

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 & STUDENT FAIRNESS COALITION, ET AL.;;
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.;; AND FORT BEND
INDEPENDENT SCHOOL DISTRICT, ET AL.,**

Appellees/Cross-Appellees

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

EFFICIENCY INTERVENORS' REPLY BRIEF

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INTRODUCTION

The Texas School system (System) sues itself every few years. That the State and its legislated designees, the independent school districts (School Districts), now join forces to shut out the very people most harmed by a constitutionally inefficient System—students, parents, and the employers who require an educated population to grow Texas’s economy—exposes the truth that this Court previously suspected. The System’s interests are not aligned with the interests of the people it is supposed to serve.

Just as the State and School Districts try to justify the System’s monopoly, the School Districts wish to monopolize these lawsuits as well—essentially arguing there are no viable constitutional claims other than their periodic claims for more money. The School Districts’ opposition to the Efficiency Intervenors signals exactly why students and parents are needed in this debate.

As a matter of law, the System is unconstitutionally inefficient—it is not productive of results with little waste. The State and School Districts all but concede their arguments to the contrary are unsupportable, both under the law and the record, because they distort the Efficiency Intervenors’ arguments and set up a series of strawmen to avoid answering the key issues. For instance, contrary to how the State and School Districts frame the Efficiency Intervenors’ complaint, these students, parents, and businesses do not ask the Court to fashion an alternative

system, nor enact new statutes. Yet the State and School Districts proclaim that the Efficiency Intervenors “really” just want the Court to make policy.

To the contrary, just as the School Districts ask the Court to declare the school finance system constitutionally inadequate, unsuitable, and inefficient, the Efficiency Intervenors request a declaration that the System is constitutionally inefficient. The Efficiency Intervenors’ claim is no more “political” than the School Districts’ claims.

Further, the State and School Districts’ assertion that the Efficiency Intervenors’ claim is created from thin air is facetious. First, this Court has expressly invited the claim on several occasions. And from day one this Court has grounded its school finance decisions on the notion that finance is an “implicit” constitutional requirement. It would be odd for this Court to now hold that only an implicit constitutional requirement is litigable and that a claim on the explicit efficiency mandate is too political to allow.

Finally, despite hundreds of fact findings, the trial court did not and could not make any adverse findings material to the Efficiency Intervenors’ complaint. The evidence at trial established the System is constitutionally inefficient because it is not productive of results nor is it with little waste. It is a virtual monopoly that ceaselessly sues itself for more money, is uncompetitive, bureaucratic, burdened

with wasteful regulatory mandates, and is currently not required at trial to show that any dollar it spends produces any educational result, efficiently or otherwise.

The Efficiency Intervenors request that the Court reverse the trial court's judgment and render judgment for them on their qualitative efficiency claim. The Efficiency Intervenors further ask that the Court determine they are entitled to reasonable and necessary attorney's fees.

ARGUMENT

I. The Efficiency Intervenors' claim is cognizable: they ask the Court to evaluate whether the current System is constitutional using standards previously adopted by this Court.

The State and School Districts' assertion that the Efficiency Intervenors ask the Court to make "policy" under the guise of a constitutional claim is invalid under this Court's precedent. So is the State's contention that the Efficiency Intervenors' claim is a non-justiciable political question.

A. The political question doctrine has no bearing on the Efficiency Intervenors' suit.

This Court has made clear that the political question doctrine does not apply to cases challenging the constitutionality of the public education System. In *West Orange-Cove II*, the Court dismissed the State's argument that claims challenging the constitutionality of the System are barred by the political question doctrine, emphasizing that the Legislature has an affirmative constitutional obligation:

This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1 imposes on the legislature *an affirmative duty to establish and provide for the public free schools*. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions.

...

If the system is not "efficient" or not "suitable," the legislature has not discharged its constitutional obligation and it is *our* duty to say so.

Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (W. Orange-Cove II), 176 S.W.3d 746, 776 (Tex. 2005) (emphasis added) (quoting *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) (*Edgewood I*); see also *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 563-64 (Tex. 2003) (*W. Orange-Cove I*); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 747-48 (Tex. 1995) (*Edgewood IV*). The Court further observed that:

If the framers had intended the Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate. The constitutional commitment of public education issues to the Legislature is primary but not absolute.

W. Orange-Cove II, 176 S.W.3d at 778.

The Court has also remarked that political questions are a "rarity" and expressed doubt about the legitimacy of the political question doctrine in Texas

courts. *Id.* at 779-80. Indeed, as the Court noted, it has never held an issue to be a non-justiciable political question. *See id.* at 780. Instead, when the Court defers to the Legislature’s policy determinations, it does so by denying the relief requested, not by dismissing the case for want of jurisdiction. *See, e.g., Underkofler v. Vanasek*, 53 S.W.3d 343, 346 (Tex. 2001); *In re Doe*, 19 S.W.3d 346, 350 (Tex. 2000). The Court has jurisdiction to consider the merits of the Efficiency Intervenors’ claim.

B. The Efficiency Intervenors present a cognizable, justiciable claim in which they ask the Court to evaluate if the System meets the constitutional efficiency mandate.

1. The Efficiency Intervenors request that the Court declare the System unconstitutional, not craft a new system.

Setting up the first in a series of strawmen, the State and School Districts improperly redefine the Efficiency Intervenors’ qualitative efficiency claim as an attempt to constitutionalize preferred educational policies. They distort the Efficiency Intervenors’ case. What the Efficiency Intervenors allege is that the System is qualitatively inefficient—i.e., the System does not produce results with little waste¹—and is therefore unconstitutional. In their pleadings, the Efficiency Intervenors requested that “the Court render judgment declaring the current system

¹ This Court has held “[t]here is no reason to think that ‘efficient’ meant anything different in 1875 [when article VII, section 1 was written] from what it now means. ‘Efficient’ conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed over time.” *W. Orange-Cove II*, 176 S.W.3d at 752-53.

of public free schools violates article VII, section 1 of the Constitution in that it is not efficient in providing for the general diffusion of knowledge in order to preserve the liberties and rights of the people. The evidence will show that the system fails the qualitative efficiency test.”² The Efficiency Intervenors then pointed to particular provisions of the Education Code and Administrative Code as examples of this inefficiency (and alternatively asked the court to also declare those provisions unconstitutional).

The Efficiency Intervenors did not ask the trial court, nor do they ask this Court, to do anything more than declare the System (or those provisions) unconstitutional. That is, they ask to Court to determine “whether” constitutional standards have been met, not to mandate “how” to meet those standards. *W. Orange-Cove I*, 107 S.W. 3d at 563-64; *see also W. Orange-Cove II*, 176 S.W.3d at 753. The Court has repeatedly concluded that it has the duty to make this determination. *See W. Orange-Cove II*, 176 S.W.3d at 776-77, 779;³ *W. Orange-*

² Efficiency Intervenors’ Third Amended Plea in Intervention (with pertinent highlighted portions) is attached hereto as Appendix A.

³ The School Districts point to language in *W. Orange-Cove II* in which the Court acknowledged that its role is to not “oversee” issues like curriculum, textbook approval, and teacher certification, but instead to decide the legal issue before it without dictating policy matters. 176 S.W.3d at 779. But the Court did not say it could not determine the legal issue of whether non-finance portions of the Education Code (such as educator certification requirements) result in a constitutionally inefficient system. *Id.* at 785 (“Whether the statutory provisions creating the public school system are arbitrary and therefore unconstitutional is a question of law.”) Further, significantly more language in *West Orange-Cove II* indicates that the Court believes that structural inefficiencies in the system (i.e., non-finance provisions of the Education Code) can be evaluated under the Constitution. *See id.* at 754, 757-58, 793.

Cove I, 107 S.W.3d at 563-64; *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 523 (Tex. 1992) (*Edgewood III*); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 498 (Tex. 1991) (*Edgewood II*); *Edgewood I*, 777 S.W.2d at 394.

Second, the Court has expressly signaled that the question of whether the System is structurally efficient should be part of the analysis in these cases. *See W. Orange-Cove II*, 176 S.W.3d at 754, 792-93; *Edgewood IV*, 917 S.W.2d at 729; *Edgewood III*, 826 S.W.2d at 524; *Edgewood II*, 917 S.W.2d at 729; *Edgewood I*, 777 S.W.2d at 395. In *West Orange-Cove II*, the Court:

- Held that “[e]fficiency implicates funding access issues, but it is certainly not limited to those issues.” 176 S.W.3d at 793.
- Recognized the risk of perpetual litigation about school funding without real structural reform, noting that “[p]ouring more money into the system may forestall those challenges, but only for a time. They will repeat until the system is overhauled.” *Id.* at 754.
- Warned that reform is required to fulfill the constitutional standards: “There is substantial evidence, which again the district court credited, that the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change take the form of increased funding, improved efficiencies, or better methods of education.” *Id.* at 790.⁴

⁴ *See also Edgewood IV*, 917 S.W.2d at 729 (the financial component of efficiency is implicit while the qualitative component is explicit); *Edgewood III*, 826 S.W.2d at 524 (“We are constrained by the arguments raised by the parties to address only issues of school finance. We have not been called upon to consider, for example, the improvements in education which could be realized by eliminating gross wastes in the bureaucratic administration of the system.”); *Edgewood I*, 777 S.W.2d at 397 (“More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient.”).

