced tax revenues, and higher state expenditures.").

not disproved (and cannot disprove) the positive relationship between funding and student outcomes that this Court itself acknowledged in *WOC II*. *See WOC II*, 176 S.W.3d at 788 ("[T]he end-product of public education is related to the resources available for its use."). The State sets the bar unreasonably high: "no guarantee" does not mean "no impact at all."

Second, the district court in this case already weighed the testimony from experts for both the State Defendants and Intervenors questioning the relationship between funding and student achievement. After receiving and considering this evidence, along with evidence from Plaintiffs asserting otherwise, the court determined that money, if well spent, *does* improve educational outcomes. *Texas Taxpayer*, 2014 WL 4254969, at *128. Indeed, as the lower court found, experts from both the State Defendants and Intervenors agreed that "additional funding should be provided for low-income students on the ground that bringing such students (compared to other students) to satisfactory performance

levels is more costly than it is for other students." *Id.* at *132. The State cites no research to the contrary.[8]

B. Courts Across the Country Recognize That Increased Funding Improves Educational Outcomes.

Other state high courts deciding similar cases also recognize that increased funding has a positive impact on student performance. *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. Rev. 1467, 1484-85 (2007) (finding that, of thirty state courts that have considered the issue, twenty-nine have determined that funding levels are an important factor in academic achievement).

For example, the Tennessee Supreme Court has recognized that "there is a 'direct correlation between dollars expended and the quality of education a student receives.'" *Tenn. Small Sch. Sys.*, 851 S.W.2d at 141. Similarly, the Vermont Supreme Court has found that "substantial funding differences significantly affect opportunities to learn." *Brigham*

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[8] Critically, a decision *not* to invest fully in education would be the most expensive decision of all. In a series of papers published in 2007, economists and subject-matter experts examining the broad range of social costs of inadequate education concluded that the impact of inadequate education on the American economy in terms of lost income, lost taxes, extra health costs, and increased crime amounts to over $250 billion per year. *See The Price We Pay: Economic and Social Consequences of Inadequate Education* (Clive Belfield & Henry Levin eds., 2007).

v. *State*, 692 A.2d 384, 390 (Vt. 1997). New Jersey's Supreme Court has likewise determined that less funding means worse educational performance, and that "[m]oney can make a difference if effectively used." *Abbott II*, 575 A.2d at 363; *see also Abbott III*, 643 A.2d at 580 ("[I]t is nonetheless clear that there is a significant connection between the sums expended and the quality of the educational opportunity." (quoting *Robinson* v. *Cahill*, 303 A.2d 273, 277 (N.J. 1973))). In New York, the high court found a "causal link" between school funding and school performance. *See CFE II*, 801 N.E.2d at 340. The Kentucky and Kansas Supreme Courts have made similar findings. *See Rose*, 790 S.W.2d at 197 ("[A]chievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district."); *Montoy* v. *State*, No. 99-C-1738, 2003 WL 22902963, at *49 (Kan. Dist. Ct. Dec. 2, 2003) ("[T]here is a causal connection between the poor performance of the vulnerable and/or protected categories of Kansas students and the low funding provided their schools."), *aff'd in relevant part*, 120 P.3d 306 (Kan. 2005). As acknowledged by the Chief Justice of the Arizona Supreme Court, it is "inarguable" according to "logic and

experience . . . that children have a better opportunity to learn" if provided the resources to do so. *Roosevelt Elementary Sch. Dist. No. 66*, 877 P.2d at 822 (Feldman, C.J., concurring).

Furthermore, a number of state high courts have rejected the argument that money is irrelevant to educational outcomes. In *Abbott II*, the New Jersey Supreme Court rejected the State's position that "money is not a critical factor in the quality of education," pointing out that the State's own budgetary process for education expenditures is "based on the premise that what money buys affects the quality of education." *Abbott II*, 575 A.2d at 405; *see also CFE II*, 801 N.E.2d at 341 (affirming the trial court's rejection of the state's argument that educational resources are unrelated to outcomes). Other courts across the nation agree. *See Serrano* v. *Priest,* 487 P.2d 1241, 1253 n.16 (Cal. 1971) (citing cases rejecting the argument that money is irrelevant to student outcomes); *Hoke Cnty. Bd. of Educ.* v. *State*, No. 95 CVS1158, 2000 WL 1639686, at *57 (N.C. Super. Ct. Oct. 12, 2000) ("Only a fool would find that money does not matter in education."), *aff'd in relevant part,* 599 S.E.2d 365 (N.C. 2004). Even Dr. Hanushek, the Intervenors'

expert in this case, has recognized that money, when spent wisely, makes a positive impact:

