

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

REPLY BRIEF OF APPELLANTS MICHAEL WILLIAMS, *ET AL.*

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ASATR	Additional State Aid for Tax Reduction
ELL	English Language Learner
EOC	End of Course
FSP	Foundation School Program
I&S	Interest and Sinking Fund
LBB	Legislative Budget Board
M&O	Maintenance and Operations
NAEP	National Assessment of Educational Progress
RPAF	Regular Program Adjustment Factor
STAAR	State of Texas Assessments of Academic Readiness
TAKS	Texas Assessment of Knowledge and Skills
TEA	Texas Education Agency
TRE	Tax Rollback Election
WADA	Weighted Average Daily Attendance

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REPLY BRIEF OF APPELLANTS MICHAEL WILLIAMS, *ET AL.*

TO THE HONORABLE SUPREME COURT OF TEXAS:

In the four months since the State Defendants filed their opening brief in this appeal, the Legislature has again significantly altered the public-education system's financing and operations. The 84th Legislature funded an estimated \$1.5 billion increase to the Foundation School Program ("FSP") for the 2016-2017 biennium, on top of the \$3.4 billion in FSP formula funding and

\$2.2 billion for enrollment growth added. It also provided \$118 million in new funding for high-quality pre-kindergarten. It passed new laws aimed at improving both early education and postsecondary success. And it adopted a new program that allows school districts to claim some of the exemptions from state mandates that charter schools enjoy.

These most recent enactments cap a decade of fundamental change in public education in Texas. As the State Defendants described in their opening brief, in 2006 the Legislature initiated a massive overhaul of the curriculum—a project that continues today—that in turn prompted the development and adoption of a new testing program and accountability system that launched in 2012-2013. The State also is currently transitioning to a different coursework plan for graduation. All of those changes are still in the early stages, and the feedback that legislators and state officials have received thus far has spurred even more recent adjustments during this lawsuit—such as moving from fifteen end-of-course exams to five, altering the phase-in schedule for testing standards, and establishing an alternate path to graduation via review committees.

In the midst of all these changes, the Plaintiffs and Intervenors ask the Court to take a snapshot of the public-education system and declare it

unconstitutional. But the exposure for that photo has been very long, and the interim movement within the system has left a blurry image for the Court to assess. If the Court arrests the dynamic process of the current education reform and makes a static determination that the Legislature must go back to the drawing board, it will serve as a strong disincentive for our leaders to set high goals for Texas students that necessarily require years of effort, analysis, and adjustment.

Still, if the Court concludes that this dispute remains justiciable, redressable, and ripe for review, the “very deferential” standard the Court has prescribed for analyzing challenges to the public-education system should lead it to conclude that the current system is constitutional.

ARGUMENT

I. THE LAWSUITS SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

A. Claims Challenging the Public-Education System Under Article VII, Section 1 of the Texas Constitution Present Non-Justiciable Political Questions.

Despite the Court’s prior efforts to define the contours of article VII, section 1, there is no meaningful framework for evaluating the “adequacy,” “efficiency,” and “suitability” of Texas’s public-education system. *See* State Br. 55-60. Because courts lack authority to determine “how” the Legislature

may satisfy these “imprecise” standards, *Neeley v. West Orange-Cove Consol. ISD*, 176 S.W.3d 746, 777-78 (Tex. 2005) (*WOC II*), parties are left speculating about what they must show to establish and defend constitutional claims. This has resulted in near-perpetual litigation that the trial court referred to as “the public debate on school finance law.” 12.CR.588 (COL 104).

Plaintiffs respond that the school system’s “adequacy” may be judicially assessed under a reasonableness rubric, and that the test boils down to whether students have a “meaningful opportunity” to obtain what the Legislature has defined as a “general diffusion of knowledge.” Calhoun Appellees’ Br. 64-68; *accord* Fort Bend Br. 51-52; *see also* Edgewood Eff. Br. 32-33 (noting that constitutional “efficiency” is also assessed under a “reasonableness” standard).¹

But the Calhoun Plaintiffs acknowledge that the Legislature’s measure of an adequate education is rebuttable under the Court’s precedents. Calhoun Appellees’ Br. 65 (recognizing “the possibility that the general diffusion of

¹ For purposes of this section, the TTSFC Plaintiffs adopted and incorporated the jurisdictional arguments made by both the Calhoun and Fort Bend Plaintiffs, TTSFC Br. 12 n.10, whereas the Edgewood Plaintiffs adopted and incorporated the jurisdictional arguments made by the Fort Bend Plaintiffs, Edgewood Eff. Br. 26 n.16, and the Charter School Plaintiffs adopted and incorporated the jurisdictional arguments made by the Calhoun Plaintiffs, Charter Appellees’ Br. 10 n.6.

knowledge could mean something beyond [the State’s] accreditation [scheme]”). The ISD Plaintiffs attempted to rebut that measure in this case without articulating standards governing (1) when rebuttal is appropriate, or (2) how courts should assess adequacy once the Legislature’s accreditation standards are eliminated from consideration. *See id.* at 94-99.

The Fort Bend Plaintiffs add that, beyond the legislative definition of adequacy, the school system’s “reasonableness” is judged “in light of the constitutional standards.” Fort Bend Br. 55. This is entirely circular. In *West Orange-Cove II*, the Court stated that “the crux of [the constitutional standards for adequacy, efficiency, and suitability] is reasonableness.” *WOC II*, 176 S.W.3d at 778.

In all events, Plaintiffs contend that students’ “meaningful opportunity” to obtain a “general diffusion of knowledge” (as defined by the Legislature or otherwise) is assessed by examining the “link” between “inputs” (funding) and “outputs” (student achievement). Calhoun Appellees’ Br. 67; *see also* Fort Bend Br. 55-56 (“By neglecting to measure costs necessary to keep pace with legislative [academic] standards . . . the Legislature has allowed the system to slide back into unconstitutionality.”). But the Court has already rejected the supposed link between inputs and outputs as the dispositive test. *WOC II*, 176

S.W.3d at 788 (“While the end-product of public education is related to the resources available for its use, the relationship is neither simple nor direct [because] . . . more money does not guarantee better schools or more educated students.”).

Instead, the constitutional adequacy standard “is plainly result-oriented” as “measured in student achievement.” *Id.* Neither the Court nor Plaintiffs have attempted to define the level of student achievement that would satisfy the Constitution with any precision, however, and for good reason: courts are ill-suited to develop standards for matters that are “not legal in nature.” *See* Calhoun Appellees’ Br. 63 (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

As the State Defendants pointed out, there are no meaningful points of comparison to determine whether Texas’s student body is performing well enough for the system to be deemed “reasonable.” *See* State Br. 55-58. The Calhoun Plaintiffs point to the “extreme[s]” identified in *West Orange-Cove II* as providing the appropriate guidelines. Calhoun Appellees’ Br. 62. But defining the constitutional bounds somewhere between “a public education system limited to teaching first grade reading” and one that “must teach all students multiple languages or nuclear biophysics,” *WOC II*, 176 S.W.3d at

778, does not provide manageable standards for assessing the reasonableness of the school system in court. Where liability falls within that vast middle ground remains unknown.

Plaintiffs also suggest that the State Defendants’ arguments regarding the non-justiciability of claims under article VII, section 1 cannot be squared with the State’s failure to challenge the justiciability of the ISD Plaintiffs’ article VIII, section 1-e state-property-tax claims. *See Calhoun Appellees’ Br. 70-71; Fort Bend Br. 50 n.25.* But claims under these separate constitutional articles are not “inherently interrelated.” *See Calhoun Appellees’ Br. 70.* A school district could establish a tax claim by proving that it lacked “meaningful discretion” in setting its property tax rates in order to meet the Legislature’s statutory accreditation standards—even if that district’s outputs surpassed the standard for establishing a systemwide general diffusion of knowledge. *See WOC II, 176 S.W.3d at 794-97; see also infra, Part VII.A.* Consequently, the article VIII, section 1-e “meaningful discretion” standard does not “incorporate[]” article VII, section 1’s “adequacy” standard. *Cf. Calhoun Appellees’ Br. 71.* Indeed, article VIII, section 1-e’s prohibition on state ad valorem taxes applies outside the school-finance context, *see State Br. 181, so*

its standard cannot possibly be dependent upon establishing an article VII claim.

At bottom, Plaintiffs do not grapple with the fact that the Court's inability to prescribe "how" education is supplied (as contrasted with "whether" it is constitutional) leads to the "litigation vortex" the State Defendants described in their opening brief. *See* State Br. 49-52. The justiciability problem is not limited to the history of "repeated litigation," Calhoun Appellees' Br. 71, or "the record's size," Fort Bend Br. 52-53. The problem is that there is no foreseeable end to school-finance litigation because the Court cannot prescribe how the Legislature can satisfy the article VII, section 1 standards.

The State Defendants have not tried to dodge the Court's adverse political-question precedents. *See* State Br. 52, 55 n.4. But stare decisis is not insurmountable, particularly when constitutional principles are at stake. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) ("Although our concern for the rule of stare decisis makes us hesitant to overrule any case, when constitutional principles are at issue this court as a practical matter is the only government institution with the power and duty to correct such errors."). As set forth in the State Defendants' opening brief and

herein, there are strong reasons to change course and hold that Plaintiffs' claims under article VII, section 1 present non-justiciable political questions.

It bears repeating that the State Defendants do not dispute the importance of public education—only whose job it is to “support and maint[ain]” a public-school system satisfying the article VII, section 1 standards. TEX. CONST. art. VII, § 1. This is not only a textual argument, but a practical one: there simply is no judicially manageable standard for assessing the constitutionality of Texas's public-education system. That task should be left with the Legislature.

B. Plaintiffs and Intervenors Lack Standing to Maintain Claims Under Article VII, Section 1 Because the Relief They Sought and Obtained Does Not Redress Their Alleged Injuries.

Even if courts possessed the tools to manage and evaluate claims under article VII, section 1, they indisputably lack the capability to remedy any constitutional defects in the school system. Far from fixing the alleged structural and monetary deficiencies challenged in this lawsuit, the declaratory and injunctive relief sought by Plaintiffs and granted by the trial court only make things worse—and purposefully so. State Br. 61-64; *see also Linda R.S. v. Richard D.* 410 U.S. 614, 617-18 (1973) (plaintiff lacked standing where declaratory and injunctive relief sought would not result in desired

child-support payments). Plaintiffs’ expectation that the Legislature will not only respond to the judgment, but also cure every alleged deficiency—despite the Court’s inability to direct the Legislature as to “how” to cure those deficiencies, *supra* p.8—is insufficient to establish redressability, State Br. 64-66.

That declaratory and injunctive relief are typically used to remedy unconstitutional legislation, *see* Calhoun Appellees’ Br. 76-78; Fort Bend Br. 56-57; Edgewood Eff. Br. 33-34; Charter Appellees’ Br. 12, is irrelevant. In most cases, invalidation of the statute is the end-game: no additional action is required for complete redress. *See, e.g., Good Shepard Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 836-37 (Tex. App.—Austin 2010, no pet.); *cf. Abbott v. G.G.E.*, No. 03-11-00338-CV, 2015 WL 1968262, at *9 n.11 (Tex. App.—Austin Apr. 30, 2015, pet. filed) (even if Legislature did not replace the challenged statute with new law providing additional process rights for involuntarily committed plaintiffs, declaratory relief would still redress plaintiffs’ injuries because “courts may overturn those applications of the statute declared unconstitutional”). But here, assuming the Court found constitutional

violations pertaining to the education system, Plaintiffs would need new legislation with additional funding or structural changes to obtain *any* relief.²

Plaintiffs do not genuinely dispute that curative legislation is necessary to remedy their alleged injuries. *See* Calhoun Appellees’ Br. 82 (“[T]he court’s declaratory and injunctive relief judgment will . . . impel the Legislature to consider new statutory approaches that comply with the Texas Constitution[.]”); Fort Bend Br. 59 (“It is reasonable to infer that the Legislature will respond . . . and take steps to bring the system into constitutional compliance.”). But the Legislature is not a party to this case. And the Court cannot compel the Legislature to enact particular laws or to spend particular funds—even when the Legislature has a constitutional duty to act. State Br. 65-66.

Although the Legislature is presumed to act in accordance with the Court’s decisions *when it acts*, *see* Calhoun Appellees’ Br. 79 (citing *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990)), no case suggests that a court could compel the Legislature to enact laws *in the first instance*. The

² The ISD Plaintiffs’ distinct injury of being required “to implement” the State’s allegedly unconstitutional school-finance system, *see* Calhoun Appellees’ Br. 75; Fort Bend Br. 58, similarly will not be cured by declaratory or injunctive relief. Without additional legislation financing or restructuring the school system, the school districts would be left essentially defunct by the judgment.

opposite is true. *Andrade v. NAACP*, 345 S.W.3d 1, 16 (Tex. 2011) (“[I]t is not for the courts to attempt to direct what laws the Legislature shall enact to comply with [the Constitution].” (citation omitted)). Plaintiffs have not identified a single case finding redressability based solely on the prospect that an injunction could spur curative legislation. *But cf. I.L. v. Alabama*, 739 F.3d 1273, 1279-81 (11th Cir. 2014) (no redressability for plaintiffs seeking an injunction of state tax-rate caps to remedy underfunding of school districts because “further legislation is necessary” for redress); *Biszko v. RIHT Fin. Corp.*, 758 F.2d 769, 772-73 (1st Cir. 1985) (no redressability when premised on Legislature “react[ing] in a certain way to a decision by this court”); *Albanese v. FEC*, 78 F.3d 66, 69 (2d Cir. 1996) (per curiam) (same—plaintiffs had argued that State would enact new campaign finance laws if FECA was invalidated); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (plurality op.) (no redressability when it was “an open question” as to whether non-party funding agencies would be bound by relief ordered against Defendant-Secretary).

The Fort Bend Plaintiffs attempt to analogize redressability in this case to redistricting cases, noting that the Legislature is ordinarily afforded an opportunity to enact a substitute apportionment plan after a court invalidates

the original plan. *See* Fort Bend Br. 57 (citing *Terrazas v. Ramirez*, 829 S.W.2d 712, 720 (Tex. 1991)). But there is a crucial distinction. In redistricting cases, courts are ultimately empowered to adopt and enforce substitute plans when the Legislature fails to do so. *Terrazas*, 829 S.W.2d at 717-18 (“Although state courts in Texas have invalidated apportionment statutes, none has ever imposed a substitute plan upon the State. Nevertheless, we do not doubt the power of our courts to do so. . . . While this power has generally been exercised by a state’s highest court, we see no constitutional reason why it does not also reside in a trial court of general jurisdiction.”) (internal citations omitted).

In contrast here, the Court has repeatedly recognized that courts lack the authority to establish a public-education system complying with article VII, section 1. *See, e.g., WOC II*, 176 S.W.3d at 777 (“[T]he Legislature has the sole right to decide *how* to meet the standards set by the people in article VII, section 1[.]” (citation omitted)). Simply put, unlike an unconstitutional apportionment plan, courts cannot fix an unconstitutional school system; only the Legislature can do that.³

³ *Utah v. Evans*, 536 U.S. 452 (2002), is also inapposite. There, the Court held that Utah had standing to maintain a post-census challenge to the method used to compile census data because Utah could obtain a declaration or injunction “requiring” the Secretary of Commerce to issue a substitute census report, and that the President (and other executive

That this Court has issued similar forms of relief in prior school-finance cases, *see* Calhoun Appellees’ Br. 83-85; Fort Bend Br. 56-57; Edgewood Eff. Br. 34-35, does not justify overlooking jurisdictional defects identified for the first time in this case, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011) (“When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.”); *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (“[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.”); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (“The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us.”); *Gantt v. Gantt*, 208 S.W.3d 27, 30 n.4 (Tex. App.—Houston [14th Dist.] 2006, pet denied) (“[I]n deciding its jurisdiction, a court is not bound by a prior exercise of jurisdiction where it was not questioned, but was passed *sub silentio*.”). In other words, the Court’s school-finance precedents have no precedential effect with regard to redressability because the Court never considered the issue in those earlier cases. *See* Calhoun Appellees’ Br. 83 n.18 (“The State never urged its

and congressional officials) would then need only make “purely mechanical” adjustments following the substitute report to cure Utah’s alleged injury. *Id.* at 463-64.

redressability arguments in the prior cases. Nor did this Court examine the issue of standing *sua sponte*[.]”).

Furthermore, that the Legislature has acted in response to the Court’s prior school-finance opinions, Calhoun Appellees’ Br. 78-80; Fort Bend Br. 58-60, does not mean that it always will. Even if the Legislature is called into a special session, it is entirely possible that the body would be unable to agree to new legislation. That would leave the school system defunct pursuant to the district court’s judgment. But even assuming the Legislature is able to pass responsive legislation, it is far from certain that the new legislation would actually cure the alleged constitutional deficiencies in the system. This is not cynical speculation. *See* Fort Bend Br. 59; Edgewood Eff. Br. 36. The redressability problem goes hand-in-hand with the Court’s inability to direct the Legislature as to “how” to operate a constitutionally satisfactory school system. Without that direction, the Legislature is operating in the dark when it tries to “fix” the defects underlying the Court’s judgment.

This problem is not manufactured or hypothetical. The very history of school-finance litigation is illustrative. Repeatedly, this Court has declared Texas’s school system unconstitutional only to have the resulting “curative” legislation subsequently challenged and itself held unconstitutional. *See*

Calhoun Appellees' Br. 79-80. This case itself challenges the constitutionality of legislation that was enacted in response to *West Orange-Cove II's* holding that the then-existing system violated article VIII, section 1-e.

At bottom, the State Defendants have not suggested that injunctive and declaratory relief can never redress constitutional injuries. *See* Calhoun Appellees' Br. 80. Of course they can. The point is that it is wholly impossible for the Court to redress the alleged injuries *in this case* without legislative involvement. Because the Court cannot compel the Legislature to make whatever fixes the Court believes are necessary to satisfy the Constitution, Plaintiffs cannot establish redressability and the case should be dismissed for lack of jurisdiction.

C. Plaintiffs' Challenge to Texas's Current Public-Education System is Unripe.

The 83rd Legislature added billions of dollars in public-education funding and altered student-testing requirements after the initial 45-day trial took place in this lawsuit. State Br. 16-21, 37-38. Although the district court recognized the need to reopen the evidence to consider the new legislation before it entered judgment, there was no way to assess its constitutionality just months after the changes were passed into law in late 2013.

As the State Defendants explained, at the time the evidence was reopened in January 2014, the available student-performance data could not possibly reflect the impact of the legislative changes to the system. State Br. 67-68.⁴ Consequently, Plaintiffs' adequacy claim was unripe, and their remaining claims could not be assessed without reference to the pertinent adequacy data. *Id.* at 68-70. The district court's findings pertaining to the insufficiency of funding appropriated by the 83rd Legislature, *see* Calhoun Appellees' Br. 87-88 (citing FOF 66-71); Fort Bend Br. 64-66 (citing FOF 65-71, 105-10, 625-40), are speculative and cannot suffice for evidence reflecting student test results and graduation rates in future years, *see WOC II*, 176 S.W.3d at 788 ("While the end-product of public education is related to the resources available for its use, the relationship is neither simple nor direct[.]").

Since the State Defendants filed their opening brief, the 84th Legislature once again passed a series of laws that significantly alter the financing and structure of the public-education system. To begin with, the Legislature funded an estimated \$1.5 billion increase to the FSP Entitlement for the 2016-17 biennium, consisting of \$1.2 billion distributed through the

⁴ Plaintiffs correctly note that the trial record contains fall and December 2013 STAAR EOC test results, Calhoun Appellees' Br. 89, Fort Bend Br. 61, 65, but those tests were taken virtually contemporaneously with the changes implemented by the 83rd Legislature.

basic allotment, \$200 million for M&O rate conversion affecting districts with compressed rates below \$1.00, \$23.7 million for the New Instructional Facilities Allotment, and \$55.5 million for Instructional Facilities Allotment awards for fiscal year 2017. See Legislative Budget Board, *Summaries: Foundation School Program Entitlement Actions Taken by the 84th Legislature (Models 84497 and 95129)*, <http://www.lbb.state.tx.us>.

Besides the additional funding, the Legislature passed laws aimed at improving postsecondary-school success. House Bill 18 requires students in grades 7-8 to receive specific instruction in preparing for high school, including the creation of a personal graduation plan, as well as college and career readiness training. Act of May 31, 2015, 84th Leg., R.S., ch. 988. Senate Bill 149 then requires school districts to establish individual graduation committees to review whether certain qualifying students who complete additional remediation should be eligible to graduate from high school despite failing to pass one or two EOC assessments by grade 12. Act of Apr. 22, 2015, 84th Leg., R.S., ch. 5, 2015 TEX. SESS. LAW SERV. 935.