- Noted that the plaintiffs and intervenors to date “have focused on funding” and acknowledged that the Court “cannot dictate how the parties present their case or reject their contentions simply because we would prefer to address others.” *Id.* at 793.
- Commented that “[p]erhaps ... public education could benefit from more competition, but the parties have not raised this argument, and therefore we do not address it.” *Id.*

The Court would not have invited a qualitative efficiency challenge if it believed that the issue solely involves political and policy considerations.

Third, nothing in the Texas Constitution limits Article VII, Section 1’s applicability to finance or funding. Rather, it provides: “A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.” TEX. CONST. art. VII, § 1. The State and School Districts ask the Court to impermissibly read a limitation into the Constitution that is not there. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008); *Jones v. Del Andersen & Assocs.*, 539 S.W.2d 348, 350 (Tex. 1976).

Fourth, the assertion that the Efficiency Intervenors seek structural changes that were legislatively rejected (thereby apparently nullifying their claim) rings false. The mere fact that the Legislature enacted a particular scheme while rejecting another does nothing to make the System constitutional. That is why there are courts: to determine whether the Legislature has fulfilled its duty to create a

constitutional System. *See, e.g., W. Orange-Cove I*, 107 S.W.3d at 564; *Edgewood I*, 777 S.W.2d at 394; *see also Patel v. Tex. Dep't of Licensing & Regulation*, ___ S.W.3d ___, 2015 WL 3982687, at *17 (Tex. June 26, 2015). Further, the same logic must then apply to the School Districts' funding claims. The Legislature has repeatedly declined to adopt the School Districts' funding preferences, yet the School Districts continue to challenge the finance system. If the Legislature's failure to change an aspect of the System nullified a constitutional challenge, school finance litigation would have long ago ceased. Thus, if the Court accepts the School Districts' argument, then it must also deny the relief they seek.

Fifth, the School Districts mischaracterize the Efficiency Intervenors' claim in analogizing it to a claim by intervenors in *Edgewood IV*. There, a group of individuals alleged a constitutional right to a school voucher system. 917 S.W.2d at 747. The Court concluded their claim impermissibly asked the Court to “*prescribe* the structure of this state's public school system.” *Id.* at 748 (emphasis added). In contrast, the Efficiency Intervenors seek only the remedy the Court can and has granted: a declaration that the Legislature has not complied with the constitutional mandate to provide a qualitatively efficient System.⁵

The Efficiency Intervenors do not ask the Court to prescribe a new system or to declare that the System is constitutionally inefficient because it lacks certain

⁵ *See* Appendix A. Additionally, counsel for Efficiency Intervenors specifically reminded the trial court of this fact when questioning witnesses. *See* 24RR77.

policy. The Efficiency Intervenors instead ask the Court to evaluate the System as a whole (including particular statutes cited as examples) and determine whether it is constitutionally efficient. It is false that a declaration like what the Efficiency Intervenors' seek would require the Legislature to adopt their "preferred educational choices."⁶ If the Court declares the System unconstitutional, the Legislature will be free to craft its own solution, again, subject to constitutional mandate.

Finally, the School Districts' attempt to distinguish their claims from the Efficiency Intervenors' is unconvincing. The School Districts contend that they do not ask the Court to adopt any particular funding policy but only to declare the finance system unconstitutional. Yet this is the same type of relief the Efficiency Intervenors seek. If the Court believes the Efficiency Intervenors' claims cross the line into policy, then the same is true for the School Districts' claims. What is more policy-laden than how schools are funded and money is appropriated by the Legislature?

2. The Efficiency Intervenors have asserted that the System as a whole is qualitatively inefficient.

The State and School Districts set up another strawman when arguing that the Efficiency Intervenors' only challenge particular statutes and do not allege that the System as a whole is inefficient. In fact, the Efficiency Intervenors pleaded, put

⁶ School Districts' Combined Br., at 20.

on evidence supporting, and argued that the System as a whole is structurally inefficient.⁷ The Efficiency Intervenors also pointed to particular statutes that individually or collectively render the System unconstitutional and asked that the trial court find those specific provisions unconstitutional.⁸ Yet the core of the Efficiency Intervenors' claim is that the *System* is inefficient because it is subject to repeated self-litigation, uncompetitive, bureaucratic, wasteful, and burdened with state-imposed mandates—the cited statutes are examples of the System's inherent structural inefficiency and waste.

It is ironic that the School Districts criticize the Efficiency Intervenors for emphasizing provisions in the Education Code. The School Districts also have pointed to provisions of the Education Code: Chapters 41, 42, and 45. The System is not amorphous. It is created by the Education Code, and the Education Code is composed of individual statutes. If the School Districts did not have any grievance with provisions of the Education Code, they would have nothing to dispute. There is no rationale that justifies authorizing School Districts to challenge provisions of the Education Code and denying challenges to other provisions of the Education Code by the true interested parties.

Furthermore, the State and School Districts misrepresent this Court's precedent. This Court has never said it cannot *evaluate* individual Education Code

⁷ See Appendix A.

⁸ See *id.*

provisions to determine whether the System as a whole is inefficient. Rather, the Court has explained that it is the System as a whole, as created by its components, that must be efficient and that can be declared inefficient. *W. Orange-Cove II*, 176 S.W.3d at 790. In the finance context, the Court evaluated whether particular provisions of a bill that created county education districts could be struck down individually. The Court concluded they could not because “the finance system that remained—if a system could be discerned in the remnants at all—would bear no resemblance to that which the Legislature intended” and “the constitutional defects we have found pertain not to individual statutory provisions but to the system as a whole. It is the system that is invalid, and not merely a few of its components.” *Edgewood III*, 826 S.W.2d at 515. Here, the Efficiency Intervenors, as part of their argument that the System is inefficient, invite the Court to review the provisions Efficiency Intervenors have highlighted and evaluate whether they contribute to an inefficient System. *W. Orange-Cove II*, 176 S.W.3d at 790.

As yet another strawman, the State claims that the Efficiency Intervenors conflated the concepts of efficiency and adequacy and failed to plead adequacy, so they may not argue that the System is not achieving the general diffusion of knowledge. Factually, this is absurd. And legally it is inaccurate.

Factually, the Efficiency Intervenors alleged in their pleadings and repeatedly demonstrated at trial that the System is “not productive of results”

(inadequate), which is part of their inefficiency claim.⁹ The lack of productive results is not even a question in this case.

Legally, this Court has instructed that “‘efficiency’ conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed overtime.” *W. Orange-Cove II*, 176 S.W.3d at 752-53 (quoting *Edgewood I*, 777 S.W.2d at 395). “Adequacy” is “simply shorthand for the requirement that public education accomplish a general diffusion of knowledge.” *Id.* at 753. And the concepts cannot be parsed and considered in a vacuum; they are linked. *See, e.g., West Orange-Cove I*, 107 S.W.3d at 566, 571 (“the interrelationship between the standards of adequacy and efficiency” was fundamental to the reasoning in *Edgewood I*); *Edgewood I*, 777 S.W.2d at 396 (the purpose of an efficient system is to provide for a general diffusion of knowledge); *id.* at 397 (the finance system can be financially inefficient or inefficient in the sense of providing for a general diffusion of knowledge). As Justice Cornyn acknowledged in *Edgewood III*, “implicit in the concept of an efficient school system is the idea that the output of the system should meet certain minimum standards—it should provide a minimally ‘adequate’ education.” 826 S.W.2d at 527 (Cornyn, J., concurring and dissenting); *see also id.* at 525-26, 529. *West Orange-Cove II* did nothing to dissolve that

⁹ *See* Appendix A.

“link,” nor did the Court suggest that there is a distinction between “productive of results” and “general diffusion of knowledge.” What sorts of “results” could the efficiency standard be referring to if not a general diffusion of knowledge?

Relatedly, the School Districts claim the Efficiency Intervenors failed to link the wastefulness of the System to any failure to achieve a general diffusion of knowledge. Another strawman. First, the School Districts and Efficiency Intervenors agree that the System is not productive of results. But even if the System was productive of results, it would still be unconstitutional for failing to be efficient—productive of results *with little waste*. The question is whether the System is wasteful. Gross waste was proven at trial and even supported by the findings of fact.¹⁰

3. As invited by the Court, the Efficiency Intervenors have brought a qualitative efficiency claim and the Court should expressly recognize it as a legitimate cause of action.

This Court has suggested there is a cause of action challenging the qualitative inefficiency of the System. The Efficiency Intervenors now ask the

¹⁰ See FOF 126-209, 529, 541, 543, 595, 597-99, 604-06, 1245; COL 30, 40, 78; Ex.1139. In its findings of fact and conclusions of law, the trial court found that “the Texas educational system has fallen short of accomplishing a general diffusion of knowledge.” 12CR207, *see* FOF 126-208; 7RR74; Ex.1001, Ex.8001; 37RR23-63; 38RR140-47; 23RR 94-97, 143-44; Ex.5670; Ex.1013; Ex.3198, p.247; Ex.3199, p.196; Ex.3201, p.240; Ex.3200, p.283; Ex.3202, p.271; Ex.3203, p.304-05; Ex.3204, p.254-55; Ex.3205, p.52-53; Ex.3206, p.58; Ex.3207, p.69; Ex.3208, p.198; Ex.3209, p.263; Ex.6334, p.92; Ex.6335, p.86-87; Ex.6336, p.22; Ex.6337, p.257-58; Ex.6339, p.96; Ex.6340, p.115; Ex.6341, p.54; Ex.6342, p.204; Ex.6343, p.81; Ex.6344, p.82-83; Ex.6345, p.58; Ex.3226, p.27; Ex.3227, p.174; Ex.5614, p.175; Ex.5615, p.57; Ex.8073; Ex.8011; 41RR79-94.