> Dr. Hanushek was billed as the expert who would demonstrate that "money doesn't matter." What he actually said was that money, foolishly spent, would not close the significant "achievement gap" which exists between the vulnerable and/or protected students who have brought this action and their majority counterparts. In fact, Dr. Hanushek testified that money spent wisely, logically, and with accountability would be very useful indeed. He concluded by agreeing with this statement: "Only a fool would say money doesn't matter."

Montoy, 2003 WL 22902963, at *49, *aff'd in relevant part*, 120 P.3d 306 (Kan. 2005).

C. <u>This Court Recognizes That Increased Funding Improves Educational Outcomes.</u>

This Court has recognized the importance of financial inputs to educational outcomes for over two decades. In *Edgewood Indep. Sch. Dist.* v. *Kirby* (*Edgewood I*), this Court found that "[t]he amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student." 777 S.W.2d 391, 393 (Tex. 1989). Similarly, in *WOC II*, as discussed above, this Court recognized that "public education can and often does improve with greater resources,

just as it struggles when resources are withheld." *WOC II,* 176 S.W.3d at 788.

Indeed, in *WOC II* this Court signaled ten years ago that the Texas public education system was on the cusp of violating the adequacy clause, characterizing the situation at the time as an "impending constitutional violation" and stating that "it remains to be seen whether the system's predicted drift toward constitutional inadequacy will be avoided." *Id.* at 790. In support of this position, this Court looked to former Lieutenant Governor Ratliff's trial testimony, wherein he explained: "I am convinced that, just by my knowledge of the overall situation in Texas, school districts are virtually at the end of their resources, and to continue to raise the standards . . . is reaching a situation where we're asking people to make bricks without straw." *Id.*

If school districts were "virtually" at the end of their resources ten years ago, they are certainly there today. In *WOC II*, this Court noted that "90% of the growth in the student population has come from low-income families." *Id.* at 796. In the ten years since *WOC II*, there has been an increase of over 800,000 economically disadvantaged students, nearly ten percentage points of the total student population, and of

approximately 230,000 ELL students. *Texas Taxpayer*, 2014 WL 4254969, at *69, *79. These student populations are growing fast and are "significantly more expensive to educate." *Id.* at *3; *see also WOC II*, 176 S.W.3d at 796 (explaining that "the higher costs of educating economically disadvantaged students and students with limited English proficiency" is a fact, not an opinion). To meet the needs of these students, the State must provide "sound, effective educational programs, such as high quality early childhood programs, smaller class sizes, qualified, extended learning time, and well trained teachers," all of which, as set forth above, cost money. *Texas Taxpayer*, 2014 WL 4254969, at *69. The State's failure to provide these kinds of essential programs and resources to its most vulnerable students lies at the heart of the district court's ruling.

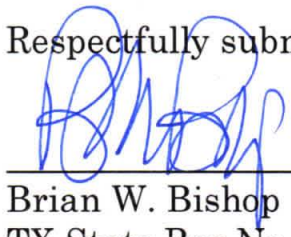
In sum, the district court's logical determination that funding inputs affect educational outcomes is consistent with this Court's precedent. The State's arguments to the contrary ignore the intuitive, logical and empirically proven link between funding inputs and educational outcomes that has been recognized not only by this Court,

but also by almost all of the other state high courts in similar cases across the nation.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the district court's decision.

Respectfully submitted,



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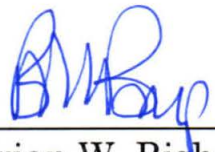
CERTIFICATE OF COMPLIANCE WITH RULE 9.4

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned certifies this brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B). Exclusive of the exempted portions in Tex. R. App. P. 9.4(i)(l), the brief contains 8,153 words. The brief was prepared using Microsoft XP.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent via electronic mail on this 11th day of August 2015, to all counsel of record.

Brian W. Bishop