In addition to these laws aimed at improving graduation prospects, House Bill 1842 provides school districts that rated acceptable or better with the opportunity to take advantage of some of the exemptions enjoyed by

charter schools if the local community chooses to designate itself as a “district of innovation.” Act of May 31, 2015, 84th Leg., R.S., ch. 1046, § 12A.

The Legislature also passed a series of laws focused on improving early childhood education. Most significantly, House Bill 4 provides \$118 million in new funding for high quality pre-kindergarten education during the 2016-17 biennium, while also incentivizing and rewarding districts that meet certain quality standards. Act of May 21, 2015, 84th Leg., R.S., ch. 142. Senate Bills 925 and 934 then establish new math and literacy training academies for grade K-3 teachers, prioritizing training teachers who work at campuses with educationally disadvantaged students. Act of May 7, 2015, 84th Leg., R.S., ch. 55; Act of May 18, 2015, 84th Leg., R.S., ch. 202. Senate Bill 972 similarly establishes reading-to-learn academies for grade 4-5 teachers who provide reading comprehension instruction. Act of May 23, 2015, 84th Leg., R.S., ch. 204. In signing these bills, Governor Abbott signaled his intention to “provid[e] our education system with the tools and resources necessary to build the strongest possible foundation for [the State’s] early education

programs and subsequently, Texas’s future.” *See* Governor Abbott Signs Emergency Early Education Bills (May 28, 2015).⁵

These significant financial and structural changes to the school system implemented through the 2015 legislation further establish that this lawsuit is not ripe. There is no way to assess the effect of this incipient legislation, which represents the state of the school system as it is presently structured, yet the Plaintiffs and Intervenors ask the Court to enjoin it anyway. In all events, the district court’s judgment obviously does not account for these changes (in addition to the 2013 changes), and should therefore be reversed and vacated. Alternatively, the Court could remand the case so that the trial court may consider the impact of the new legislation, a course consistent with the additional process Plaintiffs sought when the Legislature last altered the school system in 2013. 5.CR.231 (asking the district court to reopen the evidence because “the legislative changes are significant and the Court’s final judgment and the Supreme Court’s ultimate decision must be based on the system as it currently stands, not as it once existed”).

⁵ <http://gov.texas.gov/news/signature/29054>

While the Fort Bend Plaintiffs are correct that the ever-changing nature of the State’s education system makes it possible that a lawsuit challenging the system may never ripen into a justiciable controversy, Fort Bend Br. 62, this is just another reason challenges to the system are not capable of resolution in court. The capable-of-repetition-yet-evading-review exception to mootness doctrine does not apply, however, because that exception is available only when the complaining party is likely to be “subject to the same action again.” *United States v. Juvenile Male*, 131 S. Ct. 2860, 2865 (2011) (per curiam) (citation omitted). This case is not ripe because the school system has *changed* substantially since the lawsuit was initially filed, and Plaintiffs will never operate within that old system again.

II. THE CHARTER SCHOOL PLAINTIFFS’ SUIT IS BARRED BY IMMUNITY TO THE EXTENT IT SEEKS TO CHANGE THE FUNDING FORMULAS OR ADD A LINE-ITEM FOR FACILITIES FUNDING.

The Charter School Plaintiffs assert they have not sought a remedy that is barred by immunity. *See* Charter Appellees’ Br. 9, 11-12. But, as the State Defendants already have pointed out, the Charter School Plaintiffs’ repeated assertion that they are entitled to a separate line-item of funding for facilities expenses runs against the content of their charters, which are in the form of contracts. *See* State Br. 70-75; State Cross-Appellees’ Br. 55.

The Charter School Plaintiffs suggest that they do not seek to create an entitlement to facilities funding. Charter Appellees' Br. 11-12 & n.8. But they cut their facilities-funding argument exceedingly fine. Their live petition seeks a declaration that the Constitution requires facility funding for charter schools. 7.CR.661 ¶ f. They suggest that such a finding would be analogous to findings about the total amount of money required to fund school districts. Charter Appellees' Br. 12 n.8. And therein lies the problem: by statute and contract, charter schools are not entitled to a separate calculation of their facilities expenses. They receive a per-student amount of funding based on the presumption that, because the charter-school model affords more flexibility than school districts enjoy, they will be able to run their entire operations on that amount of funding. It is thus not true that charter schools receive no facilities funding; they receive a contractual amount designed to pay for both operations and facilities. The Court can order neither the recalculation of the funding nor the imposition of a separate line-item for facilities funding without rewriting the charters' contract with TEA. *See* State Cross-Appellees' Br. 47-48

The Charter School Plaintiffs suggest that no charter provision would change as a result of their suit. Charter Appellees' Br. 9, 11-14. But adding

facilities funding to the calculation ultimately would require changing current charters. Because the charter is a contract, its terms cannot be changed by the judiciary even if the Court believes that the Legislature should have provided a separate line-item for charter school facilities rather than providing them with an amount of funding based only on attendance.

The Charter School Plaintiffs also argue incorrectly that (1) sovereign immunity does not bar claims based on constitutional obligations that coincide with contractual obligations, Charter Appellees' Br. 15 (citing *Tex. Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 150 (Tex. App.—Austin 1998, no pet.)); and (2) *ultra vires* suits against state officials are not barred by sovereign immunity. The first argument is based on a court of appeals opinion that is inconsistent with this Court's subsequent holdings. And the second is inconsistent with longstanding precedent.

The Third Court of Appeals' unreviewed decision in *Callaway* is at odds with this Court's subsequent holding that (1) when the State acts under color of contract, it is immune from the type of takings claims at issue in *Callaway*; and (2) trespass to try titles involving state property are to be brought against an official and contested in a plea to the jurisdiction. *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 394 (Tex. 2011) (holding that the type

of title claim at issue in *Callaway* must be brought as an *ultra vires* claim, subject to a plea to the jurisdiction); *id.* at 397 & n.3 (Hecht, J., dissenting) (pointing out that *Callaway* was a “broad” reading of earlier precedent); *see also State v. Holland*, 221 S.W.3d 639, 644 (Tex. 2007) (dismissing takings claim where plea-to-the-jurisdiction record showed that State had acted under color of contract).

And it is a necessary corollary of *Sawyer Trust* and subsequent decisions that an *ultra vires* suit against a state official can be barred by sovereign immunity if the relief requested would circumvent the State’s underlying immunity from suit. *See W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 839-41 (Tex. 1958) (dismissing *ultra vires* claim against state official that sought declaration of contract’s validity because immunity bars claims that would “require acts to be performed . . . which would impose contractual liabilities upon the State”).⁶

⁶ The Charter School Plaintiffs suggest that the plaintiff parents can bring suit because they are *jus tertii* beneficiaries of the charters. Charter Appellees’ Br. 9, 14. The Charter School Plaintiffs provide no justification for the proposition that a *jus tertii* contract claim can be heard by the courts when the parties to the contract are barred from bringing the same claim. That is because there is none. The bar on contract suits is meant to preserve the Legislature’s ultimate control over state contracting. *E.g., W.D. Haden Co.*, 308 S.W.2d at 840. It would make no sense to allow *jus tertii* claims related to contract.

Any increase in charter-school funding must occur by operation of the terms of charters, not a judicial rewrite. The Court does not have jurisdiction, in the absence of a specific legislative waiver of immunity, to change the funding formula or to expand the scope of funding agreed to under the charter schools' contracts with the State.

III. THE COURT ALREADY HAS DETERMINED THAT THE DISTRICT COURT'S FACT FINDINGS HAVE "A LIMITED ROLE" IN EVALUATING THE PUBLIC-EDUCATION SYSTEM'S CONSTITUTIONALITY.

In setting forth the standard for reviewing the merits of the constitutional claims in this suit, the State Defendants' opening brief recited the standard that the Court prescribed in the last school-finance case: the Court must defer to the district court's findings of fact as to disputed factual matters, "[b]ut in deciding ultimately the constitutional issues, those findings have a limited role." State Br. 48 (quoting *WOC II*, 176 S.W.3d at 785). The State Defendants also quoted two cases that the Court cited with approval in pronouncing that standard, noting that the Court must "focus on the entire record" in resolving the constitutional questions. *Id.* at 48-49 (quoting *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996); *Tex. Workers' Comp. Comm'n v. Garcia*, 893

S.W.2d 504, 520 (Tex. 1995)); *WOC II*, 176 S.W.3d at 785 & n.210 (citing *Barshop*, 925 S.W.2d at 625; *Garcia*, 893 S.W.2d at 520).

The Fort Bend Plaintiffs concede that the facts play a limited role here, but they accuse the State Defendants of incorrectly suggesting that the district court's fact findings are "immaterial." Fort Bend Br. 68. That accusation is puzzling, given the State Defendants' plain statement that "[t]o the extent those [constitutional] issues turn on disputed factual matters, the Court defers to the district court's findings of fact." State Br. 48.

The Fort Bend Plaintiffs then assert that "the State's authorities" concern only whether a trial court's findings may displace "*legislative* fact findings." Fort Bend Br. 68. Setting aside the fact that two of "the State's authorities" cited by the Fort Bend Plaintiffs appear nowhere in the State Defendants' brief,⁷ that comment fails to respond to the most pertinent authority cited: the last school-finance case. There the Court did not qualify its holding that "the district court's findings" have "a limited role" in deciding the same constitutional claims at issue here. *WOC II*, 176 S.W.3d at 785. That conclusion properly rests on authorities that the State Defendants *did* cite.

⁷ Fort Bend Br. 68 (citing *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999); *Corsicana Cotton Mills v. Sheppard*, 71 S.W.2d 247 (Tex. 1934)).

Garcia, 893 S.W.2d at 520 (holding that, in deciding whether the Legislature has acted “arbitrarily,” the trial court’s findings do not control if “on the record presented” the Legislature apparently could have reached a different conclusion); *accord Barshop*, 925 S.W.2d at 625.

The Calhoun Plaintiffs contend that the Court was simply wrong to relegate trial-court fact findings to a limited role “in this context.” Calhoun Appellees’ Br. 53. That rule, they urge, applies only to facial constitutional challenges or rational-basis review, whereas their suit asserts as-applied challenges and is not subject to rational-basis review. *Id.* at 53-54. The Calhoun Plaintiffs are incorrect on both counts. The Legislature can violate article VII, section 1 only by failing to provide “an” adequate, efficient, and suitable “system,” “considering the system as a whole.” *See WOC II*, 176 S.W.3d at 790. Thus, as discussed below, challenges under that provision are substantively facial, not as applied, because the “claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs.” *Doe v. Reed*, 561 U.S. 186, 194 (2010); *accord Garcia*, 893 S.W.2d at 518 n.16; *see infra* Part IV.B. Moreover, “the line between facial and as-applied challenges is not so well defined that it has some automatic effect.” *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex. 2012) (citation and internal

quotation marks omitted). And the Court has specifically held that fact findings play a “limited role” in evaluating whether “the Legislature has acted *arbitrarily*,” *Garcia*, 893 S.W.2d at 520 (emphasis added), the very standard that governs claims under article VII, section 1, *WOC II*, 176 S.W.3d at 784.

IV. THE PLAINTIFFS’ DEFENSE OF THE DISTRICT COURT’S FLAWED JUDGMENT ON THEIR ADEQUACY CLAIMS IS WITHOUT MERIT.

In their opening brief, the State Defendants explained that the district court’s judgment on the adequacy challenges suffered from numerous errors warranting reversal: (1) all of the adequacy declarations were wrongly directed at the system’s funding; (2) the court improperly declared the system *partially* inadequate in its application to certain schools and groups; (3) the court erroneously held that the ISD Plaintiffs had overcome the presumption that an accredited education is constitutionally adequate; and (4) the court’s assessment of recent educational outputs improperly used statutory goals to fault a system working toward those goals. State Br. 75-117. The ISD Plaintiffs and Charter School Plaintiffs fail to rebut those points. The Court should reverse the judgment in their favor and render judgment that the system is constitutionally adequate.

A. All of the Judgment’s Adequacy Declarations Improperly Adjudicated the Constitutionality of the System’s Funding.

As the State Defendants have explained, the district court erred in declaring the public-education system unconstitutionally inadequate because each of the judgment’s seven declarations regarding adequacy was impermissibly predicated on funding levels. State Br. 94-100; State Appellees’ Br. 60-61. Adequacy is a “plainly result-oriented” standard, specifically “the results of the educational process measured in student achievement.” *WOC II*, 176 S.W.3d at 788. Funding is an input, not a result, and thus is not a proper measure of the system’s adequacy.

1. The district court’s findings on outputs cannot save its input-oriented declaratory judgment from reversal.

In response, the ISD Plaintiffs and Charter School Plaintiffs direct the Court to the district court’s fact findings concerning educational outputs. *E.g.*, Calhoun Appellees’ Br. 120-22; Edgewood Br. 79; Charter Appellees’ Br. 21-22. That misses the point. The purpose of findings of fact is to aid appellate review; they “permit the parties, as well as the reviewing court, to ascertain the true basis for the trial court’s decision” and thereby “serve to limit the issues on appeal.” *Vickery v. Comm’n for Lawyer Discipline*, 5 S.W.3d 241, 252 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). But it is the *judgment*

that “determine[s]” the “validity” of the challenged statutes, “declare[s] [the] rights, status, and other legal relations” of the parties, and thereby “terminate[s] the uncertainty or controversy.” TEX. CIV. PRAC. & REM. CODE §§ 37.003(a), 37.004(a), 37.008. And it is the judgment’s declarations of constitutional violations that would be enforced by the district court’s injunction. 12.CR.199.

Thus, it is the declaratory judgment that imparts legal consequences for the State when this appeal is over. And despite the findings on educational outputs, it is irrefutable that every one of this judgment’s declarations about constitutional adequacy explicitly determined that the system was inadequately *funded*. 12.CR.195-96. Those input-oriented declarations must be reversed.

2. The Court has not approved adjudicating the adequacy of education funding.

The ISD Plaintiffs and Charter School Plaintiffs next counter that this Court endorsed a funding-based adequacy standard in *West Orange-Cove II*. Specifically, they note the Court’s observation that “it is useful to consider how funding levels and mechanisms relate to better-educated students,” *WOC II*, 176 S.W.3d at 788. Calhoun Appellees’ Br. 122; Fort Bend Br. 147, 149; Edgewood Br. 70, 84; Charter Appellees’ Br. 23.

That language does not support this judgment. The district court went far beyond “considering” funding levels; it *adjudicated* them. The adequacy declarations each plainly pronounce that it is the amount of funds that the Legislature is appropriating for education that is unconstitutional. 12.CR.195-96. Because those declarations are backed by an injunction that closes the school system “until the constitutional violations are remedied,” 12.CR.199, and findings that a constitutionally adequate education requires an additional \$6.16 billion per year over 2012-2013 levels, 12.CR.393-94 (FOF 619-20), they are hardly distinguishable from an order directing the Legislature to appropriate that much more money for education.

Some of the ISD Plaintiffs also rely on the Court’s statement that the adequacy standard “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. Calhoun Appellees’ Br. 123; Edgewood Br. 84. In context, that statement cannot mean that a court may decide that inadequate funding is the cause of allegedly deficient outputs, that a certain amount of additional funding is necessary to achieve a general diffusion of knowledge, and that the Legislature thus has a constitutional duty to provide *that* particular level of funding. Using education outputs as a mere starting point to arrive at an

ultimate duty to appropriate a certain level of funds does not reflect a “plainly result-oriented [standard],” which is how the Court described adequacy in the preceding sentence. *Id.* Nor can that interpretation be squared with the next sentence, which recognizes that the actual cost of an adequate education is an elusive and perhaps unattainable number:

While the end-product of public education is related to the resources available for its use, the relationship is neither simple nor direct; public education can and often does improve with greater resources, just as it struggles when resources are withheld, but more money does not guarantee better schools or more educated students.

Id. Given that context, the better reading of the Court’s statement is that, while the Legislature has a duty to fund public education at whatever level is necessary to provide a general diffusion of knowledge, whether the Legislature is meeting that duty will be judged by education results, not by figuring out what that dollar amount is.

That same reading explains the Court’s observation in *West Orange-Cove II* that “[i]t would be arbitrary, for example, for the Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide insufficient means for achieving those goals,” *id.* at 785. *See, e.g.,* Calhoun Appellees’ Br. 125. Even assuming that the Court offered that example to demonstrate an adequacy violation in particular, *but*

see State Br. 98-99, it does not follow that a court can resolve whether the means are sufficient by trying to analyze *ex ante* what the means should be rather than looking at outputs to determine whether the Legislature's goals have been achieved.

Some challengers argue further that the Court has endorsed the adjudication of funding adequacy because the efficiency and state-property-tax inquiries depend on a determination of how much a general diffusion of knowledge costs. Calhoun Appellees' Br. 124-25; Charter Appellees' Br. 23. While the Court did use a trial-court cost finding for its efficiency analysis in *Edgewood ISD v. Meno*, 917 S.W.2d 717, 731 n.10 (Tex. 1995) (*Edgewood IV*),⁸ that sort of cost figure is conspicuously absent from its analysis in *West Orange-Cove II*, where the Court explicitly questioned the existence of a verifiable direct relationship between money and student achievement. *See* 176 S.W.3d at 785-98. To resolve the property-tax issue in particular, the Court evaluated school districts' meaningful discretion by reference to tax

⁸ That cost figure came from TEA documents used in the litigation, but was never intended to represent the cost of an adequate education. That is unsurprising given that the definition or cost of an adequate education was not litigated in the *Edgewood IV* trial. *See* 917 S.W.2d at 768 (Spector, J., dissenting); *see also infra* Part IV.A.4.

rates and state accreditation statistics, not to any finding of what an adequate education costs. *Id.* at 796-97.

If the Court had approved adjudicating the adequacy of education funding in *West Orange-Cove II*, presumably it would have resolved the adequacy challenges in that case on that basis. But it did not. The Court adjudged the system adequate based solely on educational outputs—specifically, TAKS and NAEP test scores. *Id.* at 789. Indeed, the Court was agnostic as to whether funding, as opposed to other types of inputs, would forestall a future adequacy violation. *Id.* at 790 (noting evidence that continued improvement in student outcomes would require significant change, “whether that change take the form of increased funding, improved efficiencies, or better methods of education”). The district court departed from that precedent by basing all of its adequacy declarations, in whole or in part, on funding levels.

3. The Court should not endorse the district court’s adjudication of education funding.

The Calhoun Plaintiffs contend that a judgment of inadequacy *must* go beyond determining that the system is not achieving a general diffusion of knowledge and discuss “what has caused this circumstance or what measures are likely to be necessary to fix it” so that the parties will not be “uncertain . . .

about what is to happen next.” Calhoun Appellees’ Br. 126; *see also* TTSFC Br. 65-66 (arguing that a court must analyze inputs in addressing adequacy); Edgewood Br. 95 (same). That reasoning is both incorrect and ill-advised.

The Court already has explained that, in adjudicating an adequacy challenge, it “must decide only *whether* public education is achieving the general diffusion of knowledge the Constitution requires.” *WOC II*, 176 S.W.3d at 753 (emphasis added). “[H]ow to meet the standards” in article VII, section 1 is the Legislature’s “sole right to decide.” *W. Orange-Cove Consol. ISD v. Alanis*, 107 S.W.3d 558, 563-64 (Tex. 2003) (*WOC I*). Thus, the Court has repeatedly stressed that it will not prescribe how to “fix” a violation of those standards. *See WOC II*, 176 S.W.3d at 783; *Carrollton-Farmers Branch ISD v. Edgewood ISD*, 826 S.W.2d 489, 523 (Tex. 1992) (*Edgewood III*); *Edgewood ISD v. Kirby*, 804 S.W.2d 491, 498 (Tex. 1991) (*Edgewood II*); *Edgewood ISD v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (*Edgewood I*); *see supra* Part I.A. A declaration that funding levels are causing the system to be inadequate impermissibly does just that.

The Calhoun Plaintiffs do not avoid this problem by soft-pedaling their language, calling only for a “discussion” of what causes inadequacy or what measures are “likely to be necessary” to fix it, but stopping short of a directive

to the Legislature. Calhoun Appellees’ Br. 126. The district court went further here—it issued *declaratory judgments* that the system’s funding in particular is unconstitutional. 12.CR.195-96. Moreover, because the results of the educational process will show whether the system is adequate, *WOC II*, 176 S.W.3d at 788, a judicial diagnosis of the causes of, or “likely” fixes for, inadequacy would amount to an advisory opinion outside the courts’ subject-matter jurisdiction, *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012).