Court to expressly recognize a claim for qualitative efficiency as a cause of action not unlike adequacy and equity (financial efficiency). The Efficiency Intervenors are, in a sense, pioneers in this litigation. They have, for the first time, brought the structural inefficiency claim that the Court has repeatedly invited. This is the reason the Efficiency Intervenors cannot point to any Court precedent expounding on a precise metric for measuring qualitative efficiency. But to the extent a precise metric is needed, this Court's precedent sheds light on what the test should be.

The System is efficient if it is "effective or productive of results" and uses "resources so as to produce results with little waste." *Edgewood I*, 777 S.W.2d at 395. Thus, in assessing qualitative efficiency, the test is (1) does the use of resources produce results and (2) is the use of those resources wasteful? The Court has previously described what "results" are when it concluded that a general diffusion of knowledge is measured by student achievement. *W. Orange-Cove II*, 176 S.W.3d at 788. The remaining question, then, is how to measure whether the system has more than "little waste."

The Court has stated that a precise metric for measuring efficiency is not required. Similar to here, in previous cases, the State had argued that it is judicially unmanageable to determine whether the finance system is inadequate, unsuitable, and inefficient. The Court retorted that "[t]hese standards import a wide spectrum of considerations and are admittedly imprecise, but they are not without content."

Id. at 778; *see also, e.g., W. Orange-Cove I*, 107 S.W.3d at 563. The Court explained that while it may be easy to measure whether a system violates the Constitution in extreme situations (like a system limited to teaching first-grade reading), “there is much else over which reasonable minds should come together, and much over which they may differ. The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness.” *W. Orange-Cove II*, 176 S.W.3d at 778.

Under this reasonableness standard, the Legislature has “much latitude in choosing among any number of alternatives that can reasonably be considered adequate, efficient, or suitable,” but it does not have “free rein” and the standards—adequate, efficient, and suitable—still must be satisfied. *Id.* at 784. Instead, the Legislature’s choices must be informed by “guiding rules and principles properly related to public education.” *Id.* at 785. And the Legislature’s choices may not result in “a public school system that is ... inefficient ... regardless of whether it has a rational basis or even a compelling reason to do so.” *Id.* at 785.

Thus, in determining whether the System is wasteful, it is appropriate for the Court to assess whether the statutory provisions creating the System waste resources so as to render the entire System inefficient. The Efficiency Intervenors submit that the System is inherently wasteful because it is subject to repeated self-

litigation between the State and School Districts, and it is uncompetitive, bureaucratic, and riddled with wasteful mandates and arbitrary formulas that do not improve the quality of education.¹¹

The Efficiency Intervenors urge the Court to recognize their claim as essential to this litigation. “Districts are firmly entrenched and powerfully resistant to meaningful change.” *W. Orange-Cove II*, 176 S.W.3d at 757. And the School Districts do not necessarily speak for parents and children in these suits, as attested by the School Districts’ desire to silence the voices of these individuals in this suit. *See id.* at 775-76. Any suggestion that recognition of a qualitative efficiency claim would somehow increase education litigation is mere hypothesis. But even if true, if the System violates the Constitution, it is the Court’s duty to say so. *See, e.g., W. Orange-Cove II*, 176 S.W.3d at 779; *W. Orange-Cove I*, 107 S.W.3d at 585; *Edgewood II*, 804 S.W.2d at 498. The Efficiency Intervenors ask the Court to formally recognize that a claim for qualitative inefficiency is cognizable and justiciable.

II. The Efficiency Intervenors, who are the persons most harmed by the inefficient System, have standing to bring a qualitative efficiency claim.

Astonishingly, it is the School Districts—and not the State—who most strongly urge the Court to dismiss the Efficiency Intervenors’ case for lack of

¹¹ Contrary to the School Districts’ assertion, the Efficiency Intervenors do not believe the standard is that “if a policy costs money, then it must waste money.” School Districts’ Combined Br., at 26. It is *wasteful* spending that the Efficiency Intervenors attack.

standing. This should put to rest any credence that the System’s self-litigation is aligned in any way with the interests of parents, students, or the business community. Texas parents, students, and businesses are the ones most harmed by the unconstitutional System. And this Court has made clear that students and parents (and even the public at large) have standing to challenge the constitutionality of the System.

Standing exists when there is a real controversy between the parties that will be actually determined by the judicial declaration sought. *See W. Orange-Cove II*, 176 S.W.3d at 773. In the context of a facial constitutional challenge to statutes: “First, the plaintiff must suffer some actual or threatened injury under the statute. Second, the plaintiff must contend that the statute unconstitutionally restricts the plaintiff’s own rights.” *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996).

The Efficiency Intervenors easily satisfy this test. The district court found the Efficiency Intervenors have standing¹² and this Court should as well.

A. The Efficiency Intervenors have suffered an actual or threatened injury.

The Efficiency Intervenors are school-aged children,¹³ the parents of school-aged children, taxpayers, and the Texas Association of Business, which is

¹² COL 59.

¹³ The parents sued individually and as next friend of their minor children. *See* Appendix A.

comprised of employers who rely on an educated workforce.¹⁴ These parties are the consumers of education. The Efficiency Intervenors have alleged and proven that the System is unconstitutional because it is qualitatively inefficient.¹⁵ It is axiomatic that school children and parents are injured by an unconstitutional System: the Texas Constitution guarantees *school children* the right to an efficient system of public education. *W. Orange-Cove II*, 176 S.W.3d at 774, 776. Clearly, if School Districts have standing to challenge the unconstitutional System, school children and parents do too.

Indeed, in the more than two decades during which the constitutionality of the System has been litigated, numerous individuals (including parents and their children) have asserted constitutional claims, and their standing has never been challenged. *See Edgewood IV*, 917 S.W.2d at 727, 747; *Edgewood III*, 826 S.W.2d at 493; *Edgewood II*, 804 S.W.2d at 493; *see also W. Orange-Cove II*, 176 S.W.3d at 776 (observing that most of the claims by school districts in that case had been made by individuals in prior cases). In *West Orange-Cove II*, this Court expressly acknowledged that persons other than school districts have standing to sue, including parents, school children, and taxpayers. 176 S.W.3d at 774, 776.

In the instant case, many individuals are parties to this suit, not just the Efficiency Intervenors. The Efficiency Intervenor parents claim they are parents of

¹⁴ *See id.*

¹⁵ *See id.*

children who “presently attend, or will soon attend, public schools” in Texas, which do not meet constitutional mandates. Four parents in the Edgewood lawsuit, two parents in the Taxpayer Student Fairness Coalition’s lawsuit, and six parents in the Texas Charter School Association’s lawsuit allege the same type of injury. Notably, the School Districts do not challenge any of these parents’ standing. As a further signal of insincerity, two groups of School Districts that joined the School Districts’ combined response (Fort Bend and Edgewood ISDs) acknowledged in their own briefs that parents and children (and for Fort Bend, even the public at large) *do* have standing to challenge the unconstitutional public school system.¹⁶

In the face of this Court’s counsel that children, parents, and taxpayers have standing to challenge the constitutionality of the System, the School Districts try to pick off each of the Efficiency Intervenors individually, claiming they have not shown an injury distinct from the public at large. This argument is another strawman. First, this Court has acknowledged that the public at large—or at least a significant portion of the public including parents, school-aged children, and taxpayers—has standing. *W. Orange-Cove II*, 176 S.W.3d at 774, 776. And as to the parents and school children in particular, it is surely enough of an injury that the children are forced to receive an education from an unconstitutional System. *See Barshop*, 925 S.W.2d at 626. These parents and children did not sue simply

¹⁶ Fort Bend ISD Br., at 58; Edgewood ISD Br., at 34.

because they live in Texas. They sued because they are the consumers of, and the ones most impacted by, the unconstitutional System.¹⁷

Second, even if parents, school children, and employers do not always possess standing to challenge the constitutionality of the System, it is false that the specific Efficiency Intervenors have not suffered a particularized injury:

- Andrea Smedshammer and Danessa Bolling testified at length about their injuries. Bo Smedshammer was unable to attend the schools of his choice because of the charter school cap and resulting waiting lists.¹⁸ Danessa Bolling's daughter was forced to attend a known, failing school district (North Forest ISD) based solely on her address.¹⁹
- Further, for the Bollings, parent and child were forced to live in separate homes so the child could attend a better school than the school she was arbitrarily zoned to that had rampant drug use, fighting, and general chaos.²⁰ If nothing else, surely a family is harmed when a parent and child are unable to live together. *Cf. In re J.F.C.*, 96 S.W.3d 256, 273 (Tex. 2002) (describing the preciousness of a parent having the right to raise her child). Ms. Bolling testified this had a negative impact on her family.²¹ Those are years that Ms. Bolling will never get back with her daughter.

¹⁷ See Appendix A.

¹⁸ 36RR23.

¹⁹ 40RR9-10.

²⁰ *Id.*

²¹ 40RR16.