A constitutional standard that permits adjudication of the amount of funding needed for public education also would entangle the judiciary in issues of state fiscal policy. The ISD Plaintiffs apparently embrace that outcome, as their briefs unabashedly draw the Court’s attention to budget surpluses, the Rainy Day Fund, and recent tax cuts to support their view that the Legislature should have been allocating that money to schools. *See, e.g.*, Calhoun Appellees’ Br. 16 & n.4, 140; Fort Bend Br. 20; TTSFC Br. 5 & n.8; Edgewood Br. 36 n.11, 89. Our Constitution’s separation-of-powers mandate forecloses judicial intervention in those matters. TEX. CONST. art. II, § 1; *see Edgewood IV*, 917 S.W.2d at 736 (holding that “the Legislature’s funding obligations are generally limited to what it appropriates”); *Mutchler v. Tex. Dep’t of Pub. Safety*, 681 S.W.2d 282, 285 (Tex. App.—Austin 1984, no writ) (noting that,

where the Legislature had consistently refused to fund a program, “separation of powers prohibits us from doing what the Legislature has refused to do”).

4. Funding is an unworkable adequacy metric.

Finally, declaring the system inadequately funded not only departs from the Court’s precedent and infringes upon the Legislature’s policy sphere, but it necessarily rests on the dubious presumption that courts can reliably assess how much it costs to provide a general diffusion of knowledge in the first place. Again, the Court already has cast serious doubt on that proposition. *WOC II*, 176 S.W.3d at 788 (observing that the relationship between resources and educational outputs “is neither simple nor direct” and that “more money does not guarantee better schools or more educated students”); *see also Edgewood III*, 826 S.W.2d at 531 (Cornyn, J., concurring and dissenting) (concluding that “any correlation between funding and educational results is tenuous at best”).

The cost studies relied upon by the district court to support its adequacy judgment bear out the Court’s skepticism. While the court acknowledged that those estimates were not “definitive,” it nonetheless concluded that they “provide[d] a credible range” of the cost of an adequate education against which the system’s funding could be adjudicated. 12.CR.399 (FOF 636). In fact, the evidence shows that those estimates were statistically flawed and

unrelated to recognized education outcomes that represent the true measure of adequacy.

The district court first cited Dr. Allan Odden’s “evidence-based” study as a credible estimate of adequacy costs. 12.CR.391-94 (FOF 610-20). But that study is based on a model school district with characteristics that are not representative of Texas districts. Fewer than 20% of elementary schools, 8% of middle schools, and 4% of high schools have a student population similar to those in Dr. Odden’s model. 17.RR.163-64. That model also fails to account for economies of scale that benefit larger schools and districts. 17.RR.164-72. And many of the model’s Texas costs were simply duplicated from other states in which Dr. Odden has produced similar models, most of which bear little resemblance to Texas either geographically or demographically (*e.g.*, Wyoming, Washington, Arkansas, and North Dakota). 17.RR.178-81, 222-23. Thus, the prototypical district in Dr. Odden’s model cannot be used to derive an accurate cost for educating most Texas students. 17 RR.161.

More importantly, Dr. Odden acknowledged that even when school funding increases substantially, student performance does not necessarily improve. 17.RR.208-09. He agreed that, in states like Wyoming that appropriated additional funds based on his model (\$4,000 more per student),

his follow-up study showed that student performance did not advance. 17.RR.219-21, 223-226. Rather, school districts spent the additional funds within their local discretion and control, with no measurable benefit to the students. 17.RR.219-21.

The district court next cited Mr. Lynn Moak's conclusory estimate that school districts required "approximately \$1,000 of additional funding per weighted student above 2010-11 spending levels" to satisfy current state standards. 12.CR.394 (FOF 621). But Mr. Moak admitted that he derived that number simply by adding together underfunding estimates from his expert report, for which he provided no backup data, and dividing them by the approximate weighted-student numbers from 2010-2011. 55.RR.46-51. And, like Dr. Odden, Mr. Moak conceded that his figure was not linked to any expected improvement in student performance. 55.RR.52.

Lastly, the district court relied on an extrapolated calculation of the trial court's finding in *Edgewood IV* that meeting accreditation standards at that time (1994) "require[d] about \$3,500 per weighted student," 917 S.W.2d at 731 n.10. 12.CR.394-95 (FOF 622-23); 55.RR.53-54. Setting aside the inherent imprecision in taking a cost figure from a different financing and accountability structure and projecting it onto the current system, the

Edgewood IV Court applied that cost finding for an *efficiency* analysis; it never evaluated or used that number as a measure of constitutional adequacy. *See supra* p. 33, n.8. Mr. Moak and Dr. Bruce Baker, who performed the calculations, did not know that figure’s origin beyond footnote 10 in *Edgewood IV*. 16.RR.91; 55.RR.53. When updating that number, Dr. Baker did not account for the funding levels at the time of *West Orange-Cove II*, when the Court actually performed an adequacy analysis and found the system constitutional. *See* 16.RR.92-95. And Mr. Moak could not vouch for the accuracy of the inflation index used to compute the current figure. 55.RR.54-57; *see infra* p. 72, n.14.

These studies’ unreliability reinforces the Court’s conclusion that adequacy must be measured by outputs, not funding or other inputs. *WOC II*, 176 S.W.3d at 788. And because these suspect studies provide the foundation for all of the district court’s declarations that the public-education system is inadequately funded, those declarations should be reversed.⁹

⁹ The district court and the ISD Plaintiffs contend that these studies were essential because the Legislative Budget Board (“LBB”) has not calculated the funding “necessary to achieve the state policy” of providing a public-education system under section 42.007 of the Education Code. *See* 12.CR.395-96 (FOF 625-27); Calhoun Appellees’ Br. 136-37; Fort Bend Br. 116-18; TTSFC Br. 67; Edgewood Br. 85 (citing TEX. EDUC. CODE § 42.007). Again, that calculation is irrelevant because funding is not the measure of the system’s adequacy. Moreover, the ISD Plaintiffs are apparently content to leave that statute as a convenient scapegoat. For all their litigation efforts to secure judicial declarations that they

* * *

The district court's declarations that the system's funding is inadequate intrude upon the Legislature's province "to determine the means for providing that education" necessary for a general diffusion of knowledge. *WOC II*, 176 S.W.3d at 784. The Legislature "is entitled" to decide whether it can improve education outcomes at existing funding levels by changing other aspects of the system, *id.*, and the district court erroneously usurped that prerogative by specifically declaring those funding levels inadequate, 12.CR.195-96.

B. The District Court Departed from Constitutional Text and Precedent in Declaring the System *Partially* Inadequate in Its Application to Certain Schools and Groups.

The State Defendants' opening brief showed that the district court also erred by declaring the public-education system inadequate specifically "for economically disadvantaged and English Language Learner students" and in regard to "funding for open-enrollment charter schools." State Br. 107-08; 12.CR.196. Those piecemeal adequacy judgments were invalid.

are entitled to more money, they never have sought relief compelling the LBB to perform the calculations that they believe section 42.007 requires.

1. Article VII, section 1 guarantees a “system” that meets certain requirements.

Article VII, section 1 obligates the Legislature “to establish and make suitable provision for the support and maintenance of *an* efficient *system* of public free schools” that is adequate to achieve “[a] general diffusion of knowledge.” TEX. CONST. art. VII, § 1 (emphases added). Because the object of this command is one statewide system, the Court has construed this text to mean that the efficiency requirement applies only to “the system as a whole,” not to its “components,” and thus the constitutional inquiry is whether “the entire system” is efficient. *WOC II*, 176 S.W.3d at 790.

The adequacy and suitability requirements must be construed in the same way. State Br. 107-08; State Cross-Appellees’ Br. 56-58. There is no textual basis for concluding that the unitary duty imposed by this section—to create a “system”—may be splintered into separate duties to distinct schools or groups that represent only part of that system for purposes of adequacy and suitability (but not efficiency).

Indeed, the Court endorsed the State Defendants’ reading in *West Orange-Cove II*. It described the adequacy inquiry specifically as “determin[ing] whether *the system as a whole* is providing for a general diffusion of knowledge.” *WOC II*, 176 S.W.3d at 788 (emphasis added). It then

analyzed the adequacy challenges only on a systemic basis and did not address the district court's separate findings and conclusions that the system was inadequate as to "property-poor districts." State Cross-Appellees' Br. 57-58 (comparing *WOC II*, 176 S.W.3d at 787-94, with Trial Order, *W. Orange-Cove Consol. ISD v. Neeley*, No. GV-100528, 2004 WL 5719215, (250th Dist. Ct.—Travis County Nov. 30, 2004) (FOF 294; COL 23-24)).

2. The Edgewood and Charter School Plaintiffs' counterarguments are without merit.

In response, the Edgewood Plaintiffs simply recite the definition of an as-applied challenge. Edgewood Br. 68 n.20. That ignores the nature of article VII, section 1. Whereas a statute may conceivably violate a constitutional right like "due process" in some applications but not others, the guarantee afforded by article VII, section 1 is an adequate, efficient, and suitable "system" of "public free schools." TEX. CONST. art. VII, § 1. The Legislature may violate that guarantee only by failing to provide such a system, not a component of one.

The Edgewood Plaintiffs also cite the district court's findings linking the performance of economically disadvantaged and ELL students to the system's overall performance. Edgewood Br. 93-94. The State Defendants do not dispute that the performance of disaggregated groups may factor into an

assessment of the system’s adequacy as a whole. State Br. 108. But the district court’s separate declaration that the system is inadequate specifically for those groups cannot stand. 12.CR.196.

The Charter School Plaintiffs contend that the declaration regarding inadequate funding for open-enrollment charter schools *is* systemic because it recognizes that inadequate funding for school districts affects charter schools, too. Charter Appellees’ Br. 16-17. Setting aside the impropriety of issuing a declaration about *funding* adequacy, *see supra* Part IV.A, the Charter School Plaintiffs’ argument at most shows that the charter-specific declaration is unnecessary. If the system were *properly* adjudged inadequate—that is, based on outputs—there is no dispute that such a judgment would implicate charter schools because they are part of the system. But a separate declaration regarding the system’s adequacy “for open-enrollment charter schools”—whether based on outputs or inputs—improperly suggests that a part of the system may be inadequate even if the rest of it is not.

The Charter School Plaintiffs next misplace reliance on precedent regarding state-property-tax and efficiency claims to argue that adequacy need not be assessed “only system-wide.” Charter Appellees’ Br. 18. Unlike article VII, section 1’s mandate, article VIII, section 1-e’s prohibition of a state

property tax does not depend on a systemic showing; a single school district can state a claim that it is subject to a state property tax based on state control. *WOC II*, 176 S.W.3d at 795. And while an efficiency claim may rest in part on a finding that some districts cannot “generate sufficient revenues,” *Edgewood I*, 777 S.W.2d at 397, that sort of finding can contribute only to a judgment that “the system as a whole” is inefficient, *WOC II*, 176 S.W.3d at 790.

That requirement to adjudicate the efficiency of the entire system was not based on a rationale that facilities and instructional funding logically should be considered together, as the Charter School Plaintiffs contend. *See* Charter Appellees’ Br. 18-19. Rather, it was grounded in constitutional text: “Article VII, section 1 requires ‘*an* efficient system of free public schools,’ considering the system as a whole, not a system with efficient components.” *WOC II*, 176 S.W.3d at 790 (quoting and adding emphasis to TEX. CONST. art. VII, § 1). Again, the adequacy requirement applies to that same textual guarantee of a single system.

The Charter School Plaintiffs dismiss that wording as having “no interpretative significance” because, under the Code Construction Act, the singular includes the plural and vice-versa. Charter Appellees’ Br. 20 (citing TEX. GOV’T CODE § 311.012(b)). Of course, that directive applies to statutes

and rules, not the Constitution. TEX. GOV'T CODE § 311.002. Nor would reading article VII, section 1's text as plural make any sense, requiring "systems" of public free schools.

Finally, the Charter School Plaintiffs incorrectly claim that article VII, section 1 confers "an individual right to an adequate education," citing (1) originalist evidence and statutes that mention providing education to "all" children or "every" child and (2) federal constitutional provisions that secure individual rights by collectively referring to "the right of the people." Charter Appellees' Br. 19-21. Again, neither constitutional text nor precedent supports that conclusion. The directive to create a "system" that provides "[a] general diffusion" of knowledge cannot be stretched to imply an individual right to obtain an adequate education. To be sure, the Court has held that an individual student may be injured by the Legislature's failure to fulfill its duty to create the system required by article VII, section 1, and thus has a justiciable interest in enforcing that duty. *See WOC II*, 176 S.W.3d at 774. But it has never held that article VII, section 1 creates an individual right or guarantee. *See id.* (explaining that "the guarantee of *public free schools* assured by article VII, section 1 extends . . . to school children" (emphasis added)). And even if such an individual right could be inferred from that provision, it would not be a right

to an education at a particular type of school, and thus could not support an adequacy violation “for open-enrollment charter schools.”

C. The ISD Plaintiffs Fail to Overcome the Presumption That the Accountability System Measures an Adequate Education.

Again, only the judgment’s first adequacy declaration even partially addressed the proper standard—whether the system as a whole is achieving a general diffusion of knowledge as measured by student achievement. 12.CR.195; *see supra* Part IV.A. But, as the State Defendants explained in their opening brief, the district court reached that conclusion only by first incorrectly discarding the presumption that districts and schools with satisfactory ratings under the system’s accountability regime are providing a constitutionally adequate education. State Br. 83-94. The ISD Plaintiffs’ arguments do not overcome that presumption.

1. Whether the ISD Plaintiffs rebutted the presumption that the accountability ratings measure an adequate education is a question of law.

As a threshold matter, the Edgewood Plaintiffs incorrectly argue that the Court may not even review the district court’s rejection of that presumption because it would “require the Court to engage in review of fact findings.” Edgewood Br. 71. Not so. As the State Defendants explained in their opening brief, because constitutional adequacy is a question of law, the

presumption that the accountability ratings reflect the provision of an adequate education is a presumption of law, not fact. State Br. 84 n.8. Thus, whether the ISD Plaintiffs rebutted that legal presumption also presents a question of law. *Id.* For example, no one disputes the fact that, in the 2013 accountability system, two of the three performance indices that measured disaggregated groups specifically tracked ELL-student performance. 301.RR(Ex. 20225). But whether the absence of an ELL measure in Index 3 is so material that it defeats the legal presumption that the accountability ratings reflect a constitutionally adequate education is a question of law, not fact.

2. The presumption does not require perfection.

The Edgewood Plaintiffs also contend that the mere fact that schools rated satisfactory still have students who do not graduate, meet college or career readiness standards, or pass STAAR exams rebuts the presumption that the accountability regime measures adequacy. Edgewood Br. 73. But adequacy does not demand a 100% success rate. *WOC II*, 176 S.W.3d at 784 (holding that the constitutional standards “do not require perfection”). Moreover, a general diffusion of knowledge entails “*access*” to quality

education and a “*meaningful opportunity*” to acquire essential knowledge and skills, not guaranteed outcomes. *Id.* at 787.

3. The disaggregation of student groups in some indices and not others does not undermine the accountability ratings.

Some ISD Plaintiffs argue that the accountability regime’s failure to disaggregate economically disadvantaged students in Index 2 and ELL students in Index 3 masks their performance *in those indices* and renders the overall ratings inaccurate. TTSFC Br. 63-64; Edgewood Br. 74, 78-79. But they have no answer to the State Defendants’ points that those choices were not arbitrary because other indices already disaggregate those groups, advisory committees had recommended minimizing redundancy among the indices, and the ratings encompass all indices to obtain a comprehensive picture of schools’ and districts’ performance. State Br. 85-86.

4. The accountability regime is not fixed.

Like the district court, the ISD Plaintiffs claim that TEA’s Director of Performance Reporting, Shannon Housson, conceded that the accountability regime is engineered to ensure that most districts and schools pass muster, not to measure a general diffusion of knowledge. Calhoun Appellees’ Br. 95-

96; Fort Bend Br. 113; TTSFC Br. 64; Edgewood Br. 77. That does not accurately describe Mr. Housson’s testimony.

As the State Defendants explained in their opening brief, Mr. Housson specified that, while the advisory committees that recommend targets for the accountability system consider the potential impact on districts and schools, TEA does not use those models to set a “goal” or achieve a certain outcome for the accountability results. State Br. 88-89 (citing 287.RR(Ex. 5785).200-01, 219). He elaborated that “those data don’t necessarily reflect what will happen in the future but simply provide a context of what the outcomes could be.” 287.RR(Ex. 5785).56.

That context reasonably informs the annual adjustments to the accountability regime so that it may serve one of its statutory and historic purposes—to be “a driver of student performance.” 30.RR.113; *see also* TEX. EDUC. CODE § 39.053(f) (requiring the Commissioner to “periodically raise the state standards” for college readiness so that the system may reach the long-term goals of closing significant achievement gaps and ranking in the top ten states in college readiness by the 2019-2020 school year). Considering that context thus is not arbitrary. And absent a showing of arbitrariness, the ISD Plaintiffs did not overcome the Court’s deference to the Legislature and rebut

the presumption that the accountability regime reflects the achievement of a general diffusion of knowledge. *WOC II*, 176 S.W.3d at 787.

The Calhoun Plaintiffs contend that the last 20 years of accountability ratings “confirm” that TEA ensures a fixed level of performance because less than 5% of districts have ever received an unacceptable rating in a single year. Calhoun Appellees’ Br. 96-97. At best, though, the Calhoun Plaintiffs are simply drawing an unwarranted inference from those results. That record just as likely shows that the system has been constitutionally adequate over that period, a conclusion consistent with the Court’s rejection of the only adequacy challenge raised during that timeframe, *WOC II*, 176 S.W.3d at 789-90, and the continued improvement since, State Br. 109-17.

5. Phased-in testing standards and targets are consistent with the Legislature’s definition of a general diffusion of knowledge.

Finally, the ISD Plaintiffs echo the district court’s criticism that the phasing in of STAAR passing scores and accountability targets allows districts and schools to attain acceptable accountability ratings based on performance that falls short of college or career readiness, which in their view disqualifies those ratings as a proxy for a general diffusion of knowledge. *See, e.g.*, Calhoun Appellees’ Br. 97-98, 104-06, 117-19; Fort Bend Br. 113, 125-26;

TTSFC Br. 62-63; Edgewood Br. 75-76, 78. As the State Defendants explained in their opening brief, that line of argument overlooks how the Legislature has redefined a general diffusion of knowledge and the dynamic nature of the system designed to achieve that goal. State Br. 90-94.

For example, the Calhoun Plaintiffs argue that the college and career readiness standards now integrated into the revised curriculum define what constitutes an adequate education *today*, regardless of how the Legislature or TEA modifies the consequences of not meeting those standards. Calhoun Appellees' Br. 117-19. But the incorporation of those standards into the essential knowledge and skills cannot be divorced from the role that the Legislature intends those standards to play. The standards' purpose is to "advance" college readiness in the curriculum, with the long-term goal of achieving a top-ten ranking among states in college readiness by the 2019-2020 school year. TEX. EDUC. CODE §§ 28.008, 39.053(f). And the Legislature rewards districts that make exceptional "*progress toward* college readiness." *Id.* § 39.234(b) (emphasis added). Given those pronouncements, it cannot be the case that the Legislature defines a general diffusion of knowledge as meeting college and career readiness standards right now.

Phasing in STAAR passing standards and accountability targets is consistent with the progressive, evolving metric of college and career readiness that the Legislature prescribed. If doing so were not compatible with the Legislature's goals, the Legislature could have enacted different performance standards when it revised the accountability regime earlier this year. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1094, § 2 (amending TEX. EDUC. CODE § 39.053). Instead, the Legislature continued to entrust those decisions to TEA and the comprehensive process it has employed to develop those scores and targets. *Id.*; *see also* State Br. 91-92.

Phasing in passing standards and accountability targets also follows from the Legislature's mandate that "vertical teams" develop the college readiness standards and "align[]" the curriculum with those standards. TEX. EDUC. CODE § 28.008(a), (b)(3). That directive required teams of teachers and college faculty to revise the curriculum beginning with kindergarten "to build the foundation upon which future learning is then scaffolded" progressively through each grade, yielding a "vertical alignment" of the curriculum that ultimately prepares students for postsecondary education and the workplace. 28.RR.120-22. As that revised curriculum is being rolled out, however, current students have not had the benefit of building that foundation from the outset

of their school careers. Phasing in college-readiness standards over time, in both the STAAR passing scores and the accountability ratings, reasonably accounts for that necessary transition.