- The Texas Association of Business also showed particularized injury.²² As this Court has recognized, the proper inquiry is whether the plaintiffs assert something more than they, as citizens, insist that the government follow the law. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 8 (Tex. 2011). The Association’s members are Texas employers, doing business throughout the State, who rely on the System to meet their need for an educated workforce. The Association sued on behalf of its members because business owners are negatively impacted by the insufficiently educated Texas workforce.²³ This is a particularized injury “distinct from that sustained by the public at large.” *Id.*

Moreover, it is only material that at least one Efficiency Intervenor has standing to challenge the constitutionality of the System. When several parties make the same claim for declaratory or injunctive relief, standing for one of the parties renders standing for the remainder immaterial. *Patel*, 2015 WL 3982687, at *5; *Barshop*, 925 S.W.2d at 627.

Finally, that it is School Districts who challenge the standing of families highlights the necessity of the families’ participation in the suit. It underscores that the School Districts are not aligned with the concerns and needs of school children

²² A group has associational standing if: (1) its members have standing to sue in their own right, (2) the interests the association seeks to protect are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993).

²³ The Association joined the lawsuit because of concerns about the education of the future workforce in Texas. Its membership includes 3,500 corporations and 200 chambers of commerce. Its members are not able in many cases to hire individuals who have the skills and academic success needed to succeed in the workforce. These concerns with the lack of an adequately educated workforce consistently rank in the top three issues when the members convene. The practical effect of this problem is that when businesses are not able to hire enough workers, they do not produce all the products or services they are called on for, and their profits are diminished. Texas business suffer actual, pecuniary damage as a result of the uneducated workforce. 38RR140-46.

and parents when bringing these suits. Individuals have standing precisely because their interests “might well diverge from those of their school districts.” *W. Orange-Cove II*, 176 S.W.3d at 776. The Court should not shut families (or employers) out of this debate by concluding they lack standing.

B. The Efficiency Intervenors’ injuries are traceable to the unconstitutional System.

The pleadings and evidence also showed that the Efficiency Intervenors’ injuries are traceable to the unconstitutional System. As mentioned, the School Districts set up a strawman, misrepresenting the Efficiency Intervenors’ case as only attacking specific statutes (like the charter school cap and educator requirements). Here they build on that strawman, arguing that the Efficiency Intervenors did not tie their injuries to these specific statutes. But of course, it is untrue that the Efficiency Intervenors tied their case to only particular statutes and regulations. The Efficiency Intervenors’ claims are tied to the unconstitutional System as a whole. Just as this Court has concluded that “school districts have standing to insist that [Texas Constitution, Article VII, Section 1] be obeyed,” parents and students (and employers), as consumers of the System, also have standing to insist the constitutional provision “be obeyed.” *W. Orange-Cove II*, 176 S.W.3d at 775. Further, Ms. Smedhammer, Ms. Bolling, and Texas Association of

Business President Bill Hammond testified how the inefficient System caused their injuries.²⁴

In the end, the School Districts claim the Efficiency Intervenors make “sweeping, largely baseless assertions,” using that exclamation to argue the Efficiency Intervenors lack standing to sue.²⁵ The Efficiency Intervenors do not, however, have to *prove* that the System is unconstitutional in order to have *standing* to challenge the constitutionality of the System. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008); *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). The Court should decline to adopt the School Districts’ effort to impose an improper standard.

C. A declaration that the System is unconstitutionally inefficient will redress the Efficiency Intervenors’ injuries.

The State claims that the Efficiency Intervenors lack standing because their claims are non-redressable in that the Legislature may not respond to the declaration the Efficiency Intervenors seek. In the face of the constitutional mandate, this argument is nonsense. The Legislature has the affirmative constitutional obligation to establish an efficient System that provides a “general diffusion of knowledge.” *Edgewood III*, 826 S.W.2d at 523. This Court has previously declared the school finance system unconstitutional, even though it was

²⁴ See pp. 21-22 supra.

²⁵ School Districts’ Combined Br., at 13.

unknown how the Legislature would respond. *See W. Orange-Cove II*, 176 S.W.3d at 798-99; *Edgewood III*, 826 S.W.2d at 523 & n.42; *Edgewood II*, 804 S.W.2d at 498-99 & n.16; *Edgewood I*, 777 S.W.2d at 399. Yet there is a reasonable inference that if the Court declares the System qualitatively inefficient, the Legislature will amend the Education Code to conform to this constitutional mandate. *Cramer v. Skinner*, 931 F.2d 1020, 1029 (5th Cir. 1991).

III. The Efficiency Intervenors' claims are not moot.

The Smedshammers' and Bollings' claims are also not moot. The School Districts argue that these parents' efficiency claims have become moot because the Smedshammers' child was eventually admitted to her preferred charter school and the school district (North Forest ISD) the Bollings' child would otherwise attend has been closed and annexed into Houston ISD. The Court should reject the School Districts' "gotcha" use of mootness to try to deprive school children and parents of a voice in this litigation.

True, a "controversy must exist between the parties at every stage of the legal proceedings." *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). "Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012). But even if Ms. Smedshammer's child now attends the charter school of the family's choice, and even if Ms. Bolling's child is now zoned into Houston

ISD, their children are still entitled to a constitutional education. Their claims are not moot so long as they are consumers of the System. The Efficiency Intervenors did not challenge only specific parts of the system. They instead sued because the System is qualitatively inefficient—and the parties to this suit continue to disagree on this issue. *See Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 441 (Tex. 1994) (because parents continued to disagree as to whether home school children should be exempt from compulsory attendance law, claims were not moot). It is especially troubling that the School Districts assert mootness for the Bollings when parent and child remain unable to live together because of the unconstitutional System.

Also since all of the Efficiency Intervenors seek the same relief, it would be irrelevant if two of the Intervenors' claims are considered moot. The School Districts have not raised the same challenge to the remaining Efficiency Intervenors. *See In re Autonation, Inc.*, 228 S.W.3d 663, 669 n.28 (Tex. 2007) (even though suit was moot as to one plaintiff, it was not to the other). Thus, even if the Court believes the Bollings' or Smedshammers' claims are moot, it should still reach the merits of the Efficiency Intervenors' case.

Finally, if nothing else, the parents' claims are capable of repetition yet evading review. This doctrine applies when the challenged action was too short in duration to be fully litigated before the action ceased or expired and a reasonable expectation exists that the same complaining party will be subjected to the same

action again. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). The doctrine is used to challenge unconstitutional acts performed by the government. *Gen. Land Office of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). Here, it is obvious that any parent suffering constitutional violations will try to find the best schooling options they can for their children, even during the pendency of the litigation. And for some families, children may graduate high school during the suit. As the instance case attests, school finance litigation often lasts years. Mootness cannot be used to circumvent the ability of parents to seek the best educational options for their children while challenging the unconstitutionality of the System.²⁶

IV. The Efficiency Intervenors do not propose a standard that would force the School Districts to “disprove” the Efficiency Intervenors’ qualitative efficiency claim before they can prove their own claims.

It is untrue that the Efficiency Intervenors maintain that the School Districts must “disprove” the Efficiency Intervenors’ claim to prove their own. To the contrary, the standard the Efficiency Intervenors propose is a logical one: for the School Districts to prove that the amount of funding they receive is inadequate, they should be required to show they are spending the money they do have with little waste. And to know whether School Districts are spending their money

²⁶ With no sense of irony, the School Districts raise this mootness argument despite that virtually every claim they brought was expressly addressed by legislative action in the 2013 legislative session and thus rendered moot.

efficiently, it is necessary to demonstrate the cost of educating a child and account for expenses through tying them to educational results. This was not done.²⁷

Further, it is inaccurate that the Efficiency Intervenors believe that the System can never be financially unconstitutional. Throughout this case, the Efficiency Intervenors have asserted that the School Districts may (or may not) need more money.²⁸ The Efficiency Intervenors' point is that there cannot be a determination of the financial efficiency of the System (which the Court has held is implicit in the constitutional mandate) without first determining whether the System is qualitatively efficient (which is explicit). *See Edgewood IV*, 917 S.W.2d at 729. And it is necessary for the System to first rid itself of qualitative inefficiencies so a proper assessment of financial need can be made. As in prior litigation, the School Districts want this Court to believe that the only variable to productivity in education is money—and they do not want the Court to question whether their money is being spent with more than “little waste.” *See W. Orange-Cove II*, 176 S.W.3d at 793. But numerous experts testified, an efficient use of funds is critical to producing effective results.²⁹

²⁷ Hurley Deposition, Ex.8145 & Report, Ex. 1; Ex.8000.

²⁸ In fact, during cross-examination of Dr. Kay Waggoner the Efficiency Intervenors established that Richardson ISD, the district for which she is the superintendent, is a highly efficient district.

²⁹ *See* 37RR (Hanushek testimony) and Ex.1001 & Ex.8001.

V. The Court should reverse and render for the Efficiency Intervenors on the merits and declare that the System is unconstitutionally inefficient.

The evidence at trial conclusively proved that the System is constitutionally inefficient because it (1) is not productive of results and (2) has massive waste. To the extent any trial court findings are binding on this Court in this case, the trial court correctly found that the System is not productive of results.³⁰ The trial court also correctly found that the State employs arbitrary and outdated formulas for determining School District monetary distributions that are incontestably wasteful.³¹ These findings alone destroy the trial court’s attempt to exclude, by strategic fact findings, recovery by the Efficiency Intervenors. Moreover, as discussed below, the trial court’s “findings” miss the point of the Efficiency Intervenors’ case and are not material to whether the System includes more than “little waste.”³² The System is the opposite of efficient: in addition to billions of dollars allocated inefficiently through arbitrary formulas, it is subject to repeated self-litigation, riddled with expensive state-imposed mandates that do not improve the quality of education, bureaucratic and uncompetitive, and imposes artificial

³⁰ The trial court found that “the Texas educational system has fallen short of accomplishing a general diffusion of knowledge.” 12CR207, *see* FOF 126-208.

³¹ FOF 655.

³² *See* FOF 1463-89. Although the Efficiency Intervenors presented six days of trial testimony, including from noted and highly qualified witnesses, plus substantive cross-examination of almost every witness, the trial court brushed over the Efficiency Intervenors’ case. The trial court made only 27 findings and three conclusions on the Efficiency Intervenors’ claims. *See id*; COL 58-60. The court never specifically addressed the “with little waste” argument made and proved by the Efficiency Intervenors at trial.

caps on more efficient operators. A system like this is, as a matter of law, inherently and unconstitutionally inefficient.

The School Districts try to create another strawman by contending that the Efficiency Intervenors should have challenged in their opening brief each of the trial court's discrete findings of fact and conclusions of law (which are comprised of 1,508 findings and 118 conclusions).³³ This misstates the standard of review. The question of whether the statutory provisions that create the System are arbitrary, and therefore unconstitutional, is a question of law that is subject to de novo review. *W. Orange-Cove II*, 176 S.W.3d at 785. If an issue turns on disputed facts, the Court defers to the district court's findings of fact. *Id.* But in ultimately deciding the constitutional issues, the trial court's findings have a limited role. *Id.* Instead, the Court "must focus on the entire record to determine whether the Legislature has exceeded constitutional limitations." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995); *Barshop*, 925 S.W.2d at 625.

In entering the findings and conclusions and rendering judgment against the Efficiency Intervenors, the trial court did so through a false lens. First, the trial court treated the Efficiency Intervenors' claim as more in the nature of a complaint

³³ The Efficiency Intervenors did challenge many of the court's findings and conclusions in the trial court, and in their opening brief made clear what parts of the court's findings or conclusions, and overall judgment, the Efficiency Intervenors' believe were in error and unsupported by the evidence.

that the Legislature had not enacted preferred education policies.³⁴ Second, and more importantly, the trial court chose to miss the point of the Efficiency Intervenors' case. The Efficiency Intervenors asked the court, based on qualitative inefficiency, to declare the System as a whole unconstitutionally inefficient. By example, the Efficiency Intervenors refer to particular statutes that cause the System to be arbitrary and unconstitutional (though based on the evidence, the trial court could have properly declared any of these particular statutes unconstitutional impediments to a constitutional educational system). Yet the trial court made no finding and refused to conclude whether the System as a whole is qualitatively inefficient. Instead the trial court added findings addressing only specific parts of the System (like the charter school cap and provisions in Chapter 21) and concluding each of these things, standing alone, did not render the System unconstitutionally inefficient.³⁵

Following the trial court's lead, the State now contends that each aspect of the System challenged by the Efficiency Intervenors is not arbitrary and thus not unconstitutional. But this Court has never held that it is necessary for a party to prove that each particular statute in the Education Code is arbitrary to prevail on an efficiency challenge. To the contrary, the Court determines whether the System is *systemically* inefficient. And that is a question of law. *W. Orange-Cove II*, 176

³⁴ FOF 1464-65.

³⁵ See FOF 1463-89; COL 58-60.

S.W.3d at 785, 790. The Efficiency Intervenors now ask the Court to review the entire record through the proper lens and determine that the entire *System* is unconstitutionally inefficient as a matter of law³⁶—as opposed to just whether School Districts waste money. *See Garcia*, 893 S.W.2d at 520.

Illustrating this distinction, in finding 177 the trial court found: “There is no credible evidence that the *ISD Plaintiffs* are systemically misallocating the resources they have now.”³⁷ And in finding 655 the trial court found: “The state and Intervenors failed to demonstrate significant or systemic wasteful spending by *Texas school districts* sufficient to refute the showing of a need for additional resources to meet the State’s higher performance standards.”³⁸ But the dichotomy is false: the Efficiency Intervenors did not sue the School Districts. It is the State that has the constitutional duty, and it is the State against which the Efficiency Intervenors make their claims. While the Intervenors recognize that the System is comprised of school districts, the School Districts operate under the statutes and regulations created by the State. The districts are bound by the System created by

³⁶ The School Districts argue that the Efficiency Intervenors did not prove their claim in part because they did not offer evidence of the Legislature’s intent in passing statutes that create an inefficient system. But the most noble intent in the world will not save the System if it violates the Constitution. Further, as noted in the Efficiency Intervenors’ opening brief, the System proves itself inefficient.

³⁷ FOF 177 (emphasis added).

³⁸ FOF 655 (emphasis added).

the State. The State forces the School Districts to operate under a System that creates or otherwise allows systemic wasteful spending.

In addition to examples pointed out in the Efficiency Intervenors Appellants' Brief, following are uncontested examples of this systemic waste (which in many instances were proffered by the School Districts or State):

- The cost of education index has not been updated in over 25 years. It was uncontested that this multiplier is outdated, irrational, and flawed. This index is the first multiplier through which all WADA funding passes. As a mathematical certainty, it leads to the misallocation of *billions* of dollars.³⁹
- The entire system of determining WADA is flawed. Each school district is constrained to the funding allocated to it through a WADA analysis. If WADA is flawed, then the funding to each school district is misallocated. The School Districts' expert Lynn Moak testified: "There are a series of weights and adjustments that go into the calculation of WADA. All of them are out of date and should be restudied and either confirmed or modified."⁴⁰ Moak agreed that misallocation of funding caused by these outdated formulas could lead to the System being constitutionally inefficient.⁴¹ Echoing Moak's concerns, Dr. Wayne Pierce testified: "we have really an irrational system. It's inefficient. But it doesn't just stop there. It has layers of irrational funding implications all the way up and down that have been cobbled along over time."⁴² These problems of waste do not originate with the School Districts, but with the State.
- The monopolistic nature of the System is inherently wasteful and "contrary to the genius of a free government." TEX. CONST. art. I, § 26. The State's own expert, Dr. Grover Whitehurst, testified that any

³⁹ 7RR134-135; Ex.6322, p.56. Ex.1328, p.8; 6RR209-12; FOF 598 (\$2.36 billion); 7RR134-35; Ex.6322, p.56; Ex.1328, p.8; 6RR209-12.

⁴⁰ 54RR166.

⁴¹ 54RR171.

⁴² 58RR126.

system will be more productive if it is subject to competition.⁴³ Dr. Jacob Vigdor, the School Districts' expert, testified about the monopsonistic⁴⁴ characteristics of the System that drive down teacher pay and quality.⁴⁵ According to Vigdor, this results in a decline in student achievement—contrary to the very goal of the System.⁴⁶

- In a System where the largest budget item is teacher salaries, these salary dollars are misallocated in that the best teachers are underpaid and the worst teachers are overpaid.⁴⁷ This misallocation was heightened by recent state-wide teacher pay raises, where every teacher in the State received a raise no matter their level of proficiency or effectiveness.⁴⁸

To be clear, again, the Efficiency Intervenors' claim is not based on whether any particular State mandate on School Districts is wasteful. Moreover, these examples are not aimed at proving any malfeasance by the School Districts. These examples are presented as evidence of major, systemic waste caused or allowed by the State that can be measured in *billions* of dollars. The trial court found there was no evidence of wasteful spending by the districts, but wasteful spending in the System, as caused by the State, is clear. The trial court's findings of fact miss the point and are immaterial on the real issue.

The trial court correctly found that the System is not providing a general diffusion of knowledge, i.e., it is not producing results. Coupled with the

⁴³ 26RR241.

⁴⁴ A “monopsony” is simply the opposite of a monopoly. In a monopoly there is one seller and many buyers. In a monopsony, there are many sellers and few buyers.

⁴⁵ 24RR63.

⁴⁶ *Id.*

⁴⁷ 37RR80-82.

⁴⁸ 37RR83.

overwhelming evidence showing vast systemic waste, the Efficiency Intervenors should prevail on the merits of their claim that the system is not constitutionally qualitatively efficient.

VI. The Court should conclude that the Efficiency Intervenors are entitled to attorney’s fees.

As noted, the Efficiency Intervenors are pioneers in the school finance litigation. For decades, this Court has recognized the need for a legal challenge highlighting “improvements in education which could be realized by eliminating the gross waste in the bureaucratic administration of the system.” *Edgewood III*, 826 S.W.2d at 524. As previously discussed, the Court has invited the voice of school children and their parents—the consumers of the System who hold the constitutional right to an efficient education system and whose interests are not necessarily aligned with the School Districts (as demonstrated in this case). The Efficiency Intervenors accepted the Court’s challenge and, for the first time, brought that challenge and that voice.

As demonstrated by their responses to this Court, both the State and School Districts join, vehemently, to fight to silence the voice of these education consumers. Despite their adamant opposition, in this lawsuit, the Efficiency Intervenors:

- highlighted countless examples of gross waste in the System that both the State and School Districts do not want to confront;

- established that a claim for qualitative efficiency—that the System is not productive of results with little waste—is a viable cause of action under Texas Constitution, Article VII, Section 1; and
- showed that, at a minimum, for a school district to prove that the System’s financing is unconstitutional, the district should be required to show that it is using the money it currently has in a cost effective manner and is nonetheless unable to provide a general diffusion of knowledge.