* * *

The recently released accountability ratings show that the system continues to achieve a general diffusion of knowledge. Among school districts and charters, 94.4% were rated either “met standard” or “met alternative standard.” Texas Education Agency, *2015 Accountability System State Summary*, <http://ritter.tea.state.tx.us/perfreport/account/2015/statesummary.html>. And 86.4% of individual school campuses earned those ratings. *Id.* Nearly 25% of campuses received the distinction designation for post-secondary readiness, *see id.*, which “takes into account factors such as graduation rates, ACT/SAT participation and performance, Career and Technical Education (CTE) graduates, and dual credit course completion rates,” Texas Education Agency, *TEA Releases 2015 Accountability Ratings* (Aug. 7, 2015), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2015/TEA_releases_2015_accountability_ratings/. At those levels, the Court should presume that the system is constitutionally adequate. *WOC II*, 176 S.W.3d at 787.

D. Under the Guidelines Provided by the Court in *West Orange-Cove II*, the System Is Constitutionally Adequate.

Even looking past the system’s accountability regime to other student-achievement measures, the district court wrongly concluded that the system is unconstitutionally inadequate. As the State Defendants showed in their opening brief, State Br. 102-06, the court failed to heed this Court’s directive that statutory descriptions of the elements of an adequate education “cannot be used to fault a public education system that is working to meet their stated goals merely because it has not yet succeeded in doing so,” *WOC II*, 176 S.W.3d at 789. Under the properly deferential analysis the Court prescribed in *West Orange-Cove II*, the system’s progress satisfies the constitutional adequacy standard as a matter of law. State Br. 108-17.¹⁰

1. State assessments show that the system is adequate.

As the State Defendants explained in their opening brief, student performance on TAKS continued to improve over the life of that testing program. State Br. 111-12. The ISD Plaintiffs acknowledge that trend, but

¹⁰ The Edgewood Plaintiffs incorrectly claim that the district court’s determinations that “the system’s outputs don’t show student achievement” are unreviewable fact findings. Edgewood Br. 71. The results are what they are; the relevance of any particular result and whether the results collectively show that the system is constitutionally adequate are questions of law. *WOC II*, 176 S.W.3d at 785, 789-90.

they criticize the *rate* of improvement over the program’s final years. *E.g.*, Calhoun Appellees’ Br. 110; Fort Bend Br. 149-50. Nothing in the Court’s precedent suggests that the adequacy standard is so exacting that an improving system nonetheless could be considered unconstitutional. *See WOC II*, 176 S.W.3d at 789 (citing improving scores as evidence of adequacy).

Consistent with the Legislature’s goal of advancing Texas students to a top ranking in college readiness by 2020, the STAAR testing program is far more rigorous than the TAKS program, and addresses skills taught in the classroom at “a greater level of cognitive complexity.” 27.RR.35-36; 293.RR(Ex. 11475 (Assessment Update)).2. The results from the first four years of the program reflect that significantly increased difficulty, on top of the growing pains of moving to a new curriculum and assessment. *See State Br. 19-20*, 103-04. But, contrary to the district court’s conclusions and the Plaintiffs’ arguments, they do not demonstrate that the system is unconstitutionally inadequate.

The Class of 2015 was the first class to graduate under the STAAR testing requirements. 255.RR(Ex. 10336).ix. After the Spring 2015 administration of the test, 92% of students had passed all five EOC exams required for graduation. Texas Education Agency, *Class of 2015 STAAR End-*

of-Course Exam Passing Rate Hits 92 Percent (May 29, 2015), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2015/Class_of_2015_STAAR%C2%AE_end-of-course_exam_passing_rate_hits_92_percent/. Of the remaining students, 72.2% were eligible for graduation consideration through the review committees established by the Legislature this year because they had successfully completed all course work and passed all but one or two of their EOC exams. *Id.*; TEX. EDUC. CODE § 28.0258.

The current cumulative passing rate for all administrations of the five STAAR EOC exams exceeds 93% for each subject:

Subject	Passing Rate	White	Hispanic	African-American	Econ. Disadv.
Biology	99.2%	99.7%	99.0%	98.8%	98.8%
Algebra I	97.8%	98.8%	97.6%	96.4%	97.2%
U.S. History	97.0%	98.7%	96.0%	95.8%	95.4%
English I	95.8%	98.1%	94.4%	94.5%	93.6%
English II	93.7%	97.1%	92.1%	90.9%	90.7%

Texas Education Agency, *Class of 2015 STAAR End-of-Course Exam Passing Rate Hits 92 Percent* (May 29, 2015), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2015/Class_of_2015_STAAR%C2%AE_end-of-course_exam_passing_rate_hits_92_percent/. This data shows that the cumulative passing rates for economically disadvantaged students are keeping pace. *Id.*

The ISD Plaintiffs criticize any reliance on cumulative passing rates because they include students who had multiple opportunities to take an exam. *E.g.*, Calhoun Appellees’ Br. 108-09. But data from this last school year also shows that students taking STAAR EOC exams for the first time are faring relatively well:

Subject	2014-2015 Passing Rate for First-Time Test Takers
Biology	94%
U.S. History	92%
Algebra I	85%
English I	71%
English II	73%

Texas Education Agency, *Most Students Taking STAAR End-of-Course Exams Pass on First Try* (June 3, 2015), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2015/Most_students_taking_STAAR_%C2%AE_end-of-course_exams_pass_on_first_try/. For the two EOC exams that have been administered since the STAAR program began in 2012—Biology and Algebra I—the passing rate for first-time test takers has increased from 87% to 94% on Biology and 83% to 85% on Algebra I. *Compare id. with* 173.RR(Exs. 4131, 4133). And while it does not reflect an apples-to-apples comparison, the first-time passing rate on the social-studies EOC exam administered in Spring 2012 (World Geography) was 81%, 173.RR(Ex. 4135),

whereas the same rate for the social-studies exam administered in the 2014-2015 school year (U.S. History) was 92%.

The 2014-2015 passing rates for all but one of the Grade 3-8 STAAR exams fell within the range of 70-77%. Texas Education Agency, *TEA Releases Preliminary Statewide STAAR Grades 3-8 Passing Rates* (May 26, 2015), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2015/TEA_releases_preliminary_statewide_STAAR%C2%AE_grades_3-8_passing_rates/. Those passing rates have remained stable over the four years those exams have been administered, generally with year-to-year increases or decreases of only a few percentage points. *Id.* The 2014-2015 passing rate for Grade 8 Social Studies was 64%, a 5% increase from that exam's first administration. *Id.*

Like the district court, the ISD Plaintiffs aim to puncture this overall picture by emphasizing, among other things, certain results from the first STAAR administration; small gains or drops in performance in subsequent years; the use of a transition rule to account for legislative changes in the exam requirements; distinctions in performance between “cohorts” and “classes”; and passage rates at final standards that have not been phased in yet. *See* Calhoun Appellees’ Br. 100-15; Fort Bend Br. 151-53; TTSFC Br. 61;

Edgewood Br. 80-83. But the results cannot be divorced from their context. While the STAAR program is at a stage of implementation comparable to where the TAKS program was at the time of *West Orange-Cove II*, STAAR is a significantly more difficult assessment and, according to the ISD Plaintiffs' own expert, it tests standards that represent a "quantum leap" over those gauged by TAKS. 207.RR(Ex. 6322).67. Consequently, the period of adjustment is taking longer and progress is occurring at a slower rate. Viewed in that light, the STAAR results show encouraging signs of student achievement as well as the need for improvement to meet the Legislature's goals, but they do not signify a system that is not working toward its goals and is so deficient that it violates the Constitution.

2. NAEP scores show that the system is adequate.

In its opening brief, the State Defendants explained that Texas students' performance on the NAEP assessment reflected constitutional adequacy. State Br. 114. Texas ranked above the national average on the 2011 exams; it ranked even higher among key disaggregated groups, such as African-American, Hispanic, and economically disadvantaged students; and improvement in those groups' performance showed that achievement gaps were narrowing. *Id.*

The TTSFC Plaintiffs challenge the relevance of NAEP scores to adequacy. TTSFC Br. 64. But this Court already has determined that those scores have a place in the analysis and specifically cited those scores as proof of the system's adequacy in *West Orange-Cove II*. 176 S.W.3d at 789.

The TTSFC Plaintiffs also attempt to downplay Texas's NAEP performance. First, they isolate scores at the "proficient" level, arguing that those results matter more because that level "corresponds somewhat" to the STAAR Level II and Level III standards. TTSFC Br. 64-65. That comparison is inapt, however, because (1) TTSFC analyzes NAEP scores from 2005 to 2011, a period before the STAAR program even began; and (2) as discussed, TEA is still phasing in the Level II standard. Second, they note that Texas does not rank among the top 10 states and ranks lower than other large states. TTSFC Br. 65. While Texas is striving to improve its national standing, it defies precedent and common sense to say that the system must outperform *most* of its sister states just to be considered constitutional. *See WOC II*, 176 S.W.3d at 789 (citing Texas's relative improvement on NAEP as evidence of adequacy, not its overall national ranking).

The Calhoun and Fort Bend Plaintiffs highlight dips in NAEP scores for certain tests and groups from 2011 to 2013. Calhoun Appellees' Br. 110; Fort

Bend Br. 154-55. Again, it is unreasonable to suggest that such short-term shifts in performance should define the adequacy of a dynamic public-education system, especially during a period of transition. Moreover, that selective focus overlooks that Texas's scores on Grade 8 reading steadily improved from 2005 to 2013, and its scores on Grade 4 and 8 math remained above the national average during that same period. 293.RR(Ex. 11488).2, 22, 32.

3. Other outputs show that the system is adequate.

In their opening brief, the State Defendants also cited recent rankings placing Texas fourth in the nation in graduation rates in 2011 and tied for second in 2013. State Br. 115. Some ISD Plaintiffs respond by citing an older statistic reporting a lower rate. Fort Bend Br. 155; Calhoun Appellees' Br. 113-14. But the newer data reflect "the superior way to calculate graduation rates." 26.RR.158.

Those already exceptional rates continue to improve. In 2014, the on-time graduation rate climbed to an all-time high of 88.3%, the seventh consecutive year that the overall rate has increased. Texas Education Agency, *Class of 2014 Graduation Rate Sets New Mark* (Aug. 5, 2015), http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2015/Class_of_2014

graduation_rate_sets_new_mark/. Over that same seven-year period, the gap in graduation rates for African-American students was cut in half, and the gap for Hispanic students narrowed even more. *Id.* Graduation rates for economically disadvantaged students remained steady at 85.2%, up from 78.3% in 2009. *Id.*

The Fort Bend Plaintiffs claim that ACT and SAT scores “confirm that Texas students are falling behind the nation.” Fort Bend Br. 155; *see also* Calhoun Appellees’ Br. 111 (criticizing those test results). In fact, the ACT scores show that Texas students are catching up: whereas Texas’s average composite score fell below the national average from 2007, it matched the national average in 2013. Ex. 11368, at 4. And while Texas’s SAT scores have declined in recent years, that reflects a national trend on that test. *Id.* at 6. Texas’s SAT scores increased slightly in 2013 while the national average remained the same. *Id.*

V. THE SCHOOL-FINANCE SYSTEM IS CONSTITUTIONALLY EFFICIENT, AND THE PLAINTIFFS HAVE NOT PROVEN OTHERWISE.

On the issue of constitutional efficiency, the parties have presented numerous statistical models, examples, experts, and arguments in an attempt to calculate the relevant tax-rate and revenue gaps in the current system. In the end, though, the Court does not have to resolve whether any specific

mathematical model is best, because the arbitrariness standard requires the Court to uphold the system as long as reasonable minds can differ. *See WOC II*, 176 S.W.3d at 784-85. Thus, although the statistical analyses used by the parties can be complex, the efficiency analysis is simple: if reasonable mathematical calculations demonstrate that the tax-rate and revenue gaps between property-wealthy and property-poor districts are within the bounds of *Edgewood IV* and *West Orange-Cove II*, the system is not arbitrarily structured but is constitutionally efficient.

In defense of the judgment, the TTSFC, Edgewood, and Fort Bend Plaintiffs urge the Court to disregard relevant evidence and focus solely on their hand-picked statistics that amplify any alleged inefficiencies. But that analysis is inconsistent with the arbitrariness standard. *See id.* at 784 (requiring courts to uphold the school-finance system if it “can reasonably be considered . . . efficient”). The State Defendants’ argument—that the Court should consider all relevant statistics—is a more faithful application of the arbitrariness standard and gives appropriate discretion to the Legislature to craft a public-education system.

A. The Tax-Rate Gaps Between Property-Poor and Property-Wealthy Districts Do Not Render the System Inefficient.

The existing tax-rate gap is smaller than the 9-cent gap that the Court determined was constitutional in *Edgewood IV*, 917 S.W.2d at 731-32. To avoid this simple truth, the TTSCF, Edgewood, and Fort Bend Plaintiffs (1) import their inadequate-funding claim into the efficiency analysis, (2) rely on illogical calculations, and (3) use methods that do not accurately reflect the school-finance system. The Court should reject their attempts to complicate the efficiency analysis and hold that the Legislature has not acted arbitrarily.

1. The existing tax-rate gaps are similar to or smaller than the gap in *Edgewood IV*.

Comparing the poorest and wealthiest 15% of students, the Court in *Edgewood IV* found that the school-finance system was constitutionally efficient despite a 9-cent gap in the tax rate deemed necessary to achieve a general diffusion of knowledge. 917 S.W.2d at 731-32 & n.12. The 2013 tax-rate gap between the poorest and wealthiest 15% of WADA, as calculated by the TTSCF Plaintiffs' expert Dr. Wayne Pierce, is 7.1 cents for M&O taxes and 7.5 cents for M&O and I&S taxes combined. 277.RR(Exs. 3320, 3324). That, alone, should be enough to demonstrate that the tax-rate gaps do not render the system inefficient.

Going further, though, all of the experts who calculated the existing tax-rate gap between property-wealthy and property-poor districts agree that it is 10 cents or less. Dr. Albert Cortez found a 10-cent gap in 2013 M&O rates between the top and bottom deciles of districts, 294.RR(Ex. 20030).3; Dr. Pierce also found a 10-cent gap in 2013 M&O rates between the top and bottom 10% of districts sorted by wealth, and 7.9-cent gap in 2013 M&O rates between the top and bottom 10% of WADA sorted by wealth, 277.RR(Exs. 3356 & 3368); and Dr. Lisa Dawn-Fisher found a 4.6-cent gap in 2013 M&O rates between Chapter 41 and Chapter 42 districts, 293.RR.(Ex. 11470 – Summary Tab).

These additional statistics buttress the conclusion that the tax-rate gaps between property-poor and property-wealthy districts do not render the system unconstitutional. The gaps are similar to the gap found constitutional in *Edgewood IV*, 917 S.W.2d at 731-32 (9 cents), and nowhere near the gap found unconstitutional in *Edgewood I*, 777 S.W.2d at 393 (27 cents). The Court’s analysis need go no further.

2. Arguments regarding inadequate funding do not belong in the efficiency analysis.

The arguments of the TTSFC, Fort Bend, and Edgewood Plaintiffs depend heavily on their claim that the system is inadequately funded. TTSFC

Br. 15-19; Fort Bend Br. 158-66; Edgewood Eff. Br. 41-53. Under their theory, if the system is inadequately funded, it is, by definition, inefficient. *See, e.g.*, Fort Bend Br. 160 (“[I]f the system does not provide for a general diffusion of knowledge it is, per se, inefficient.”). They premise this argument on the Court’s statement regarding efficiency that “the State’s duty to provide districts with substantially equal access to revenue applies only to the provision of funding necessary for a general diffusion of knowledge.” *Edgewood IV*, 917 S.W.2d at 731. Because the public-education system is constitutionally adequate, *see supra* Part IV, there is no need for the Court to consider this argument. Even so, the Plaintiffs are wrong about its validity.

The Court has said that there is a point—the provision of a general diffusion of knowledge—after which the system must no longer be efficient. *WOC II*, 176 S.W.3d at 791; *Edgewood IV*, 917 S.W.2d at 731. It has never said that the system is necessarily inefficient if it fails to reach that point. Holding so now would conflate the adequacy and efficiency claims and give school-finance plaintiffs a backdoor approach to making their inadequate-funding argument.

The requirement of a “general diffusion of knowledge” was once treated as a part of the efficiency analysis. State Cross-Appellees’ Br. 16. In

Edgewood I, the Court held, in part, that the school-finance system was not “efficient in the sense of providing for a ‘general diffusion of knowledge’ statewide.” 777 S.W.2d at 397. And in the context of *Edgewood IV*’s efficiency discussion, the Court reasoned that the Legislature should not be permitted to “level-down” the system by, for example, providing \$500 per student when \$3500 was required for a general diffusion of knowledge. 917 S.W.2d at 730. But the articulation of a separate adequacy claim in *West Orange-Cove II* that asks whether the system provides a general diffusion of knowledge addresses those concerns. 176 S.W.3d at 753, 788. It is, therefore, no longer necessary for efficiency to take on the dual role of guaranteeing similar revenues for similar tax rates and ensuring that there is a general diffusion of knowledge. To hold that efficiency requires funding up to the point of a general diffusion of knowledge renders the adequacy standard superfluous.

Moreover, now that the Court has defined adequacy as a result-oriented standard, *id.* at 788, it makes no sense to then redefine it as a funding standard for efficiency purposes, and the Court has not done so. After assessing the system’s adequacy under a result-oriented standard in *West Orange-Cove II*, the Court did not go back and determine the amount of funding necessary to provide a general diffusion of knowledge when it addressed the efficiency

claim. *Id.* at 790-93. Following Plaintiffs’ position would allow the Court to tell the Legislature how much money it must budget for public education each year under the guise of an efficiency analysis.¹¹ But the Court has repeatedly said that it may not “prescribe *how* the [article VII] standards should be met.” *Id.* at 753; *see also Edgewood I*, 777 S.W.2d at 399 (stating that “[t]he legislature has primary responsibility to decide how best to achieve an efficient system”).

Again, the system is adequate as it currently operates, so any suggestion that it is inefficient because it is also inadequate should be rejected. However, even if the system is inadequate, that does not automatically render the system inefficient. The Court should reject any attempt to make adequate funding an element of the efficiency claim.

3. The Court should reject the TTSFC Plaintiffs’ attempt to shrink the constitutionally permissible gap.

Faced with facts demonstrating that current tax-rate gaps are within constitutional bounds, the TTSFC Plaintiffs seek to alter the legal standard by performing unnecessary and illogical mathematical calculations. TTSFC

¹¹ Here, affirming the district court’s finding that the system is inefficient because it does not provide over \$6800 per WADA would have the practical effect of requiring the Legislature to find an additional \$6 billion each year to budget toward school finance.

Br. 23-24. The TTSFC Plaintiffs combine the 9-cent gap in *Edgewood IV* with the \$1.50 cap in *West Orange-Cove II* and the compression of tax rates by one-third following *West Orange-Cove II* to conclude that the 9-cent gap must be reduced to 6 cents. TTSFC Br. 23. They then make multiple arguments that the current tax-rate gaps are an increase over the (non-existent) 6-cent gap. TTSFC Br. 24. The district court erroneously adopted this unsound theory. 12.CR.490-91 (FOF 1208); *Edgewood Eff. Br.* 46 n.21.

Even accepting the premise of the TTSFC Plaintiffs' theory that tax-rate gaps are limited by tax caps, the relevant calculations do not support their conclusions. In *Edgewood IV*, the tax-rate cap was \$1.50, and Tier 2 was intended to provide, in part, "additional funds for facilities." 917 S.W.2d at 727-28 (describing funding). Districts also had the ability to impose a 50-cent I&S tax that, in certain circumstances, could exceed the otherwise applicable \$1.50 cap, although the Court noted that most districts were within the \$1.50 limit. *Id.* at 732 & n.13, 747 n.36. Today's tax-rate cap is \$1.67 (combining \$1.17 for M&O taxes, TEX. EDUC. CODE § 45.003(d), with \$0.50 for I&S taxes, *id.* § 45.0031(a)), or 83.5% of the \$2.00 limit in *Edgewood IV*. Applying that percentage to the 9-cent gap results in 7.5 cents—the same gap that existed between the top and bottom 15% of WADA in 2013. 277.RR(Ex. 3324).

Regardless, the Court has never tied the constitutionally permissible tax-rate gap with tax caps, tax compression, or any other legislative funding element. Indeed, one could just as easily argue that the permissible tax-rate gap should increase by the same percentage as revenue has increased or be adjusted for inflation. But the Court need not jump through any of these mathematical hoops. A 9-cent gap was permissible in *Edgewood IV* and is permissible now. Because the current, comparable tax-rate gap is only 7.5 cents, the tax-rate gap does not make the school-finance system inefficient.¹²

The TTSFC Plaintiffs also argue that the current tax-rate gap is irrelevant because *Edgewood IV* concerned the gap in tax rates necessary to achieve an equal amount of funding—\$3500. TTSFC Br. 22-23. But the \$3500 figure simply represented what the Court believed was necessary to achieve a general diffusion of knowledge. Because (1) the public-education system is currently achieving a general diffusion of knowledge, *see supra* Part IV, and (2) the efficiency of the system should be judged independently of its adequacy, *see supra* Part V.A.2, the proper comparisons in an efficiency analysis are current tax rates and current revenues.