These are significant contributions, essential to this litigation, that demonstrate the trial court abused its discretion in concluding it was “just and equitable” to deny Efficiency Intervenors their (undisputedly) reasonable and necessary attorney’s fees. *See Neeley v. W. Orange-Cove*, 228 S.W.3d 864, 868 (Tex. App.—Austin 2007, pet. denied) (concluding that awarding attorney’s fees was equitable and just when parties in school finance litigation “made significant contributions” and “were essential to the litigation as a whole”).

The State offers no real response to this argument, instead arguing only that the Efficiency Intervenors should not be awarded attorney’s fees because they did not prevail at trial. Yet the very cases cited by the State make clear that an award of attorney’s fees in a declaratory judgment action “is not dependent on a finding that a party ‘substantially prevailed.’” *See Barshop*, 925 S.W.2d at 637.

The Efficiency Intervenors’ significant contributions to this litigation—and the fact that they answered this Court’s invitation to challenge the gross waste in the System—should not be disregarded. As a member of this Court recognized,

past school finance trials have “focused too much on the priorities of school districts, and not enough on the priorities of school families.” *W. Orange-Cove II*, 176 S.W.3d at 802 (Brister, J., dissenting). The Court should also be mindful that virtually no Texas family could afford the astronomical fees required to participate in this type of multi-year lawsuit. *See id.* at 807. If the Court slams the door on the Efficiency Intervenors’ ability to recover attorney’s fees—despite their pioneering efforts and significant contributions—that will almost certainly ensure that the voice of Texas families will be silenced. Future school finance litigation will again focus on the needs of School Districts, rather than the needs of school children, without the State and School Districts being required to address, let alone fix, the System’s gross inefficiencies.

Whether or not this Court concludes that the Efficiency Intervenors should prevail on the merits of their constitutional claim, the Court should hold that the trial court abused its discretion by concluding it is “equitable and just” to not award Efficiency Intervenors attorney’s fees. The Court should then either render judgment for the reasonable and necessary fees conclusively proved at trial or, alternatively, remand for further proceedings by the trial court.

PRAYER

The Efficiency Intervenors request that the Court:

- (1) reverse the trial court's judgment against the Efficiency Intervenors on their efficiency claim and render judgment for them on this claim;
- (2) reverse the trial court's judgment declining to award the Efficiency Intervenors' attorney's fees and render judgment for the reasonable and necessary fees proven at trial and for court costs or, alternatively, remand for a determination of the amount of reasonable and necessary fees; and
- (3) grant any other relief to which the Efficiency Intervenors may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, the Efficiency Intervenors certify that this Reply Brief (when excluding the sections excluded in Texas Rule of Appellate Procedure 9.4(i)(1)) contains 9,471 words.

/s/ Craig Enoch
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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2015, the foregoing Reply Brief of Efficiency Intervenors was served via electronic service on the following:

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Craig T. Enoch

APPENDIX A

THE TEXAS TAXPAYER & STUDENT	§	IN THE DISTRICT COURT
FAIRNESS COALITION, et al.	§	
	§	
Plaintiffs	§	
	§	
	§	
vs.	§	200 th JUDICIAL DISTRICT
	§	
MICHAEL WILLIAMS, COMMISSIONER	§	
OF EDUCATION, IN HIS OFFICIAL	§	
CAPACITY, et al.	§	
	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

THIRD AMENDED PLEA IN INTERVENTION
OF THE EFFICIENCY INTERVENORS

TO THE HONORABLE JUDGE OF SAID COURT:

The Texas Constitution guarantees an “efficient system of public free schools.”¹ The Texas Supreme Court² has stated: “While we considered the financial component of efficiency to be implicit in the Constitution's mandate, the qualitative component is explicit.” *Edgewood IV*, 917 S.W.2d at 729. That Court has also stated: “[A]lthough the issues brought before us in *Edgewood I*, *Edgewood II*, and . . . *Edgewood III*, have all been limited to the financing of the public schools, as opposed to other aspects of their operation, *money is not the only issue, nor is more money the only solution.*” *West*

¹ Texas Constitution, article VII, section 1 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”)

² The Texas Supreme Court decisions discussed herein will be referred to as follows: *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (“*Edgewood I*”); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (“*Edgewood II*”); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (“*Edgewood III*”); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (“*Edgewood IV*”); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (“*West Orange-Cove I*”); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 793 (Tex. 2005) (“*West Orange-Cove II*”).

Orange-Cove II, 176 S.W.3d at 793 (emphasis added). Throughout the school finance cases, the Court, noting it only has the power to rule on issues brought before it by the parties, has routinely called on the Texas Legislature to consider more fundamental, structural change to the State’s primary education system.³ Finally, the Court has written: “Perhaps . . . public education *could benefit from more competition, but the parties have not raised this argument . . .*” *Id.* (emphasis added).

Parents, students, taxpayers, and/or business entities Joyce Coleman, Danessa Bolling, Lee and Allena Beall, Joel and Andrea Smedshammer, Darlene Menn, Texans for Real Efficiency and Equity in Education, and Texas Association of Business file this Second Amended Plea in Intervention and show:

I. PARTIES AND STANDING

1. Intervenor are Joyce Coleman, individually and as next friend of her minor children; Danessa Bolling, individually, and as next friend of her minor child; Lee Beall and Allena Beall, individually, and as next friends of their minor children; Joel Smedshammer and Andrea Smedshammer, individually, and as next friends of their minor children; Darlene Menn, individually and as next friend of her minor child, Texans for Real Efficiency and Equity in Education, a non-profit Texas corporation, and Texas Association of Business (collectively “Efficiency Intervenors”).

2. The Efficiency Intervenors are parents, students, taxpayers, and/or business entities. The Efficiency Intervenors have a significant interest in this litigation, as article VII, section 1 of the Texas Constitution guarantees an “efficient system of

³ *See supra*, note 2.

public free schools.”⁴ While the above-styled consolidated lawsuit challenges, *inter alia*, adequacy, suitability and financial efficiency of the current system of school finance, the Efficiency Intervenors’ claims regarding lack of *qualitative* efficiency of the system of public free schools would be prejudiced if this litigation were to proceed without their involvement.⁵ Most recently, in *West Orange-Cove II*, the Texas Supreme Court, citing cases all the way back to *Edgewood I*, summed it up succinctly: “More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient.” *West Orange-Cove II*, 176 S.W.3d at 793 (citing *Edgewood I*, 777 S.W.2d at 397).

3. Judicial economy and judicial precedent demand that the claims of the Efficiency Intervenors be litigated along with the above-styled lawsuit. As acknowledged in Plaintiffs’ Original Petition, “There are two aspects to the efficiency requirement. ***First***, the system must be ‘effective or productive of results’” *See* Plaintiffs’

⁴ TEX. CONST., art. VII, § 1.

⁵ “While we considered the financial component of efficiency to be implicit in the Constitution’s mandate, the *qualitative* component is *explicit*.” *Edgewood IV* at 729 (emphasis added). *Edgewood IV* also drew the critical distinction between equity and efficiency:

The district court viewed efficiency as synonymous with equity, meaning that districts must have substantially equal revenue for substantially equal tax effort at all levels of funding. This interpretation ignores our holding in *Edgewood II* that unequalized local supplementation is not constitutionally prohibited. The effect of this ‘equity at all levels’ theory of efficiency is to ‘level-down’ the quality of our public school system, a consequence which is universally regarded as undesirable from an educational perspective. Under this theory, it would be constitutional for the Legislature to limit all districts to a funding level of \$500 per student as long as there was equal access to this \$500 per student, even if \$3500 per student were required for a general diffusion of knowledge. Neither the Constitution nor our previous *Edgewood* decisions warrant such an interpretation. Rather, the question before us is whether the financing system established by Senate Bill 7 meets the financial and qualitative standards of article VII, section 1.

Id. at 730.

Original Petition at 14 (emphasis added). Additionally, the Texas Supreme Court has clearly recognized, “*money is not the only issue.*” *West Orange-Cove II*, 176 S.W.3d at 793 (citing *Edgewood III*, 826 S.W.2d at 524). In fact, the Texas Supreme Court, as set out in more detail in paragraph 8 below, has consistently called for structural change in the system of public free schools in Texas. The issues in the underlying lawsuit and this intervention are interrelated such that separate litigation would result in substantial duplicative efforts, both on the part of this Court, and the parties. To put it colloquially, the claims of the underlying consolidated lawsuit and the Efficiency Intervenors are collectively arguing both sides of the same coin.

II. THE TEXAS SUPREME COURT HAS REPEATEDLY CALLED FOR *QUALITATIVE* CHANGE

4. The stated purpose of article VII, section 1 of the Texas Constitution is the “preservation of the liberties and rights of the people” of Texas. Since a “general diffusion of knowledge” was deemed essential to that ultimate goal, the founders drafted language that required the legislature to “make suitable provisions for the support and maintenance of an efficient system of public free schools.” In fact, the Texas Supreme Court stated in *Edgewood I* that “article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools.” *Edgewood I*, 777 S.W.2d at 394. In a free society it is important we remember that the founder’s ultimate intent was for the “preservation of liberties and rights of the people,” and that a “general diffusion of knowledge” is essential to that end.⁶

⁶ TEX. CONST., art. VII, § 1.

5. The Texas school finance system has undergone recurring litigation based in part on article VII, section 1 of the Texas Constitution since the initial *Edgewood I* ruling in the 1980s. The Texas Supreme Court has consistently reiterated the explanation that “‘*efficient*’ conveys the meaning of *effective or productive of results and connotes the use of resources so as to produce results with little waste.*” *Edgewood I*, 777 S.W.2d at 395 (emphasis added).

6. In the last months of 2011, four lawsuits were filed by hundreds of school districts in Texas.⁷ So, school finance is again before the courts. And yet once again, even though repeatedly requested by Texas’ highest court, the issue of *qualitative* efficiency is absent from those pleadings.⁸ More money may or may not be required for an efficient system of public free schools. But **without determining if the system itself is qualitatively efficient, the question of more money cannot be answered accurately.**

7. In *West Orange-Cove II*, the Texas Supreme Court stated:

In *Edgewood III*, we explained that ‘although the issues brought before us in *Edgewood I*, *Edgewood II*, and now *Edgewood III*, have all been limited to the financing of the public schools, as opposed to other aspects of their operation, *money is not the only issue, nor is more money the only solution*’

West Orange-Cove II, 176 S.W.3d at 793 (emphasis added). The Court further recognized that the issue of efficiency, as defined traditionally, has not been litigated: “**We have not been called upon to consider, for example, the improvements in education which could be realized by eliminating gross wastes in the bureaucratic administration of the system.**” *Id.*

⁷ *Tex. Taxpayer & Student Fairness Coalition v. Scott*, No. D-1-GN-11-003130(200th Dist. Ct., Travis County, Tex.); *Edgewood Indep. Sch. Dist. v. Scott.*, No. D-1-GV-11-001972 (345th Dist. Ct., Travis County, Tex.); *Calhoun County Indep. Sch. Dist. v. Scott.*, No. D-1-GV-11-001917 (419th Dist. Ct., Travis County, Tex.); *Fort Bend Indep. Sch. Dist. v. Scott.*, No. D-1-GV-11-002028 (200th Dist. Ct., Travis County, Tex.).

⁸ “While we considered the financial component of efficiency to be implicit in the Constitution's mandate, the *qualitative* component is *explicit.*” *Edgewood IV*, 917 S.W.3d at 719 (emphasis added).

(citing *Edgewood III*, 826 S.W.2d at 524). The Court also recognized that, “It is true that the plaintiffs and intervenors here have focused on funding . . . [we] cannot dictate how the parties present their case or reject their contentions **simply because we would prefer to address others.**” *Id.* (emphasis added). Lastly, the Court stated, “Perhaps, as the dissent contends, public education **could benefit from more competition, but the parties have not raised this argument**, and therefore we do not address it.” *Id.* (emphasis added).

8. Throughout the course of past school finance litigation, the Texas Supreme Court has consistently called for structural change in the system of public free schools:

- ***Edgewood I*** — The Court stated that “efficient” does not just mean equity as some may wish to contend. Instead, “[e]fficient’ conveys the meaning of **effective or productive of results** and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed over time.” *Edgewood I*, 777 S.W.2d at 395 (emphasis added). The Court held that “the state’s school financing system is neither financially efficient nor efficient in the sense of providing for a ‘general diffusion of knowledge statewide’” *Id.* at 397.
- ***Edgewood III*** — Once again calling for structural change, the Court stated: “In *Edgewood I*, we stressed, **‘the system itself must be changed.’** . . . As long as our public school system consists of variations on the same theme, the problems inherent in the system cannot be expected to suddenly vanish.” *Edgewood III*, 826 S.W.2d at 524. The Court went on to explain, “We are constrained by the arguments raised by the parties to address only issues of school finance. We have not been called upon to consider, for example, the improvements in education which could be realized by eliminating gross wastes in the bureaucratic administration of the system. The Legislature is not so restricted.” *Id.* (emphasis added).
- ***Edgewood IV*** — The Court stated that traditional “qualitative” efficiency is explicitly demanded by the Constitution: “While we considered the financial component of efficiency to be implicit in the Constitution’s mandate, **the qualitative component is explicit.**” *Edgewood IV*, 917 S.W.2d at 729 (emphasis added). The Court reiterated that although previous rulings focused on equity, the Constitutional standard is higher: “[A]t the time *Edgewood I* was decided, we did not then decide whether the State had satisfied its constitutional duty to suitably provide for a

general diffusion of knowledge. We focused instead on the meaning of financial efficiency.” *Id.*

- ***West Orange-Cove II*** — Delivering the strongest call for traditional “qualitative” efficiency, the Court stated: “Efficiency implicates funding access issues, but it is certainly not limited to those issues.” *West Orange-Cove II*, 176 S.W.3d at 793. Alluding to the risk of perpetual litigation without real structural reform, the Court recognized that “[p]ouring more money into the system may forestall those challenges, but only for a time. **They will repeat until the system is overhauled.**” *Id.* at 754. The Court referred to deep divisions in drafting of the Constitution: “The delegates to the Constitutional Convention of 1875 were deeply divided over how best to provide for a general diffusion of knowledge, finally adopting article VII, section 1 by a vote of 55 to 25. No subject was more controversial or more extensively debated.” *Id.* at 785. The Court agreed with the state regarding the focus on results: “The State defendants contend that the district court focused too much on ‘inputs’ to the public education system—that is, available resources. They argue that whether a general diffusion of knowledge has been accomplished depends entirely on ‘outputs’—the results of the educational process measured in student achievement. We agree that the constitutional standard is plainly result-oriented.” *Id.* at 788 (emphasis added).

Reform is required to fulfill the constitutional standards: “There is substantial evidence, which again the district court credited, that the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change take the form of increased funding, **improved efficiencies, or better methods of education.**” *Id.* at 790 (emphasis added).

9. Ongoing school finance litigation in Texas may never end unless this Court considers the qualitative efficiency issue and examines the underlying need for structural, qualitative efficiency changes called for explicitly and repeatedly by Texas Supreme Court.

III. CURRENT INEFFICIENCIES IN THE SYSTEM

10. Ultimately, as set out in the Remedies requested below, **the Efficiency Intervenor** request the Court to rule that the entire system of public free schools is **inefficient and therefore unconstitutional**. A ruling of this breadth in this arena is not

without precedent.⁹ Intervenors will show that the system is unconstitutionally inefficient due to a number of current problems, considered individually or collectively. These problems include, but are not limited to, the following general and specific issues:

11. The current statutory cap on the number of charter schools breeds inefficiency in the system of public free schools. *See* TEX. EDUC. CODE §12.101(b). The cap of 215 prevents new charter operators from entering the Texas marketplace and providing students and parents more options. In fact, Defendant Commissioner of Education Robert Scott has reportedly sought ways to circumvent this arbitrary cap with some success. An estimated 56,000 students are on waiting lists across the state, showing there is more demand than supply for charter schools. It is probable that even more students would apply if they thought that they had a chance to win the attendance lottery for charter schools. Placing an arbitrary, artificial cap on charter schools reduces the potential for both charter school operators and students, thereby restricting both supply and demand, and is therefore inefficient.¹⁰ Current statutory restrictions on the number of charter schools restrict options for both providers and consumers thereby restricting the “liberties and rights of the people.” These restrictions violate both the “efficiency” requirement and the “liberty and rights” clause, which is the explicit purpose of article VII, section 1 of the Texas Constitution. Senate Bill 2, passed during the 83rd legislative

⁹ *Edgewood I*, 777 S.W.2d at 397 (“We hold that the state’s school finance system is neither financially efficient nor efficient in the sense of providing for a ‘general diffusion of knowledge’ statewide, and therefore it violates article VII, section 1 of the Texas Constitution.”); *Edgewood II*, 804 S.W.2d at 498 (“[W]e therefore hold as a matter of law that the public school finance system continues to violate article VII, section I of the Constitution.”); *Edgewood III*, 826 S.W.2d at 515 (“We therefore conclude, as we have in both those prior school funding decisions, that the constitutional defects we have found pertain not to individual statutory provisions but to the *scheme as a whole*. It is the system that is invalid, and not merely a few of its components.”) (emphasis added).

¹⁰ These inefficiencies were illustrated in the recent documentary film, “Waiting for Superman.” *See* waitingforsuperman.com.

session provides in part for an increase in the number of charter licenses by 15 each year until a total of 305 charter licenses is reached. Based on uncontroverted evidence during the trial of this matter, this new legislation barely scratches the surface of the true demand for charter schools in Texas. Senate Bill 376 created an unfunded mandate on charter schools to provide free breakfast to students who don't qualify for free breakfast.

12. The system proves itself to be inefficient. One of the primary and most important differences between traditional public schools and charter schools (which together constitute 100% of the system of public *free* schools) is that charters operate under far fewer statutory and regulatory burdens. Charter schools provide for a “suitable” system of public free schools, and evidence will prove that traditional public schools could realize enormous savings to the system if allowed to operate under the same rules and regulations as charter schools. Thus, the waste caused by special interest-driven regulatory burdens on traditional public schools has rendered the entire system inefficient. If the charter system (the article VII, section 1 “system”) is “suitable” and “efficient”—i.e., constitutional—every district should be allowed to operate under those more efficient regulatory burdens. Such a system would be less arbitrary and more efficient.