¹² The TTSFC Plaintiffs erroneously assert that the proper comparison is between the top and bottom 10% of districts. TTSFC Br. 24. But the Court in *Edgewood IV* was using the top and bottom 15% of students. 917 S.W.2d at 731-32 & n.12.

Finally, the TTSFC Plaintiffs claim that the tax-rate gap between Chapter 41 and Chapter 42 districts has grown since *West Orange-Cove II*. TTSFC Br. 46. But given the Court’s ruling in *West Orange-Cove II* that 67% of school districts were being forced to tax at or near the \$1.50 cap, 176 S.W.3d at 794-98, it is unsurprising that there was a small tax-rate gap. The fact that it has grown since then is not proof that it has grown to an unconstitutional level.¹³

4. The Edgewood Plaintiffs continue to rely on Dr. Cortez’s inaccurate calculations.

The Edgewood Plaintiffs assert that the tax-rate gap must be calculated at the levels necessary to generate \$6500 or \$7000 per WADA, the amount they believe is needed to achieve a general diffusion of knowledge. Edgewood Eff. Br. 43.¹⁴ But for the reasons described above, the tax-rate gap should be

¹³ The TTSFC Plaintiffs’ argument presents a heads-I-win, tails-you-lose proposition: if the tax-rate gap is too small, it is evidence of a state property tax; if it is too large, it is evidence of an inefficient system. Plaintiffs cannot have it both ways.

¹⁴ Plaintiffs and the district court reach amounts between \$6500 and \$7000, in part, by applying the “education comparable wage index” to the \$3500 figure used by the Court in *Edgewood IV*. 16.RR.24; 289.RR(Ex. 6618).19). As discussed above, reliance on that \$3500 figure is misplaced in the first instance. *See supra* Part IV.A.4. Moreover, applying that figure to analyze tax-rate gaps in particular is flawed for at least two additional reasons:

- School districts were achieving a general diffusion of knowledge for less than \$3500 in *Edgewood IV*. *See WOC II*, 176 S.W.3d at 762 (explaining that, in *Edgewood IV*, Chapter 41 districts averaged \$3510 per WADA and Chapter 42 districts averaged \$3005 per WADA).

generated at current levels. Regardless, the adopted-tax-rate-yield projections used by the Edgewood Plaintiffs' expert witness, Dr. Cortez, to calculate tax-rate gaps have no relevance to the efficiency of the school-finance system because they were not based on the formulas used in the school-finance system. State Br. 138-40. Again, because there are reasonable calculations that demonstrate the system is efficient, it should not matter for purposes of an arbitrariness analysis what Dr. Cortez's calculations show. But because Dr. Cortez's analysis makes up almost the entirety of the Edgewood Plaintiffs' argument, Edgewood Eff. Br. 42-46, 49-53, the State Defendants will offer a few additional points.

While it may be informative to look at what a district receives per penny at its adopted tax rate, it is not acceptable to use that per-penny amount to predict what a district will receive at other tax rates when the law supplies a different calculation altogether. *See* State Br. 26-33 (describing school-finance system). The Edgewood Plaintiffs echo the district court's reasoning that the State Defendants pointed to only four examples showing the analysis was flawed, Edgewood Eff. Br. 58, ignoring the fact that the law, on its face,

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- If the Consumer Price Index is used to calculate inflation, rather than the comparable wage index for education, the \$3500 in *Edgewood IV* is approximately \$5548 today, matching the average M&O revenue. 58.RR.87-92.

demonstrates Dr. Cortez’s errors. If the State Defendants had erroneously assumed that funding was provided at \$50 a penny, the Edgewood Plaintiffs would not be required to go through each and every district to prove the State Defendants’ error. They could simply point to the Texas Education Code which sets out a different funding scheme. The same should hold true for Dr. Cortez’s theory that districts are funded at “adopted tax rate yields.” It is simply contrary to the law and should not form the basis of any finding that the school-finance system is inefficient.¹⁵

Because school-finance funding is front-loaded (Tier I, target revenue, and golden pennies), Dr. Cortez’s method magnifies any initial gaps by assuming they will exist across the copper pennies which are, as a matter of law, equal for all districts. Indeed, by using adopted-tax-rate yields and \$1.17 yields (also problematic), Dr. Cortez has managed to reach two different results when trying to predict what the school-finance system will provide.

176.RR(Ex. 4251).¹⁶ The Court should not rely on his flawed calculations.

¹⁵ The Edgewood Plaintiffs go so far as to state that it is “speculat[ion] that district yields could vary at different tax rates” and that “no credible evidence in the record supports such a contention.” Edgewood Eff. Br. 58. But one need only look at the Texas Education Code to discover that, in fact, the Legislature has prescribed different yields per penny at different tax rates. *See, e.g.*, TEX. EDUC. CODE §§ 42.101, .302.

¹⁶ Dr. Cortez’s analysis also ignores the fact that, to be eligible for target revenue, a district must tax at its compressed tax rate. TEX. EDUC. CODE § 42.2516(b). A district funded at

B. Analysis of the Revenue Gaps in the Current System Show That It Is Constitutionally Efficient.

As with the tax-rate gaps, there are numerous analyses of the revenue gaps that demonstrate that the current school-finance system is constitutionally efficient. As pointed out in the State Defendants' opening brief, current gaps in revenue fall within the 1.36-to-1 ratio from *Edgewood IV*, the dollar and percentage gaps discussed in *Edgewood I* and *Edgewood IV*, and the percentage gaps between Chapter 41 and 42 districts discussed in *West Orange-Cove II*.¹⁷ State Br. 122-31. The Plaintiffs, however, attempt to narrow the scope of the relevant evidence to only that which supports their claim by considering hypothetical situations that do not reflect the current system, using only unweighted analyses, and ignoring the Chapter 41/42 comparisons.

target revenue cannot, therefore, tax below its compressed tax rate, as his calculations assume, and still expect to receive the same adopted-tax-rate yield.

¹⁷ The Edgewood Plaintiffs assert that they do not know how the 1.36-to-1 ratio in *Edgewood IV* was derived. *Edgewood Eff. Br.* 53. The ratio between the \$28 per WADA permitted by recapture and the guaranteed level of \$20.55 per WADA is 1.36-to-1. *Edgewood IV*, 917 S.W.2d at 728, 730.

1. The Court should not consider hypothetical situations when determining the efficiency of the current system.

Although they cite a large number of statistics, the TTSFC Plaintiffs have not shown that the revenue gaps are so large that the Legislature must have acted arbitrarily. Instead, many of the statistics the TTSFC Plaintiffs cite are irrelevant to the efficiency of the current system, either covering hypothetical situations—assuming all districts tax at \$1.00, \$1.04, \$1.17, or \$1.67—or covering only a portion of the system—describing gaps in I&S rates or compressed tax rates. TTSFC Br. 26-40. But the school-finance system must be judged as it currently operates and as a whole.

There is no evidence to support the idea that all districts will, one day, tax at the exact same level, be it \$1.00, \$1.17, or \$1.67. In fact, the district court made findings that many districts will never be able to tax at \$1.17 because their voters would not approve that rate. 12.CR.311-13 (FOF 253-62). And with respect to I&S taxes, there is no evidence that each district must tax at 50 cents in order to provide adequate facilities, especially given the fact that many districts have no I&S tax in the first place. 12.CR.305 (FOF 230). If the system will never achieve the uniformity in tax rates that the TTSFC Plaintiffs assume, it makes little sense to use uniform tax rates to determine its efficiency.

The system must also be judged as a whole. As the Court stated in *West Orange-Cove II*, “[a]rticle VII, section 1 requires ‘an efficient system of free public schools,’ considering the system as a whole, not a system with efficient components.” 176 S.W.3d at 790 (footnote omitted). *See supra* Part IV.B. Thus, attempting to calculate the revenue gaps created by portions of the system is not a permissible analysis.

2. The TTSFC Plaintiffs rely exclusively on unweighted averages, but the Court must look at the whole picture.

The TTSFC Plaintiffs, while claiming that the district court’s decision did not lean too heavily on Dr. Pierce’s unweighted averages, TTSFC Br. 28, rely almost exclusively on Dr. Pierce’s unweighted averages to support the judgment, TTSFC Br. 32-40. Again, the State Defendants are not asking the Court to exclude Dr. Pierce’s data, but merely to keep it in the proper perspective—namely, that it allows a few small, wealthy districts to increase the revenue gaps. State Br. 142-43. In the past, the Court has been willing to overlook a small group of districts that might otherwise skew the statistics. *See, e.g., WOC II*, 176 S.W.3d at 761 & n.76 (discussing hold harmless districts in *Edgewood IV*, 917 S.W.2d at 734). The Court does not have to do so here. It simply needs to recognize that Dr. Pierce’s use of unweighted averages

gives emphasis to smaller districts while weighted averages keep their impact in perspective.¹⁸

The TTSFC Plaintiffs erroneously assert that using an unweighted average is more appropriate because “funding is computed on a district’s tax effort without regard to its size.” TTSFC Br. 29. That is incorrect as a matter of law. The sparsity adjustment, the small- and mid-sized district adjustments, and the cost-of-education index all take the size of the district into account. TEX. EDUC. CODE §§ 42.102-.105; *see also* 63.RR.76 (Dr. Dawn-Fisher noting that the sparsity adjustment can add up to \$900 to a district’s average). More importantly, a district receives funding on the basis of ADA and WADA, which directly measure its size. TEX. EDUC. CODE §§ 42.101, .302. In short, most of the funding parceled out by the State is related, directly or indirectly, to a district’s size. Taking size into account by using weighted averages is, therefore, entirely reasonable.¹⁹

¹⁸ By way of example, the United States Senate is unweighted by population—each State receives two senators—while the House of Representatives is weighted by population. If someone wanted to know what the average American thought about an issue, polling the Senate and House would produce relevant results, but the data from the House would more accurately reflect what the average American believes.

¹⁹ The TTSFC Plaintiffs err in stating that Dr. Clark did not use weighted averages. TTSFC Br. 31. The testimony cited reveals only that she did not exclude any districts. 58.RR.94.

Neither the Texas Constitution nor the Court's precedents explicitly choose a weighted or unweighted average as the standard for assessing the efficiency of the school-finance system. And there is no call for the Court to do so here. Because the Court judges the Legislature's actions by an arbitrariness standard, all relevant data should be included within the scope of the Court's analysis. If the Court begins to specify that only certain statistics are permissible in the efficiency analysis, the Court will have transformed efficiency into a strict mathematical calculation, potentially hamstringing the Legislature and preventing future innovation.

3. The Chapter 41/42 comparisons are relevant and demonstrate that the system is efficient.

The Edgewood and TTSFC Plaintiffs argue that it is improper for the Court to consider the Chapter 41/42 comparisons in its efficiency analysis. TTSFC Br. 45-46; Edgewood Eff. Br. 60-62. The Edgewood Plaintiffs go so far as to suggest that the Court was not, in fact, relying on a Chapter 41/42 analysis in *West Orange-Cove II*, apparently believing that the Court's description of the Chapter 41/42 numbers was only for educational, not analytical, purposes. Edgewood Eff. Br. 60-61. The Chapter 41/42 analysis was not dicta, but rather informed the Court's ultimate decision.

The TTSFC and Edgewood Plaintiffs assert that any Chapter 41/42 analysis is unhelpful because it does not compare the same number of districts. TTSFC Br. 45; Edgewood Eff. Br. 61. But the Chapter 41/42 analysis in *West Orange-Cove II* did not consider an equal number of districts, either. *WOC II*, 176 S.W.3d at 759-60. Instead, the Court looked at 99 recapture districts in *Edgewood IV* (when recapture began at \$280,000 per WADA) and 134 recapture districts in *West Orange-Cove II* (when recapture began at \$305,000 per WADA). *Id.* The entire point of the analysis is to compare property-wealthy districts to property-poor districts. The Chapter 41/42 analysis does that and demonstrates how the revenue gaps have decreased since *West Orange-Cove II*. 293.RR(Ex. 11476).12-13.

The TTSFC and Edgewood Plaintiffs also complain that not all Chapter 41 districts pay recapture.²⁰ TTSFC Br. 45 n.54; Edgewood Eff. Br. 62. It is unclear why that is a relevant criticism regarding the efficiency analysis, as whether a district ultimately pays recapture does not change the fact that it is a property-wealthy district. The TTSFC and Edgewood Plaintiffs also point

²⁰ A district with \$319,500 per WADA is a “Chapter 41” district. But there is no recapture at \$319,500 for any pennies of tax effort but copper pennies. Thus, for example, a district with \$350,000 per WADA that does not tax high enough to tap into its copper pennies would be a Chapter 41 district that does not pay recapture.

out that the difference in revenue per WADA between Chapter 41 districts that pay recapture and Chapter 42 districts has increased from \$900 in 2006 to \$1400 in 2013. TTSFC Br. 46; Edgewood Eff. Br. 62. But, in 2015, that amount was reduced to \$860. 293.RR(Ex. 11470 – Summary Tab). And if the comparison includes all Chapter 41 districts, the gap is further reduced to \$488. 293.RR(Ex. 11470 – Summary Tab).

* * *

There are an infinite number of ways that the Legislature could structure the school-finance system but only a few data points from the Court’s precedent that give specific guidance regarding what is permissible from an efficiency standpoint. If the Court hopes to achieve any stability in the area of school finance, it should hew closely to its precedent and the tax-rate and revenue gaps that it has found constitutional in the past. The Legislature did not act arbitrarily when it crafted a system that fell within the few data points available.

C. Plaintiffs Attack Pieces of the School-Finance System, But It Must Be Judged as a Whole.

The Edgewood Plaintiffs repeatedly, and incorrectly, assert that the State Defendants have urged the Court to ignore portions of the system when conducting its efficiency analysis. Edgewood Eff. Br. 59, 65. Rather, it is the

district court, now echoed by the TTSFC and Edgewood Plaintiffs, that sought to pick apart the school-finance system and judge the efficiency of each piece. 12.CR.539-43 (FOF 1378-88); 12.CR.544-47 (FOF 1393-1405); TTSFC Br. 50-59; Edgewood Eff. Br. 66-72. But the system must be judged as a whole. *WOC II*, 176 S.W.3d at 790; State Br. 144-45; *see supra* Part IV.B

The State Defendants will not repeat their arguments regarding each piece of the system, *see* State Br. 132-35, 144-45, but will address the allegations regarding target revenue, as the TTSFC and Edgewood Plaintiffs paint an inaccurate picture. The TTSFC Plaintiffs attempt to equate target revenue with the hold harmless districts discussed by the Court in *Edgewood IV* and *West Orange-Cove II*, arguing that the Legislature has actually increased the number of “hold harmless” districts. TTSFC Br. 54-55. And both the TTSFC and Edgewood Plaintiffs assert that the Legislature has evidenced an intent to make target revenue permanent by “increasing” it in 2013. TTSFC Br. 55; Edgewood Eff. Br. 68-69.

Target revenue, which ensured that districts were not harmed by the compression of property taxes in response to *West Orange-Cove II*, is set to expire in 2017. 189.RR(Ex. 5653).148. During the budget cuts necessitated by the recession, the Legislature decreased target revenue to 92.35% of its

previous value. 133.RR(Ex. 1701).224. As the economy recovered, the Legislature raised that percentage to 92.63%, an increase of 0.28%. 293.RR(Ex. 11489).236). At the same time, the Legislature added \$3.4 billion in FSP funding, and it raised formula funding by increasing the basic allotment and golden-penny yield and effectively eliminating the RPAF. 289.RR(Ex. 6618).5; 293.RR(Ex. 11489).236. As a result, the number of districts funded by target revenue and the amount of ASATR have continued to decrease. 293.RR(Ex. 11476).19-20. This is not evidence that the Legislature intends to continue target revenue indefinitely.

The TTSFC Plaintiffs also present numerous comparisons of individual districts to emphasize certain revenue gaps. TTSFC Br. 40-42. But again, the Court must consider the system as a whole. Of the fifteen districts identified by the TTSFC Plaintiffs that received more funding, twelve were in the top 15% of property wealth per WADA, including three of the top ten wealthiest districts. 155.RR(Ex. 3006) (sorting lowest property-wealth per WADA to highest). 188.RR(Ex. 5389D) (sorting highest property-wealth per WADA to lowest). Over half of the property-poor districts were in the bottom half of property wealth per WADA. 155.RR(Ex. 3006); 188.RR(Ex. 5389D). Comparing the extremes on either end does not present the whole picture.

D. The I&S Tax Does Not Make the System Inefficient, Because Plaintiffs Have Failed To Demonstrate a Statewide Need for Facilities

Despite explicit instructions from this Court that school-finance plaintiffs must make a threshold showing that facilities needs are the same across the State, no Plaintiff made that showing. *WOC II*, 176 S.W.3d at 792. Instead, they followed the exact same formula that proved insufficient in *West Orange-Cove II*. The Plaintiffs cannot, therefore, claim that I&S taxes render the entire system inefficient.

The TTSFC Plaintiffs are the only Plaintiffs to attempt to meet the required burden of proof. TTSFC Br. 49-50. But their efforts fall short. They begin by citing the testimony of a handful of superintendents who wish to make improvements to their facilities but feel unable to do so. None of those superintendents is in a district that taxes at the 50-cent limit. State Br. 147. Indeed, two of them are in districts that tax at 0 and 2 cents. 161.RR(Ex. 3203).43 (Anton ISD at 0 cents); 165.RR(Ex. 3207).13 (Los Fresnos ISD at 2 cents).²¹ And TTSFC does not demonstrate how any of the seven districts has

²¹ The disconnect between a district's spending wish-list and its choice to tax below the cap is played out in the analysis under article VIII, section 1-e. *See infra* Part VII.C.

been unable to provide a general diffusion of knowledge as a result of the allegedly lacking facilities.

The TTSFC Plaintiffs also cite the Comptroller's 2006 facilities survey, stating that districts with more economically disadvantaged students have older buildings, fewer "good" or "excellent" buildings, and more portable buildings. TTSFC Br. 50. But the study also shows that districts with more economically disadvantaged students have a lower percentage of instructional facilities that are "poor" or "in need of replacement" than many districts with fewer economically disadvantaged students. 109.RR(Ex. 1070).23. Moreover, the TTSFC Plaintiffs have not provided evidence demonstrating that the age of a building or its portability impacts the ability of students to learn within its walls. Absent proof of a similar need for facilities funding for districts across the State, the Plaintiffs cannot include I&S funding within their efficiency argument. The Legislature, therefore, did not act arbitrarily, but created an efficient school-finance system.

VI. BECAUSE THE SYSTEM IS ADEQUATE AND EFFICIENT, THE DISTRICT COURT'S JUDGMENT THAT THE SYSTEM IS UNSUITABLE MUST BE REVERSED.

The district court declared that the system is unsuitable because its design "prevent[s]" school districts from generating enough resources to

accomplish a general diffusion of knowledge and makes it “impossible” to do so in a financially efficient manner. 12.CR.194-95. As the State Defendants explained in their opening brief, because the system is efficiently producing a general diffusion of knowledge, its design necessarily does *not* prevent the achievement of adequacy and efficiency, and the district court’s declarations of unsuitability must be reversed. State Br. 153.

The Fort Bend Plaintiffs contend that this analysis “reads the suitability requirement out of the Constitution.” Fort Bend Br. 107-08. Not so. It simply recognizes that the Court’s definition of suitability is closely interrelated with adequacy and efficiency, a link that the Fort Bend Plaintiffs themselves acknowledge. Fort Bend Br. 108. Again, the Court has framed the suitability inquiry as whether “the structure []or the operation of the funding system *prevents* it from efficiently accomplishing a general diffusion of knowledge” or makes that goal “*impossible.*” *WOC II*, 176 S.W.3d at 794 (emphases added). Thus, the State Defendants properly relied on the system’s legal adequacy and efficiency as their *proof* that the system is suitable. If the Court agrees with the State Defendants that the system is both adequate and efficient, then the district court’s declarations that the system is unsuitable because it prevents adequacy and efficiency cannot stand.

Moreover, the Court has not described the suitability analysis as entailing the searching inquiry into the system’s details that the ISD Plaintiffs suggest. In *West Orange-Cove II*, the district court concluded that the system was unsuitable because it was insufficiently funded, but this Court undertook no review of the system’s funding levels in reviewing that judgment. *Id.* at 793-94. Nor did the Court examine the sort of alleged operational concerns that the ISD Plaintiffs cite as examples of unsuitability here—*e.g.*, failure of funding to keep pace with standards, lack of special and remediation programs, and growing numbers of economically disadvantaged and ELL students, *see* Fort Bend Br. 109-47—even though the district court had specifically found those same issues to be present in *West Orange-Cove II*. 176 S.W.3d at 787-88, 793-94. Instead, the Court assessed the system’s suitability based on its fundamental structure, such as the delivery of education “through school districts” and “rel[iance] on local tax revenues.” *Id.* at 794. And because those features did not make it “impossible” to achieve adequacy and efficiency, the Court concluded that the system was suitable. *Id.* That same fundamental structure remains in place today, which provides an additional reason for the Court to reverse the district court’s judgment that the system violates the constitutional suitability requirement.

VII. THERE IS NOT A STATE-IMPOSED AD VALOREM PROPERTY TAX.

The State Defendants’ position on the tax issues hews to this Court’s decision in *West Orange-Cove II*. To find that the school-finance system as a whole imposes a state ad valorem property tax, school districts must be deprived of “meaningful discretion.” See *Edgewood III*, 826 S.W.2d at 502. *West Orange-Cove II* inferred a systemic lack of meaningful discretion from the system-wide numbers, after tying its analysis to the question whether the “ceiling” on tax effort is so low that it is, in effect, the “floor” tax rate to participate in the system, 176 S.W.3d at 796-98. And while the Court has held that a single district can demonstrate a tax claim, *WOC I*, 107 S.W.3d at 579, it has never suggested that the standard for doing so would be different from *West Orange-Cove II*’s requirement that the plaintiff school district demonstrate that the ceiling had become the floor.

There are, thus, two questions: (1) Do the state-wide numbers support a conclusion that districts generally lack meaningful discretion? (2) Does the record show that any given district has been deprived of meaningful discretion?

The answer to both questions is no. The current system-wide numbers are better than those in *West Orange-Cove II*—only 24.9% districts are at the

\$1.17 cap, compared to 48% taxing at the cap with 67% of the districts taxing within \$.05 of the cap in *West Orange-Cove II*. That figure, by itself, makes it inappropriate to find a systemic tax violation because the majority of districts are not taxing at or near the cap. Also, the record does not show that any individual district lacks discretion to set its own tax rates within the meaning of the legal test. And the focus districts are all accredited. At most, the districts have shown that they cannot afford all of the programs they would like to implement, but they are not foreclosed from exercising control over their own taxing and spending by the imposition of state requirements.

A. Plaintiffs’ Arguments Seek to Turn Article VIII, Section 1-e into a Mechanism for Demonstrating Claims—Such as a District-Specific Adequacy Claim—the Court Already Has Foreclosed.

The ISD Plaintiffs’ appellate briefing presents no reason to change the answers to the questions described above. The TTSFC Plaintiffs address only the system-wide issue and, in essence, treat the tax claim as a corollary of the adequacy and efficiency claims. *See* TTSFC Br. 72. But the TTSFC Plaintiffs ignore the fact that, based on the dispositive facts in *West Orange-Cove II*, the system is in a better place than it was at that time. *See infra* Part VII.B. The Fort Bend Plaintiffs argue that (1) the structure of tax compression, combined with the recently enacted ban on repealing local-option homestead

exemptions, creates a state ad valorem property tax, Fort Bend Br. 71-72; (2) the fact that voter approval is needed before exceeding a \$1.04 tax rate creates a state property tax, *id.* at 43; and (3) the combination of the prohibition on repealing local-option homestead exemptions and “hoard[ing]” of local tax revenue, effectively sets the tax rate, *id.* at 44. That boils down to an assertion that any state statute that affects tax rates at all violates Article VIII, section 1-e. The Calhoun Plaintiffs advance, among other things, the argument that it is unconstitutional to give the voters a say in local tax rates, because school districts’ position in the school-finance system means that they should not be required to justify their expenditures to the voting public. Calhoun Appellees’ Br. 155-58. That approach ignores the fact that this Court and the Constitution recognize a role for voters in setting local tax rates. TEX. CONST. art. VII, §§ 3, 3-b; *see* State Br. 173-74.

The common theme of the ISD Plaintiffs’ arguments is that they attempt to obtain victory through the tax claim based on the same sort evidence offered to support their adequacy claims under Article VII, section 1. The ISD Plaintiffs do not argue that the State’s accreditation requirements require them to set a particular tax rate. And none of the ISD Plaintiffs’ focus districts is unaccredited. Instead, they seem to presume that, if they can point to any

program that might lead to better educational outcomes for which they don't have adequate funding, and any district is at the cap or the \$1.04 TRE threshold, then there is a tax violation. That approach illogically mixes the adequacy and tax inquiries.

Under the Court's precedent, the Constitution requires the Legislature to create a public-education system that is "adequate" in that it achieves a general diffusion of knowledge. *WOC II*, 176 S.W.3d at 753. And the Court generally defers to the Legislature's definition of the level of education that constitutes a general diffusion of knowledge. *Id.* at 784. The Legislature requires school districts and charter schools to provide that education and measures whether they are doing so via its accreditation standards. *Id.* at 787. For that reason, the Court presumes that acceptable accreditation ratings reflect a general diffusion of knowledge. *Id.* But the Court has looked past that presumption and examined education outputs directly to assess whether the system is constitutionally adequate. *See id.* at 789-90. Still, that sort of independent adequacy analysis has no bearing on a state-property-tax claim. Regardless of whether the accreditation regime provides an accurate proxy for *the Legislature's* satisfaction of its *constitutional* duty to provide an *adequate* system, accreditation remains the touchstone for the state-property-

tax claims because there the relevant inquiry is whether *school districts'* satisfaction of their *statutory* duties to provide what the Legislature defines as an accredited education forces them to tax at a certain rate. *Id.* at 796-97.

The Court should be particularly wary of the argument that \$1.04 is a *de facto* tax cap because higher tax rates require voter approval. Having local voters decide whether to raise taxes is the *exact opposite* of a state-imposed property-tax rate. The ISD Plaintiffs' argument on this point manifests a distaste for local voter control. *See* Calhoun Appellees' Br. at 155 (arguing that "meaningful discretion" must rest with the *districts*, which may adopt certain taxing requirements regardless of what *the voters* think). Local voter involvement in tax rates is a textual requirement of the Texas Constitution. TEX. CONST. art. VII, § 3(e); *Edgewood III*, 826 S.W.2d at 503; *see* State Br. at 173-74. The Court should not accept the ISD Plaintiffs' invitation to allow school districts to bypass their own electorate.

B. There Is No System-Wide Article VIII, Section 1-e Violation.

- 1. The numbers show that the system is in a better place with regard to the \$1.17 cap than it was with regard to the \$1.50 cap in *West Orange-Cove II*.**

As the State Defendants already have explained, the system numbers are better than they were in *West Orange-Cove II*, based on the factors to

which the Court referred in concluding that the system violated Article VIII, section 1-e. *See* State Br. 159-60 (explaining that 24.19% of the districts are at the cap, 68.56% are at the \$1.04 level, and 95.4% of districts were rated “met standard”); *see also* *WOC II*, 176 S.W.3d at 794 (discussing parallel numbers). That less than a quarter of districts are at the cap, while in *West Orange-Cove II* almost half of the districts were there and two-thirds of districts were within five cents of the cap should, by itself, foreclose any systemic tax claim.

2. The TTSFC Plaintiffs’ discussion of the system numbers does not establish a system-wide violation under *West Orange-Cove II*.

The TTSFC Plaintiffs argue that there is a systemic violation because (1) 25% of the districts are taxing at the cap and the district court found that these schools could not provide a general diffusion of knowledge and (2) 623 districts are “capped” at the \$1.04 rate, at which they “should be able to provide a [general diffusion of knowledge].” TTSFC Br. 71. The TTSFC Plaintiffs further point to Mr. Moak’s calculation that the “enrichment level” was down to 2.4% of system revenue as an average of all districts. TTSFC Br. 71.

The TTSFC Plaintiffs’ systemic-violation argument fails as a matter of law because the findings of fact do not support it and because the evidence

underlying those findings could not support the conclusion that the system creates a state-imposed ad valorem property tax.

The TTSFC Plaintiffs do not argue that an individual district's tax rate is, in effect, being set by state policy, but rather that (1) a number of districts are taxing at \$1.17 or \$1.04, (2) those districts are each failing to provide a general diffusion of knowledge; and (3) there is only "2.4 percent" of "enrichment" money in the system, all of which leads to a systemic violation.²² That chain of arguments fails because (1) that any given district is failing to provide a "general diffusion of knowledge" cannot itself trigger a violation of Article VIII, section 1-e, because that would transform the tax claim into a district-specific adequacy claim; (2) the district-specific fact findings do not even address the amount of spending necessary to meet state requirements; and (3) \$2.3 billion in taxing capacity remains in the system, which amounts to

²² Like the other Plaintiffs, the TTSFC Plaintiffs rely only on findings of fact for the proposition that there is a lack of meaningful discretion. TTSFC Br. 71; *accord* Fort Bend Br. at 72 (citing FOFs 210, 262). To the extent those findings purport to find a lack of meaningful discretion as such, they are mislabeled conclusions of law. Mislabeled conclusions of law are not rendered binding on appeal by the trial court's misdesignation. *McAshan v. Cavitt*, 229 S.W.2d 1016, 1020 (Tex. 1950) ("The designation is not controlling.").

between 6% and 7% of total taxing capacity, 143.RR(Ex. 1818).154-58, more than the 3% available in *West Orange-Cove II*, 176 S.W.3d at 763.²³

A tax violation occurs when the State's policies in effect leave a district with no ability to impose a lower tax rate, because it is required by state standards to implement programs that cost it more than its revenue at the tax-rate cap. Thus, even a district taxing at the cap may be spending funds unnecessary to meet state standards, which reflects the exercise of discretion to enact enrichment programs. That is, failure to provide a general diffusion of knowledge cannot necessarily be traced to failure to spend the correct amount of money. *See supra* Part IV.A. Nor does *West Orange-Cove II* state that the tax claim is tied to any measure of adequacy other than state accreditation requirements. *See WOC II*, 176 S.W.3d at 795-96. The Court

²³ Mr. Moak's 2.4% figure and Dr. Dawn Fisher's 6%-7% figure measure different things. Mr. Moak testified to the amount of money available between a tax rate of \$1.04 and \$1.17 based on projected values for 2012-2013. 128.RR(Ex. 1334).52-53. He did not calculate the total taxing capacity left in the system. Dr. Dawn Fisher's numbers address the total amount of capacity in the system, which is what the Court relied on in *West Orange-Cove II*, 176 S.W.3d at 763. The TTSFC Plaintiffs are thus incorrect to suggest that Mr. Moak's calculation addresses a percentage of total system revenue averaged across districts. *See* TTSFC Br. 71-72. The Fort Bend Plaintiffs correctly read Mr. Moak's testimony, Fort Bend Br. 97-98, but incorrectly tie it to their argument that any reduction in the availability of a district to tax between \$1.04 and \$1.17 creates a state property tax. *See infra* Part VII.B.3. And the Calhoun Plaintiffs effectively concede that Dr. Dawn Fisher's 6%-7% estimate is correct by arguing that school districts are using 94% of total taxing capacity. Calhoun Appellees' Br. 166.

should not indulge the TTSFC Plaintiffs' attempt to use the tax claim as another mechanism to prevail on its adequacy allegations.

The TTSFC Plaintiffs rely on the findings of fact related to a group of \$1.17 districts and a group of \$1.04 districts. None of these is sufficient to support a tax violation, because they assert only that the districts cannot afford certain programs, not that the State's accreditation requirements have required them to set their tax rates at the maximum. *See supra* Part VII.A. And none of the findings demonstrate a lack of discretion. The \$1.17 districts are, the record shows, performing less well than other districts on testing measures.²⁴ But the system need not be perfect, and a constitutionally adequate set of state requirements can exist even when individual districts are not meeting those standards. *E.g., WOC II*, 176 S.W.3d at 784. They do not establish that the individual districts had no discretion, because they do not link cuts in programs to any area of state control. The point of the tax claim is to prevent the Legislature from setting local tax rates by proxy; if the

²⁴ As explained below, the evidence cannot support a legal conclusion that any particular district has been forced to forgo enrichment to provide basic education: every superintendent testified to providing at least some enrichment. The superintendents do not testify as to a lack of enrichment funding; they testify about their own views of adequacy that hinge on the inability to spend a particular amount of money per student. *E.g., 175.RR(Ex. 4224-S).198* (Edgewood superintendent testifying that he would love to impose higher taxes, but not tying this desire to a lack of adequacy); *see also infra* Part VII.C.

superintendents cannot establish that the State’s requirements, as opposed to local preferences, have required them to tax at the cap, they cannot make out a claim that the Legislature has indirectly seized control of local property tax rates.

These same defects undermine the TTSFC Plaintiffs’ argument that there is a systemic violation based on the districts taxing at \$1.04. The TTSFC Plaintiffs wrongly credit the superintendents’ conclusions that they are not providing a general diffusion of knowledge—a question of law, *id.* at 785—in a context that requires an analysis whether the state accreditation requirements give rise to a tax claim, *id.* at 796.

The superintendents, like any interested fact witness, cannot use their testimony to establish ultimate legal conclusions. *E.g., Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 579 (Tex. 2002). And the TTSFC Plaintiffs make no attempt in their argument to tie tax rates to state requirements; they assume the link exists. To be sure, the link cannot be exact, *see WOC II*, 176 S.W.3d at 796 (referring to a “spectrum of possibilities”), but it does not follow from the inquiry’s inexactitude that the districts bear *no* burden of proof or production. They have to prove their case. The assertion that given districts cannot provide a general diffusion of knowledge at current tax rates does not

establish that the districts were forced to raise taxes to the cap by state policies, just as not a single superintendent recognized that at least some of the programs they have had to cut were not required by the State's accountability standards.

Finally, Mr. Moak's testimony that the enrichment range was, on average, 2.4% in 2012 is not a basis for finding a systemic tax violation. First, there is no magic amount of money that has to be available in the system. *West Orange-Cove II* does not speak to a certain amount of enrichment, it speaks to the existence of a zone of reasonable discretion to adopt enrichment programs, *see* 176 S.W.3d at 790-91 (citing *Edgewood I* for the distinction between state requirements and enrichment curricula). Mr. Moak's analysis presumes that the cut off for enrichment is \$1.04 and measures systemic discretion based on the ability to raise funds above that level. *See* 128.RR(Ex. 1334).52 (explaining methodology). But as Dr. Dawn-Fisher noted, there was \$2.3 billion of capacity left in the system in 2012, permitting a significant amount of enrichment. *See* State Br. 159. That is 6%-7% of the system, compared to the 3% total taxing capacity available in *West Orange-Cove II*. *Compare* 143.RR(Ex. 1818).154-58, *with WOC II*, 176 S.W.3d at 763 (discussing use of

97% of total taxing capacity). Further, the 83rd and 84th Legislatures have continued to put even more funding into the system. *See supra* Part I.C.

And the TTSFC Plaintiffs' assertion that the \$1.17 districts that cannot raise their tax rates have "zero discretion" is supported by neither the record nor the findings of fact on which the TTSFC Plaintiffs rely. *See* TTSFC Br. 71-72 (citing "Ex.20060", FOF 218, & FOF 220).²⁵ The evidence does not support the conclusion that any particular district has "zero" discretion; instead, the TTSFC Plaintiffs wrongly opine that it is constitutionally problematic to treat increases in local property tax revenue as replacing funding available prior to 2011. *See infra* Part VII.C.2. Finding of fact 218 is legally irrelevant, because it is predicated on the need to spend a particular amount of money per student, and factually irrelevant, because it does not even address the 2011-12 school year. *See* 12.CR.302-03 (FOF 218) ("looking at the lowest adequacy estimate . . ." to address the "2010-11 school year"). And finding 220 does not address a particular lack of discretion, but instead suggests that it was a constitutional violation to provide less than the 12.5% of the range of tax rates the Legislature provided at the time of tax compression,

²⁵ Exhibit 20060 is not in the record, but many of the tables were reproduced in Exhibits 6618 and 6619.

because the State also mandated salary increases. 12.CR.303 (FOF 220). While those facts are undisputed, it does not follow as a matter of law that the districts have no meaningful discretion to set their own tax rates. For example, many districts have continuously chosen to pay salaries above the state pay rates. *E.g.*, 3.RR.233-34 (Humble ISD has always chosen to pay more than the minimum state teacher salary). Very few districts follow the minimum salary schedule. 189.RR(Ex. 5630).437-38. That is a form of discretion to spend more than state mandates would require.

3. The fact that state requirements have required school districts to spend more than they initially had to following tax-rate compression does not, by itself, establish a state-property-tax violation.

The crux of the Fort Bend Plaintiffs' argument is that there is a property-tax violation because the State has not provided additional, non-property tax funds to the system since tax compression. Fort Bend Br. 75, 76; *see also* Fort Bend Br. 81-82 (making same argument for facilities funding).²⁶

²⁶ The Fort Bend Plaintiffs suggest that there is no separate facilities-funding tax claim in the district court's order. *See* Fort Bend Br. 73 (citing FOF 232). Not so. The district court expressly stated that the "50 cent debt test functions as a *de facto* cap on I&S rates," 12.CR.314 (FOF 266), suggesting a separate constitutional violation based on limiting bond repayments. At any rate, as the State Defendants have already explained, the two inquiries should remain separate, because debt limitations are different from tax caps. As the Court held in *West Orange-Cove II*, it is inappropriate to link facilities funding with M&O taxes unless the districts demonstrate a current, statewide need for additional facilities funding to provide a general diffusion of knowledge, 176 S.W.3d at 792; *see* State Br. 180-82.

The Fort Bend Plaintiffs’ systemic argument seeks to blend together all the various claims in this litigation into a single, tax claim. *See* Fort Bend Br. 71 (urging the Court to look at “the combined effect of all the different ways that the control is exercised”). That approach would, in effect, collapse all these inquiries into a single one that would look at whether tax rates are “clustered” at a particular level and find a state property tax if those rates coincide with increased educational requirements.

a. The clustering of tax rates at \$1.04 does not transform the FSP system into a state property tax.

The Fort Bend Plaintiffs argue that any decrease in taxing discretion from the 17 cent range provided in compression violates the Constitution. *See* Fort Bend Br. 73-74 (suggesting that increased accountability requirements have required districts to tax at the cap). But, of course, nowhere near so many districts are taxing at the \$1.17 cap as were taxing within \$.05 of the cap in *West Orange-Cove II*. *See* State Br. 159. Thus, the Fort Bend Plaintiffs must argue that the TRE requirement renders the lower \$1.04 threshold for seeking voter approval of a tax increase a de facto cap on property taxes. Fort Bend Br. at 75-76. Presuming that it is the TRE requirement that “clusters many school districts property rates around \$1.04,” *id.* at 75, the Fort Bend Plaintiffs

conclude that the \$1.04 TRE requirement establishes a state-imposed ad valorem property tax.

Those assumptions fail. By itself, the fact that the tax rates are “clustered” suggests that the State has not actually imposed a particular tax rate. After all, it is inherent in the fact that the State imposes any range of funding requirements at all that school districts will adopt tax rates in response to the incentives created by the State requirements. If the fact that districts act strategically in response to state requirements establishes an Article VIII, section 1-e claim, then there is no statute the Legislature could impose that would not violate Article VIII, section 1-e. Moreover, as the Fort Bend Plaintiffs candidly concede, one significant reason that tax rates cluster around \$1.04 is local political pressure. *See* Fort Bend Br. 76. As the State Defendants pointed out in their opening brief, local political opposition to higher tax rates cannot be construed as a state-property tax—the decision of local voters not to enact tax hikes is the opposite of a state property tax imposed by the state over the objection of local voters. *See* State Br. 173-74.

The Fort Bend Plaintiffs’ response to the local-control argument on the \$1.04 issue is a non-response: they argue that the system would not violate article VIII, section 1-e if the State had maintained a level of funding

proportional to what it provided districts at the time of compression. Fort Bend Br. 76-77. They augment this argument with the implication that the Legislative Budget Board's failure to comply with a statutory requirement that it assess the per-student cost of education somehow rises to a constitutional violation. *Id.* at 77.

The Fort Bend Plaintiffs' position fails because the Constitution requires meaningful discretion to set tax rates, not that the Legislature maintain the precise amount of discretion it happened to impose at the time of compression. The Court has expressly stated that the Legislature's decision to rely on local property tax income, as opposed to other forms of state taxation, does not violate the Constitution. *WOC II*, 176 S.W.3d at 756; *see* State Br. 178. At heart, the Fort Bend Plaintiffs' argument is that any decrease in the proportion of state funding from compression levels constitutes a tax violation. That argument cannot be squared with the background principle that there is no requirement that state funds be used to provide a particular proportion of education funding. *Edgewood III*, 826 S.W.3d at 503.

The Fort Bend Plaintiffs' suggestion that the increased proportion of tax income that comes from increases in property value, as opposed to state

funding, creates a tax violation likewise fails. *See* Fort Bend Br. 78-79. Revenue is revenue. And if it does not derive from state-imposed tax rates, the amount is irrelevant. *West Orange-Cove II* and the other tax-related cases say nothing about a necessary ratio between local and state revenue, and nothing in Article VIII, section 1-e suggests that there is a constitutionally-mandated ratio between local and state revenue.

Nor does it make a difference that the Legislature has prohibited repeal of local homestead exemptions. *See* Fort Bend Br. 83-84. The Fort Bend Plaintiffs' \$1.04 argument is predicated on the fact that local voters may not wish to increase their tax rates to provide the level of funding school administrators would like to spend. As a practical matter, those same voters would be unlikely to vote for the repeal of their homestead exemptions. The change is one of form, not substance.

The Fort Bend Plaintiffs argue that they can show a tax violation based on the \$1.04 levels because certain districts cannot as a practical matter raise taxes, but they then cite *West Orange-Cove II's* discussion of the standard of proof for showing that districts could not decrease tax rates and still meet accreditation standards, *id.* at 89-90. The tax claim cannot be measured in terms of exceeding the State's general requirements: it is designed with the

idea that local voters might choose a level of funding that meets, but does not exceed, state standards. The current system places less pressure on the districts, so there is no basis for presuming that local tax rates have been, in effect, set by the Legislature.

- b. Likewise, the \$.50 cap on school-district bond servicing does not impose a state property tax, and cannot be held to do so without undermining other, similar debt limits.**

Continuing its mix-everything-together approach, the Fort Bend Plaintiffs argue that the \$.50 limit to service bonds for improvements effects a de facto cap on facilities tax rates. As they argue for M&O funds, the Fort Bend Plaintiffs take the position that the system would be constitutional if, but only if, the Legislature had increased the amount of funding it placed into facilities assistance. *See* Fort Bend Br. 81-82. The Fort Bend Plaintiffs then argue that this limitation imposes a specific tax rate on fast growing school districts.

There is a factual impediment to the Fort Bend Plaintiffs' argument: the Legislature provided additional facilities funding in the latest budget. *See* Legislative Budget Board, *Summaries: Foundation School Program Entitlement Actions Taken by the 84th Legislature (Models 84497 and 95129)*, <http://www.lbb.state.tx.us>; *see supra* Part I.C. There is no evidence as to how

this will affect particular school districts at this time, but the enactment of new funding where previously there was no funding blunts the practical impact of the Fort Bend Plaintiffs' argument.

But that should not matter, because caps on local indebtedness are, at most, an indirect restraint on the amount of taxation a local taxing entity can impose, and in many cases such limits are imposed by the Constitution itself. *See State Br. 179-82.*

The Fort Bend Plaintiffs conclude their systemic argument by asserting that the mere fact that districts have chosen to raise taxes demonstrates a systemic tax violation. Fort Bend Br. 100-01. Not so. As the State Defendants have already pointed out, some of those districts adopted higher tax rates for political, not educational reasons. *See State Br. 171.* That a particular percentage of students live in districts taxing at the cap cannot demonstrate a systemic tax problem if there is proof that many of those districts did not raise taxes to provide additional educational services, but instead to restructure their debt.

4. The Calhoun Plaintiffs' arguments likewise fail.

The Calhoun Plaintiffs take issue with the State's comparison of the current status of the system to that in *West Orange-Cove II* primarily by

suggesting that it cannot matter what the Court looked at in *West Orange-Cove II*, because the system could have been struck down based on evidence from a single district. Calhoun Appellees’ Br. 164-68. That argument rings hollow: *West Orange-Cove II* presumed that there was a tax violation because the numbers were so extreme that they supported a violation. Better numbers on all the things that the *West Orange-Cove II* Court mentioned in reaching its conclusion goes directly to the heart of the ISD Plaintiffs’ systemic challenge. The Calhoun Plaintiffs do not actually challenge the State Defendants’ numbers—indeed, they accept the State Defendants’ capacity calculations as correct. Calhoun Appellees’ Br. 166. If the numbers are better than *West Orange-Cove II*—and the number of districts taxing at or near the tax-rate cap is decidedly smaller than it was in *West Orange-Cove II*—they support the State Defendants’ argument that the Court should not find a system-wide violation.

a. There is no basis for a systemic violation.

The Calhoun Plaintiffs attempt to counter the State Defendants’ explanation that the system is better than it was in *West Orange-Cove II* by suggesting that (1) it doesn’t matter how many districts are taxing at the maximum level, Calhoun Appellees’ Br. 164-65, (2) the districts taxing at \$1.04

are part of a “bulge” in tax rates, *id.* at 165, and (3) the fact that Chapter 41 districts lose some money above that level to recapture keeps them from meeting state standards at around or just above \$1.04, *id.* at 165-66.

The tax-rate cap is \$1.17, but it does not create a tax violation because fewer districts are taxing at the cap and there is more money on the table than there was in *West Orange-Cove II*. See *supra* Part VII.A. The Calhoun Plaintiffs’ argument regarding the \$1.04 rate hinges on the idea that the imposition of the duty to provide the education required by the state standards puts school districts at odds with the citizens who elect school board members. Calhoun Appellees’ Br. 155-56. The Calhoun Plaintiffs’ assertion that decreased revenue has affected classroom instruction by requiring elimination of full-day pre-K programs, the elimination of teaching positions, and reductions of other personnel is telling: these things are not necessarily required to meet state standards. They could not support a district-specific tax claim, and should not be a basis for applying a new and different tax-claim analysis than the Court applied in *West Orange-Cove II*.

The Calhoun Plaintiffs’ response to the State Defendants’ argument that 95.4% of districts “met standard” in 2013 emphasizes a difficulty in interpreting the data. Under the old system, there were four categories of

performance; now there are two. The new tests are being phased in over time, because they represent the implementation of an entirely new curriculum. *See* Calhoun Appellees’ Br. 23-24 (emphasizing the change in both curriculum and testing regimes). The numbers cannot line up exactly, but the State Defendants believe that the current numbers cannot be used to indicate a general drop in student achievement.

Moreover, the Calhoun Plaintiffs play semantics with the concept of the “impact” of recapture, suggesting that because more districts are putting more money into the system, recapture has a bigger impact in “absolute” terms. Calhoun Appellees’ Br. 167-68. But there is more money in the system, so even a smaller percentage will be bigger in “absolute” terms. And the fact that more districts are in a situation to contribute to the total amount of money being recaptured actually marks a form of progress; the average district paying recapture paid more than \$9 million in 2006, but only \$5 million in 2015. 293.RR(Ex. 11470 – Summary Tab).

b. The Calhoun Plaintiffs’ “individual district” arguments—which are effectively systemic arguments—fail.

Under the rubric of “individual district” claims, the Calhoun Plaintiffs make several arguments regarding groups of districts. *See* Calhoun

Appellees' Br. 171-78; *see esp. id.* at 177 (asserting that the evidence regarding the focus districts establishes a systemic claim). This approach misreads *West Orange-Cove II*, in which the Court found a system-wide violation based on system-wide numbers, not a system-wide violation based on the focus districts. As do the Fort Bend and TTSFC Plaintiffs, the Calhoun Plaintiffs attempt to create a district-specific adequacy claim out of the fabric of the tax claim. *See supra* Part VII.B. That approach must necessarily fail, because otherwise the tax analysis would do nothing but undermine the test the Court has set out for adequacy.

The Calhoun Plaintiffs further argue that the tax-swap argument is invalid because only some of the \$1.17 districts used that approach, Calhoun Appellees' Br. 171; that the districts taxing between \$1.05-\$1.16 cannot raise enough money to meet their stated needs, Calhoun Appellees' Br. 174-75; and that the \$1.04 districts are subject to a tax violation purely because their revenue above \$1.04 would be subject to recapture, Calhoun Appellees' Br. 175-77. These arguments necessarily fail.

A significant fraction of the \$1.17 districts used the tax-swap mechanism,²⁷ and the Calhoun Plaintiffs do not attempt to suggest that a tax-swap district can state a valid tax claim when its tax-rate increase is not tied to instructional requirements. The intermediate districts want more money for activities that are not required by the State, such as reduced class sizes and a full-day kindergarten program. *See* Calhoun Appellees’ Br. 174 (discussing testimony regarding Alief ISD); *see also infra* Part VII.C.4. And with regard to the \$1.04 districts—which the Calhoun Plaintiffs do not deny are doing well on the achievement standards—the argument that having a tier of tax that is subject to greater recapture rates automatically violates article VIII, section 1-e ignores law and logic. The mere existence of incentives to tax at different rates cannot rise to the level of a tax violation, or the Legislature will be without tools to deal with efficiency. The Court has never suggested that article VIII, section 1-e stands for the proposition that the Legislature can pass no law with regard to tax rates. And the argument is illogical, because the districts and their voters have exercised discretion not to raise tax rates.

²⁷ Four out of twelve, or 33%. As the Calhoun Plaintiffs correctly point out, the State Defendants mislabeled Abernathy as a swap district. *See* Calhoun Appellees’ Br. 171 & n.34. The State Defendants intended to refer to Weatherford ISD. 208.RR(Ex. 6337).198-202; *see also id.* at 205 (testimony that swap was not designed to provide for any program).

They cannot, therefore, complain that their tax rates have, in effect, been set for them by the State.

C. District-Specific Claims Also Fail.

As the State Defendants explained in their opening brief, none of the superintendents has demonstrated that a district has had to forgo enrichment entirely in order to meet the minimum requirements of the system. The Fort Bend Plaintiffs suggest that this approach cuts things too fine and, consistent with its general approach of blending all the claims together, suggests that it is impossible to segregate enrichment from basic education expenses. *See* Fort Bend Br. 101-02. The fact remains that, if the districts have funding to pursue enrichment activities, then they must not be at the far end of the spectrum of possibilities that can trigger an article VIII, section 1-e violation.

The ISD Plaintiffs disregard the very basis of *West Orange-Cove II*'s tax-claim holding to suggest that a tax claim can be based on a district-specific inadequacy claim, as the TTSFC Plaintiffs appear to do; or that the mere fact of recapture creates a tax claim, as the Calhoun Plaintiffs appear to do; or that there is a tax claim because the districts cannot raise enough tax revenue to cover the entire \$6 billion they seek to add to the State's education budget.

1. A proper district-specific analysis requires segregation of basic education activities and enrichment.

In both their systemic and district-specific arguments, the Fort Bend Plaintiffs argue that districts cannot bear the burden of segregating their basic educational activities from enrichment activities. In doing so, they make the tax argument exactly the same as their funding-based adequacy argument. *See* Fort Bend Br. 95-99 (arguing that there is a tax violation because there is insufficient funding to provide per-student funding at the rates articulated by the plaintiffs' experts).²⁸ Neither of the other two plaintiff groups to brief the issue, the Calhoun and TTSFC Plaintiffs, provides a standard for a tax claim

²⁸ Tellingly, the first argument in the Fort Bend Plaintiffs' brief to deal with the district-specific claims does not, in fact, deal with district-specific claims. Attempting to sidestep the fact that the ISD Plaintiffs' main expert, Mr. Moak, did not perform any analysis of the necessity of charging at or above the \$1.17 cap, *see* State Br. 175-76 (discussing record), the Fort Bend Plaintiffs point to Dr. Clark's analysis, which they characterize as showing that only some school districts could "raise the revenue necessary for a general diffusion of knowledge at the \$1.17 tax rate." Fort Bend Br. 98-99 n. 50. But Dr. Clark's analysis is legally irrelevant. She presupposes the need to spend a particular amount of money—a metric the Court has repeatedly rejected as a measure of adequacy, *see supra* Part IV.A—then calculates that only some school districts could meet that income level by taxing at the cap. *See* 289.RR(Ex. 6622).20. In short, if one presumes that the education system is unconstitutional unless it contains \$6 billion in additional funding (a contention the State Defendants dispute), then Dr. Clark reasons that school districts cannot reach that amount of funding by taxing at the \$1.17 rate. That logic puts the cart before the horse: there is a state-property-tax violation when the State effectively sets property tax rates, not when the plaintiffs' cost projections would cost more money than there is room for in the system. Dr. Clark's testimony about how tax rates would function in a counterfactual universe (one in which the districts have all the money their experts believe they should spend) says nothing about the availability of meaningful tax discretion based on the information contained in this record.

that avoids the same problems. The Calhoun Plaintiffs suggest that the \$1.04 districts can establish a tax claim merely because the weighted recapture amounts dissuade voters from supporting tax increases, an argument that attempts to attack a policy required by the Court's efficiency holdings through the lens of the tax claim, *see supra* Part V.D. And the TTSFC Plaintiffs appear to argue that the tax claim can support a single-district adequacy claim, *see supra* Part VII.B.2, even though the Court has stated no such claim exists.

West Orange-Cove II embraces the idea that there is a funding distinction between basic accreditation and enrichment, and declines to hold that any particular district has been forced to raise its tax rates to meet the minimum accreditation requirements because it imputes a system-wide violation. It follows that, to demonstrate a district-specific violation, a district would have to show that it had to give up most or all of its enrichment activities to meet minimum state standards. *See WOC I*, 107 S.W.3d at 579 (“Thus, a single district states a claim under article VIII, section 1-e if it alleges that it is constrained by the State to tax at a particular rate”). Any other approach would allow districts to bring a tax claim based only on their spending preferences, not on the actual requirements of meeting the State's accreditation requirements.

None of the ISD Plaintiffs has demonstrated that they were required by the State to tax at a particular rate. Instead, they argue that they are taxing either at the actual cap of \$1.17 or the putative intermediate cap of \$1.04 and are not currently providing what they view as a district-specific general diffusion of knowledge. But that cannot meet the test set out in *West Orange-Cove I*: article VIII, section 1-e precludes the State from imposing tax *rates*. And the tax claim has to be based on the State accreditation requirements. *See WOC II*, 176 S.W.3d at 795-96. The ISD Plaintiffs' individual claims all fail because they tie the tax-rate caps to a putative district-specific general diffusion of knowledge, not to the actual accreditation requirements. While it might in fact be somewhat difficult to draw precise rules distinguishing state-required spending from enrichment, *id.* at 796 (meaningful discretion is an "imprecise standard"), none of the districts has even attempted to fulfill the *West Orange-Cove I* standard. Their claims fail.

2. The TTSFC Plaintiffs in effect make no district-specific claim.

The TTSFC Plaintiffs argue that the superintendent testimony regarding general diffusion of knowledge is conclusive on the tax claim. *See supra* Part VII.B.2. Accordingly, the TTSFC Plaintiffs cite only to the district court's findings of fact, and do not actually engage in a district-specific

analysis. As a result, the TTSFC Plaintiffs never grapple with the fact that a district should be able to demonstrate, at least to some degree, that it is required to spend so much on state requirements that it has no access to enrichment funds. Tellingly, for example, the TTSFC Plaintiffs do not mention La Feria ISD, one of the tax-swap districts. Even the Calhoun Plaintiffs, which attempt to minimize the importance of the tax-swap districts, cannot dispute that such districts do not automatically have a tax claim. *See supra* Part VII.C.1. A tax-swap district is categorically incapable of meeting the *West Orange-Cove I* articulation of a district-specific claim. The Court should not adopt a view of Article VIII, section 1-e that allows a tax-swap district to avoid any inquiry into its spending choices.

3. The Fort Bend Plaintiffs' district-specific \$1.04 arguments fail.

The Fort Bend Plaintiffs do not cite any evidence from particular \$1.17 districts. Instead, they attempt to rehabilitate the testimony of some superintendents who testified that they were unable to provide all the programs they wanted to, rather than testifying that they had to spend so much on the basic programs that they could spend no money on their wish-list programs. In short, the Fort Bend Plaintiffs' position is that, if a superintendent says that his district cannot afford a program, there is a tax

violation even if the district is taxing at \$1.04. Under the Fort Bend Plaintiffs' view, if a superintendent highlighted a single setback in the end-of-course exam passage rate, or a particular challenge that faces a \$1.04 district, there must be a tax violation at the \$1.04 level. *See* Fort Bend Br. 102-105.

For example, the Fort Bend Plaintiffs highlight Duncanville, a \$1.04 district that has failed to pass a TRE, in a footnote. Fort Bend Br. 77 n.38. That footnote proves the State Defendants' point. Duncanville's superintendent testified that he could not afford the level of services the community wanted, not that he was unable to afford the basic state requirements together with some additional enrichment. Indeed, the superintendent elaborated that voters did not want to pay for supplemental technology, and that he believed that the State should pay for this additional program. 208.RR(Ex. 6342).135-36. The Fort Bend Plaintiffs try to take the State Defendants to task for not discussing Duncanville's EOC testing rates. *See* Fort Bend Br. 101-02. But, once again, that data is irrelevant to the tax question, because the problem is whether Duncanville has enough money to meet state accreditation requirements without taxing at the \$1.17 cap. And at any rate, the EOC exams have been reduced and changed over time.

And while Duncanville has struggled with EOC exam passage rates, that cannot by itself show that Duncanville's taxing decisions have been indirectly imposed by the state academic requirements. The EOC tests are a work in progress, meant to test a new curriculum that is being introduced gradually. Given that Duncanville could raise more tax revenue by raising its tax rates, it is difficult to say how the State's academic requirements have prevented it from raising its tax rates. And, at any rate, it is hard to see how the state requirements embodied in the new standards tested by the EOC exams could have forced Duncanville to raise taxes, when those requirements were put in place *after* Duncanville adopted its current tax rate.

The Fort Bend Plaintiffs also highlight Humble, whose superintendent asserted that the district could not afford STAAR remediation efforts. Fort Bend Br. 78 n.39. But Humble's superintendent readily admitted that at least one program that had been cut constituted enrichment, not required state activity. 3.RR.230, *see* State Br. 164-65. Indeed, the Humble superintendent, like the Duncanville superintendent, asserted that there is not enough money at \$1.04 to provide for *community* expectations—as opposed to *state requirements*. A tax claim cannot be based on a local community's expectation that a school district raise taxes from a point well below the \$1.17 cap to

provide services that one community might believe are necessary but are not required by the state standards.

The Fort Bend Plaintiffs likewise suggest that Corsicana can establish a tax claim because it cannot sustain academic performance at the \$1.04 level. Fort Bend Br. 102. But that is exactly the point: \$1.04 is not the cap, and it is not a violation of Article VIII, section 1-e to have to raise taxes to some level below the \$1.17 cap. Corsicana's superintendent did not attempt to show that Corsicana could not meet state standards if it raised its tax rate above \$1.04.

All of the Fort Bend Plaintiffs' examples fail because (1) they have discretion to tax above \$1.04 if their voters approve; (2) their only basis for showing that they need more money is the EOC exam data, which does not show that they are failing to meet state requirements; and (3) none of them can show that the State's accreditation requirements deprived them of discretion to tax below the tax cap because they are taxing below \$1.17.

4. The Calhoun Plaintiffs' district-specific arguments fail.

The Calhoun Plaintiffs accuse the State Defendants of engaging in cherry-picking by suggesting that the Calhoun Plaintiffs' examples do not demonstrate that the State has vicariously set districts' tax rates for them. *See* Calhoun Appellees' Br. 170. But the point of a district-specific claim is that it

can be cherry-picked: otherwise, the Court would have to adopt the view that a single district's inadequate performance coupled with a tax rate at the cap automatically demonstrates an article VIII, section 1-e violation. By citing all of the findings of fact, the Calhoun Plaintiffs highlight the fact that none of the superintendents made an attempt to segregate basic activities from enrichment. The findings of fact merely list programs. Some superintendents testified that they could not pay for programs that were clearly not required by state law. *E.g.*, 3.RR.230 (conceding that pre-K for three-year-olds was not a state requirement); *see also* 289.RR(Ex. 6557).74 (Humble ISD superintendent testifies that his budget concerns are based on local expectations). Nothing in the evidence regarding Humble ISD suggests that it is state requirements that force the district to tax at particular level. Like the Humble evidence, the Calhoun Plaintiffs' argument boils down to an assertion that a plaintiff need not demonstrate that state law required it to adopt a particular tax rate. That assertion cannot be squared with *West Orange-Cove I*.

The Calhoun Plaintiffs' remaining arguments amount to single-district adequacy claims, not claims that the State's standards actually require a given district to impose a particular tax rate. The Calhoun Plaintiffs point to two

\$1.17 districts. *See* Calhoun Appellees’ Br. 171-73. Van ISD expressly raised its tax rate without considering an intermediate rate and tied that number to the number of employees it had. But no one has suggested that the total number of employees at a school is a measure of state requirements—quite the opposite, given that when Van had staff cuts, it retained its accreditation. At any rate, Van’s superintendent made clear that she was applying her own view of what the district needed, not the State’s requirements. *See* 159.RR(Ex. 3201).105-06. Likewise, the Everman superintendent’s testimony shows that she would have the State provide more money purely because it is her belief that there should be 100% pass rates on every measure. *See* 280.RR(Ex. 3541).58. And the Alief superintendent testified that he needed additional funding to provide more services that are not actually required by the state standards: more teachers, full-day pre-kindergarten (which was not required at the time), technology programs, and block scheduling. 8.RR.131-32. Like the Calhoun Plaintiffs’ brief generally, the testimony of the Van, Everman, and Alief superintendents predicates the tax claim on a spending wish-list, not the actual state accreditation requirements.

The Calhoun Plaintiffs highlight several \$1.04 districts: Calhoun, Lewisville, and Aransas ISDs. Calhoun Appellees’ Br. 175-77. The Calhoun

Plaintiffs do not even argue that Calhoun ISD is having trouble meeting state accreditation; they base their entire argument on the fact that the tiered recapture system creates a disincentive for raising taxes. *Id.* at 176. But if the mere fact of a tiered tax-rate system triggers a tax violation, then there is no way to satisfy the *Edgewood* requirements regarding efficiency. Likewise, Lewisville ISD was unable to raise its tax rate because its voters said no. If local control means anything, it means that local voters have some say over tax claims. After all, as the Calhoun Plaintiffs concede, the 2-cent tax raise Lewisville sought would have yielded golden pennies. The tiered tax structure cannot be invoked as a mode of state control when the incentives it provides did not even come into play. And the Calhoun Plaintiffs' discussion of Aransas's tax rate ties its woes to its previous budget, rather than to state requirements. This is, in short, an argument that the State should be required to foot a particular percentage of Aransas's bill. As explained above, *see supra* Part VII.A, the Court has repeatedly rejected that argument.

VIII. IF THE COURT REVERSES ANY PART OF THE JUDGMENT FOR THE ISD PLAINTIFFS ON THE MERITS, IT SHOULD REVERSE THE RULINGS ON ATTORNEYS' FEES AND REMAND THAT ISSUE FOR RECONSIDERATION.

In their opening brief, the State Defendants explained that, if the Court reverses the judgment for the ISD Plaintiffs on the merits of any of their

claims, it also should reverse the judgment awarding attorneys' fees to the ISD Plaintiffs and denying fees to the State Defendants, for three reasons: (1) the district court's unconditional awards of appellate attorneys' fees were improper; (2) any change in the parties' relative success on the merits would warrant reconsideration of their fee requests; and (3) the district court wrongly attempted to insulate the ISD Plaintiffs' fee awards from reversal by stating that the full awards still would be justified even if the ISD Plaintiffs lose on appeal because they made significant contributions to a purported "public debate on school finance law" through this lawsuit. State Br. 183-87. The ISD Plaintiffs have failed to rebut any of these reasons for reversal.

A. The District Court's Expressly Unconditional Award of Appellate Attorneys' Fees Cannot Stand.

Most of the ISD Plaintiffs concede that the district court could not have ordered unconditional awards of appellate attorneys' fees. *See* Calhoun Appellees' Br. 180; Fort Bend Br. 169; Edgewood Br. 112-13.²⁹ But they urge

²⁹ The TTSFC Plaintiffs dismiss as "mere puffery" the State Defendants' point that the unconditional award of appellate attorneys' fees improperly penalizes them for appealing the judgment. TTSFC Br. 73. This Court and others disagree. *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998) (holding that "[a]n unconditional award of appellate attorney's fees . . . unjustly penalizes a party" and "serves only as an improper deterrent to appellate review"); *Messier v. Messier*, 458 S.W.3d 155, 170 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("A trial court may not grant a party an unconditional award of appellate attorney's fees because to do so could penalize a party for taking a meritorious appeal."); *accord Werley v. Cannon*, 344 S.W.3d 527, 536 (Tex. App.—El Paso 2011, no pet.); *Pickett v. Keene*, 47 S.W.3d 67, 78 (Tex. App.—Corpus Christi 2001, pet. dismiss'd); *Weynand v. Weynand*, 990

that their fee awards do not suffer from that defect because an appellate-fee award that is not expressly contingent on a party's success on appeal necessarily contains an *implied* condition to that effect. Calhoun Appellees' Br. 180 (citing *La Ventana Ranch Owners' Ass'n v. Davis*, 363 S.W.3d 632, 652 n.17 (Tex. App.—Austin 2011, pet. denied); *Spiller v. Spiller*, 901 S.W.2d 553, 560 (Tex. App.—San Antonio 1995, writ denied)); Fort Bend Br. 169 (citing *La Ventana*, 363 S.W.3d at 652 n.17); Edgewood Br. 112-13 (same).

That implied-condition fix will not work here. The cases cited by the ISD Plaintiffs involved appellate-fee awards that *did not address* whether they were contingent on a party's appellate success. *Davis v. Driftwood Dev., L.P.*, No. 07-0245, Final Judgment at 4 (428th Dist. Ct.—Hays Cnty. May 7, 2009), *rev'd in part sub nom. La Ventana*, 363 S.W.3d at 652; *Spiller*, 901 S.W.2d at 560 (noting that “the judgment before us is not specific” as to whether the appellate fees were conditional). That silence allowed the courts of appeals to read implied conditions of appellate success into those awards to avoid error. *See Davis v. McCray Refrigerator Sales Corp.*, 150 S.W.2d 377, 378 (Tex. 1941) (holding that, when a judgment does not dispose of an issue “in express terms,”

S.W.2d 843, 847 (Tex. App.—Dallas 1999, pet. denied); *Bisby v. Dow Chem. Co.*, 931 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1996, no writ); *CPS Int'l, Inc. v. Harris & Westmoreland*, 784 S.W.2d 538, 544 (Tex. App.—Texarkana 1990, no writ).

the disposition “may be inferred,” “provided such an inference follows as a necessary implication”). By contrast, the judgment in this case expressly and affirmatively made the ISD Plaintiffs’ appellate-fee awards unconditional by stating that the full fee awards “would still be equitable and just” even if the ISD Plaintiffs do not prevail on appeal. 12.CR.203, 205-08.³⁰ An implied condition that the appellate-fee portions of those awards are contingent on appellate success could not coexist with the judgment’s express terms making the awards unconditional in their entirety. *See Salomon v. Lesay*, 369 S.W.3d 540, 558 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (reversing an “internally inconsistent” judgment); *Am. Cas. & Life Ins. Co. v. Boyd*, 394 S.W.2d 685, 687-88 (Tex. Civ. App.—Tyler 1965, no writ) (holding that an order both granting and denying a motion to dismiss was a “nullity”).

At a minimum, then, the Court should reform the judgment to make the appellate-fee awards expressly conditioned on the ISD Plaintiffs’ success on

³⁰ The Calhoun Plaintiffs describe the fee rulings out of sequence, creating the false impression that the district court expressly made only the award of trial fees unconditional. *See Calhoun Br.* 179-80. They first recount their trial-fee award; next, they comment that the court found “[t]hat award” to be “warranted even if the CCISD Plaintiffs did not prevail on their claims on appeal”; and only then do they add that “[t]he court also awarded the ISD Plaintiffs their appellate attorneys’ fees.” *Id.* To be clear, for each ISD Plaintiff group, the district court made an award of trial *and* appellate attorneys’ fees *before* concluding that “*this* award of attorneys’ fees” would stand even if the group did not prevail on appeal. 12.CR.203, 205-08 (emphasis added).

appeal. *Messier*, 458 S.W.3d at 170; *Sundance Minerals, L.P. v. Moore*, 354 S.W.3d 507, 515 (Tex. App.—Fort Worth 2011, pet. denied); *see also* Calhoun Appellees’ Br. 180 n.38 (acknowledging this remedy).

That modification, however, will not forestall the reversal of the fee awards that the State Defendants seek. The State Defendants already have conceded that, if the Court affirms the judgment for the ISD Plaintiffs in full, the district court’s unconditional awards of appellate fees would be harmless error, and the State Defendants do not ask for reversal of the awards under those circumstances. *See* State Br. 185. But if the ISD Plaintiffs do not prevail on one or more of their claims, the appellate-fee awards—which must be conditioned on appellate success—will have to be reversed. *Bisby*, 931 S.W.2d at 21-22; *CPS Int’l*, 784 S.W.2d at 544-45. And, as discussed below, the ISD Plaintiffs’ failure to prevail on one or more claims also would warrant a reversal of their trial-fee awards as well. *See infra* Parts VIII.B-C.

B. Any Change in the Judgment on the Merits Warrants Reversal of the District Court’s Fee Rulings.

In their opening brief, the State Defendants asked the Court to take precisely the same approach to the fee awards in this case that it took in the last school-finance case: if the Court “conclude[s] that the plaintiffs are entitled to only part of the relief granted by the district court” or “no relief,”

it should “reverse the award of attorney fees and remand the case to the district court to reconsider what award of attorney fees, if any, is appropriate.” *WOC II*, 176 S.W.3d at 799 (cited in State Br. 185). As the State Defendants explained, that is a common remedy in UDJA cases in which the trial court’s judgment is at least partially reversed. State Br. 185-86 & n. 31 (citing recent decisions from this Court and eight different courts of appeals). It recognizes that, because the equity and justness of a UDJA fee award 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) (emphasis added), a changed resolution of the case’s merits should prompt reconsideration of the award.

The ISD Plaintiffs respond largely by attacking arguments that the State Defendants did *not* make. The State Defendants did not argue that the ISD Plaintiffs must prevail on the merits, substantially or otherwise, to receive fee awards; that their awards necessarily would constitute an abuse of discretion if they are nonprevailing parties on appeal; that their success on the merits controls their fee awards; that the Court is required to remand their fee awards if it reverses the judgment on the merits; or that their fees were not reasonable and necessary. *See* Calhoun Appellees’ Br. 181-82; Fort Bend Br. 170; TTSFC Br. 73-74; Edgewood Br. 112-13. Rather, the State

Defendants urged only that (1) the parties' relative success on the merits is *relevant* to the fee rulings, as the district court itself recognized, 12.CR.200 (rejecting the State Defendants' fee request in part because they were "predominantly non-prevailing parties"); and (2) consistent with ample precedent, a change in that factor *should* (not must) result in a remand so that the district court may reevaluate the awards. State Br. 185-86.

Some ISD Plaintiffs contend that reversal of a fee award follows reversal on the merits only when the award rests on a party's prevailing status or the award's basis is uncertain. *See* Calhoun Appellees' Br. 182; Fort Bend Br. 170; Edgewood Br. 112. That is not the case here, they claim, because the district court based the ISD Plaintiffs' fee awards on their "significant contributions" to a "public debate on school finance law" regardless of how they fare on the merits. *See* Calhoun Appellees' Br. 182; Fort Bend Br. 170-71; Edgewood Br. 112.

Setting aside for the moment the impropriety of the "public debate" justification, *see infra* Part VIII.C, that argument does not help the ISD Plaintiffs. The district court still denied the *State Defendants'* fee request in part because of their "predominantly non-prevailing" status. 12.CR.200. Thus, by the ISD Plaintiffs' own logic, any change in the judgment on the

merits that favors the State Defendants would warrant a remand for reconsideration of the State Defendants' fee request. *Cf. Barshop*, 925 S.W.2d at 637-38 (reversing and remanding a UDJA fee award based on a finding that the plaintiffs had "substantially prevailed" in the trial court where the judgment for the plaintiffs was reversed on appeal). And because any fee award to the State Defendants would partially offset the ISD Plaintiffs' fee awards, those awards should be reversed and remanded as well.

C. The District Court's "Public Debate" Rationale for Its Fee Rulings Was Unreasonable.

In their opening brief, the State Defendants explained that the district court unfairly applied a double standard to the parties' respective fee requests. State Br. 186-87. Being a "predominantly non-prevailing" party counted against the State Defendants, Charter School Plaintiffs, and Intervenors, but it will not count against the ISD Plaintiffs, even if they lose all of their claims on appeal. 12.CR.200, 203, 205-08. That is inequitable on its face.

The district court attempted to justify that disparate treatment by asserting that the "ISD Plaintiffs have made significant contributions to the public debate on school finance law through this lawsuit," whereas the other parties' contributions to that debate "were not so significant as to warrant an award of fees." *Id.* That sort of comparison had no place here. Having been

sued, the State Defendants’ job was to defend Texas law, not to instigate or enrich any discussion outside the courtroom. *See* TEX. CONST. art. XVI, § 1 (requiring elected and appointed officers to take an oath to “defend the . . . laws . . . of this State”); TEX. CIV. PRAC. & REM. CODE § 37.006(b) (providing that the Attorney General “is entitled to be heard” in any UDJA suit challenging a Texas statute’s constitutionality). Indeed, our judicial system is designed to ensure that a debate is neither the mode nor the objective of a lawsuit. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (explaining that the redressability requirement “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action”).

Moreover, as the State Defendants pointed out, the record contains no evidence of the purported public debate or how the parties actually contributed to it. State Br. 186. Some of the ISD Plaintiffs shrug that off by arguing that awarding and denying fees on that basis was simply within the district court’s discretion. *See* Calhoun Appellees’ Br. 182, 184; TTSFC Br. 74; Edgewood Br. 112. But if a trial court may validly grant some fee requests

and deny others merely by announcing *ex cathedra* that some parties did more to advance a public debate, this Court may as well hold that whether a UDJA fee award is “equitable and just” is unreviewable.

The Calhoun Plaintiffs wrongly assert that the district court’s “public debate” rationale finds support in the court of appeals’ decision upholding the fee award on remand after *WOC II*. Calhoun Appellees’ Br. 182-84 (citing *Neeley v. W. Orange-Cove Consol. ISD*, 228 S.W.3d 864, 868 (Tex. App.—Austin 2007, pet. denied)). There the court specifically cited the fact that the school districts had “ultimately prevailed” in this Court on one claim, which preserved their injunctive relief in full, and noted their “significant contributions” to that “lawsuit,” not to any public debate. 228 S.W.3d at 868.

The Calhoun Plaintiffs also fail to justify the district court’s fee rulings by simply labeling their case-in-chief as their contribution to a school-finance debate. *See* Calhoun Appellees’ Br. 183-85 (citing their challenges to funding levels, finance formulas, the lack of a cost study, and student achievement results). All that shows is what they tried to do to win this lawsuit; it does not demonstrate the existence of a “public debate on school finance law,” much

less how their litigation efforts contributed to that debate more than the State Defendants' did.³¹

Perhaps recognizing that more is required, the Fort Bend Plaintiffs offer the only evidence of an actual debate, citing one legislator's mention of this case to support their view that "[t]his lawsuit spurred action in the 83rd Legislature." Fort Bend Br. 171. "But the statement of a single legislator, even the author and sponsor of the legislation, does not determine legislative intent." *AT&T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528-29 (Tex. 2006). And the Fort Bend Plaintiffs misleadingly follow that reference with the claim that "[e]ven the State acknowledged that the 83rd Legislature's actions were a result of school district advocacy." Fort Bend Br. 172. To be clear, the "advocacy" acknowledged by the State Defendants was the *lobbying* efforts of many groups, including school districts, in influencing the 2013 legislative changes—*in contrast to* this lawsuit. 64.RR.85 ("Now, at the same time the ISD plaintiffs were seeking relief from this Court, they

³¹ The Calhoun Plaintiffs add that it would have been "inequitable and unjust to take money from the very school districts that had established an adequacy violation and use it to pay the State's attorneys' fees." Calhoun Appellees' Br. 184. Of course, that was not the district court's rationale for denying the State Defendants' fee request. It does, however, reinforce the State Defendants' point that success on the merits is relevant and any shift in that regard on appeal should prompt reconsideration of the fee rulings.

along with parents and other stakeholders sought the very same reform from the 83rd Legislature.”). In any event, those strained efforts to muster support for the district court’s “public debate” rationale do not begin to explain the court’s assessment that the ISD Plaintiffs’ purported contributions that debate warranted a fee award of \$10 million—win or lose—while the other parties’ contributions were worth nothing.

Finally, some ISD Plaintiffs defend the district court’s fee rulings by alluding to this case’s size, complexity, duration, and importance. *See* Calhoun Appellees’ Br. 183; TTSFC Br. 73-75; Edgewood Br. 113. None of those factors, however, substantiates the court’s disparate treatment of the parties’ fee requests. This case was just as massive, complicated, and lengthy for the State Defendants’ counsel as it was for the ISD Plaintiffs’ attorneys. Moreover, the court already accounted for the amount and difficulty of the work involved in finding that the fees awarded were reasonable and necessary—a finding not at issue on appeal. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (explaining that whether fees are reasonable and necessary depends in part on “the time and labor required” and “the novelty and difficulty of the questions involved” (quoting TEX. DISCIPLINARY R. PROF. CONDUCT 1.04)). And to the extent that the

courts have a role in evaluating the public-education system, challenging the Legislature's policy choices as unconstitutional is no more important than defending those choices to ensure that they are not erroneously set aside.

IX. THE DISTRICT COURT'S RETENTION OF "CONTINUING JURISDICTION" OVER THIS CASE UNNECESSARILY IMPLIES A POWER BEYOND THAT CONFERRED BY TEXAS LAW.

In response to the State Defendants' point that the district court cannot exercise continuing jurisdiction in the nature of a federal district court overseeing a structural injunction, the ISD Plaintiffs appear to concede that it is beyond the jurisdiction of a Texas court to impose that sort of relief. *See* Fort Bend Br. 172-74; Calhoun Appellees' Br. 185-87; TTSFC Br. 75; Edgewood Br. 5 n.3. And no one disputes that the controlling standard on this issue is set out in *City of San Antonio v. Singleton*, 858 S.W.2d 411, 412 (Tex. 1993) (per curiam) (citing *Smith v. O'Neill*, 813 S.W.2d 501, 502 (Tex. 1991) (per curiam)). *See* State Br. 187-89.

The State Defendants take issue, however, with (1) the term "continuing jurisdiction" itself, which is not used in *Singleton*, and (2) the supposed need to affirmatively assert continuing jurisdiction, which is inconsistent with *Singleton's* recognition of an inherent, limited power to "open, vacate or modify a permanent injunction upon a showing of changed conditions," 858

S.W.2d at 412; *see* TEX. R. CIV. P. 308 (creating district court authority to “cause its judgments and decrees to be carried into execution”). Under *Singleton*, the district court could have entertained a petition to modify the judgment based on changed conditions at any time after its plenary power expired.³² The district court’s order appears to do something different from *Singleton*. It *affirmatively* asserts *general* jurisdiction over the matter for a period of time ending when the “State defendants have fully and properly complied with its judgment and orders.” *See* 12.CR.208. A specifically asserted extension of plenary power to an uncertain date is not the same as a limited, inherent power to modify based on changed conditions.

The Court should not recognize an expansion of the limited modification power articulated in *Singleton* and *Smith*, based on the language of Rule 308. The limited power to modify based on changed facts must remain distinct from the district court’s plenary power to modify, which expires 30 days after

³² The Calhoun Plaintiffs are thus wrong to suggest that it was “particularly necessary” for the district court to assert continuing jurisdiction because the injunction expressly contemplated changed circumstances. Calhoun Appellees’ Br. 186. Such a change is always possible, regardless of whether the judgment acknowledges that fact. Even without the language cited by the Calhoun Plaintiffs, then, the district court would have retained modification power under *Singleton* as part of its inherent authority to enforce its order. *See Smith*, 813 S.W.2d at 502 (explaining that inherent-modification jurisdiction is triggered by “changed conditions”).

judgment. TEX. R. CIV. P. 329b(d). The State Defendants ask the Court to reverse the district court's unnecessary statement regarding continuing jurisdiction or modify that statement in accord with the bounds set by *Singleton*. See State Br. 187-89 & n. 32.

PRAYER

The final judgment should be reversed and the case dismissed for want of subject-matter jurisdiction. In the alternative, the final judgment should be reversed in part insofar as it grants judgment for Plaintiffs on their claims for declaratory and injunctive relief; judgment should be rendered for the State Defendants on those claims or, alternatively, those claims should be remanded for further proceedings in light of the 2015 education-related legislation; and the judgment on the attorney-fee requests should be reversed and remanded to the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

According to Microsoft Word, this brief contains 29,872 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.**

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CERTIFICATE OF SERVICE

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