13. The Commissioner has been delegated the duty to develop systems to rate financial accountability. *See* TEX. EDUC. CODE § 39.082(a). Little expertise is available within the Texas Education Agency to carry out this duty. The authority for the evaluation of a more than \$50 billion per year system should not be in the control of the same governmental branch that controls the funds. Efficiency requires that such evaluation should be conducted by an independent third party. No successful—or

efficient—enterprise would spend over \$50 billion per year without assurance that the funds were to be allocated in an effective manner in the first place. Furthermore, successful enterprises assure efficiency by also conducting unbiased third-party evaluations. **There currently exists no financial accountability information that would demonstrate cost effectiveness of the Texas Education Agency’s policies, processes, or the productivity of its financial decisions.** Therefore, it is literally *impossible* for the legislature or other current managers of the school system in Texas to take the position, in cost-effective economic terms, that *any particular level of funding* is necessary for *efficiency*. Even the question of allocation of funding among districts cannot be determined in an efficient manner without a more substantive and comprehensive system of financial accountability. **The lack of any system of measuring “productivity” or “cost effectiveness” of the expenditures of public funds is a clear constitutional failure of public policy.** “To determine whether the system as a whole is providing for a general diffusion of knowledge, it is useful to consider how funding levels and *mechanisms* relate to better-educated students.” *West Orange-Cove II*, 176 S.W.3d at 788 (emphasis added).

14. The Cost of Education Index (“CEI”) found in TEX. EDUC. CODE § 42.102(a) and Texas Administrative Code, Title 19, §203.10 provide that the basic allotment for each district is adjusted to reflect the geographic variation in known resource costs and costs of education. But this index has not been updated since 1991. Texas has seen significant economic changes since 1991. At that time, Texas was just starting to recover from the “oil bust” and the economy was diversifying. Plaintiffs in this lawsuit also complain about this issue, stating: “Some of these weights and adjustments

have not been reviewed or updated since before the fall of the Berlin Wall.” Plaintiffs’ Original Petition at 21. Research indicates that the state could save billions by aligning the CEI with today’s actual cost differentials. “Because the State has not made any effort to ensure that the existing weights and adjustments actually are related to the true cost of meeting the State’s own rising performance requirements for all students and all districts, the weights and adjustments now are inadequate, inequitable, *arbitrary, and inefficient.*” *Id.* (emphasis added).

15. Texas Education Code, Chapter 21 makes the system inefficient and therefore unconstitutional. Personnel decisions are seldom designed in the best interests of students. Current laws make it difficult to hire and efficiently compensate the most effective teachers and remove poor performing teachers. Districts are burdened with arbitrary and inefficient rules and regulations in dealing with personnel. Chapter 21 in its entirety drives millions of dollars in waste every year. A few specific examples include:

- The minimum salary schedule and state-mandated teacher salary grants, as set out in TEX. EDUC. CODE § 21.402 *et seq* set the standard for paying teachers based primarily on tenure, plus arbitrary across-the-board pay raises determined at the state level. This causes vast inefficiencies in the system as payroll is the largest single factor in school budgets. As it stands now, ineffective teachers are paid the same as similarly tenured effective teachers. Efficiency requires that teachers, as in every other profession, be compensated based on need, productivity, and performance.
- The teacher certification process as set out in TEX. EDUC. CODE § 21.031 makes the system inefficient. Today’s strict certification laws are designed to protect the profession rather than the interests of the students. Because the state, not the local community, controls all aspects of the certification of teachers, local authorities have limited authority to hire those who they believe can do the most effective job.
- A school district has little flexibility in the length of teacher contracts – the minimum contract, as set out in TEX. EDUC. CODE § 21.401, is 10-months. This is inefficient. Local schools must have the flexibility to hire teachers on terms that correspond to the current needs of the district, and more importantly, the students.

- The appeal process for non-renewal of teacher contracts as set out in TEX. EDUC. CODE §§ 21.207, 21.209, 21.251, 21.252, 21.253, 21.254, 21.255, 21.256, 21.257, 21.258, 21.259, 21.301, 21.302, 21.304, 21.3041, and 21.307, and corresponding regulations in Texas Administrative Code, Chapter 157, subchapters A and D, is inefficient.
- It is inefficient to notify a teacher during the school year that the teacher's contract will not be renewed. As it stands now, TEX. EDUC. CODE § 21.206 requires a teacher be notified "[n]ot later than the 10th day before the last day of instruction."
- TEX. EDUC. CODE § 21.057 and 21.355 require school districts to notify parents of a teacher that is not "certified," but if a teacher is not effective, there is no mechanism to report this to parents. In fact, teacher evaluations are deemed confidential. Imagine if the health department's evaluation of the cleanliness of a restaurant were made confidential by a governing body. Systems that withhold important information from consumers are inherently inefficient.
- The teacher appraisal process as set out in TEX. EDUC. CODE § 21.351 *et seq* is inefficient as the process is inherently flawed. "In many failing schools with dismal student achievement rates, the vast majority of teachers receive the highest possible rating on their evaluations. If our evaluation systems put students first, this dissonance would be impossible." www.studentsfirst.org. Moreover, the current appraisal system does not provide a meaningful measure of teacher performance that includes a value-added component.

16. Related to the charter school issue is that of Home-Rule School District Charters. *See* TEX. EDUC. CODE § 12.011-12.013. Home-Rule Charters were established in 1995. Home-Rule Charters are an explicit acknowledgment by the legislature that greater local freedom and parental control are needed for an efficient system. Due to special interest pressures, however, twenty-three very restrictive regulations were added to this class of schools. *See* TEX. EDUC. CODE § 12.013(b)(3)(F)-(S). These restrictions, in effect, took away the very benefit of converting to a Home-Rule Charter school and are so restraining that the number of Home-Rule Charter schools today is *zero*. Removing the statutory (special interest-driven) mandates could make this program more efficient.

17. The Public Education Grant Program is another series of statutes that started with good intentions, but was watered-down in subsequent code sections so that it has little or no effect on the efficiency of the system. Under TEX. EDUC. CODE § 29.201, an “eligible” student may attend a local public school or, through the use of a public education grant, may attend “any other district chosen by the student’s parent.” This section, by itself, provides the power for parents to flee an under-performing school to a school in “any other district.” The problem lies mainly with the receiving district’s ability to arbitrarily reject an attempt to transfer, without cause or any ability to appeal. So, what the legislature gave in TEX. EDUC. CODE § 29.201 (an explicit admission that the power of parental choice is important) was taken away in TEX. EDUC. CODE § 29.203(d) (giving districts the ultimate power rather than parents). For every rejection by a receiving school, a child is left in a severely underperforming school—this is the *real inequity* in the system. *Student* equity, not just equity for school districts, is the key to an efficient system that will preserve the liberties and rights of the people.

18. There are also inefficiencies in the system not tied directly to any specific statute or regulation. One of the currently filed lawsuits describes system-wide problems with such things as the elimination of teaching positions, reduction of career and counseling services, restrictions in curriculum, and applications for class size waivers. See Plaintiffs’ Original Petition, paragraph 43, *Calhoun County Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-001917 (419th Dist. Ct., Travis County, Tex. Dec. 9, 2011). The following issues are known and studied problems in the system of public free schools that have yet been addressed:

- The current system is inconsistent with the original intent of the 1876 Constitution. In the years following the adoption of the 1876 Constitution,

Texas had a mixed system of public free schools that included unlimited community schools operating alongside public schools. Community schools could be formed at will by any group of parents. The parents could form the school, hire the teacher, and allow any student to attend regardless of geographic residence. Similar to today's charter schools, they were free from overreaching state regulations. But unlike today's charter schools, the public was allowed to create as many community schools as needed or desired. "Concern for efficiency in the education article in the Texas Constitution arose from a basic Texan sense of frugality, distrust of opulence, and a *fear of government overreaching and excessive spending.*" Billy D. Walker, Intent of the Framers in the Education Provisions of the Texas Constitution of 1876, 10 REV. OF LITIG. 625, 661, n.289-90 (1991) (*cited in Edgewood III*, 826 S.W.2d at 524 (Cornyn, J., dissenting) (emphasis added). Today's highly bureaucratic system is grossly inefficient when compared to the consumer/parent-driven system in place in 1876.

- **The near total absence of competition within the system causes the system to be inherently inefficient.** History of economics proves that the absence of competition makes any system more inefficient. Additionally, the failure to allow for consumer-driven supply side change makes the system inefficient.
- **The top-down bureaucratic nature of the system makes the entire system inefficient.** Excessive state controls that usurp decisions at the district and campus levels make the entire system inefficient. State mandates not only drive excessive administrative expense, they also make it difficult, if not impossible, for local leaders to make effective decisions regarding taxpayer funds and student needs. One example of this is the two state mandated across-the-board teacher pay raises. The last two times the legislature gave districts more money, the legislature dedicated half of the new money to statewide across-the-board pay raises as mandated grants to individual teachers, instead of allowing local authorities to make pay decisions. **This is clearly an arbitrary allocation of educational resources and therefore grossly inefficient.** Another example is class size laws that are inflexible unless tedious, resource-consuming paperwork is completed. TEX. EDUC. CODE §§ 25.111-112.
- **Some school districts are much more "productive of results" than others.** Schools with similar demographics and budgets have dramatic differences in productivity—e.g., output per unit of input—than other school districts. There are school districts that spend far less per student with better results than other similarly situated districts. If all districts were as efficient as districts in the top quartile, significant additional funds would be available to spend in ways that are "effective or productive or results" and using "resources so as to produce results with little waste." *See Edgewood I*, 777 S.W.2d at 395.

- The system is not efficient for purposes of economic development needs. The “liberties and rights” of our citizens are at stake if our educational system cannot provide graduates who can compete in today’s competitive world economy. According to the U.S. Chamber of Commerce ICW website: “America is failing. Among 34 developed countries, American students rank 14th in reading, 17th in science, and 25th in mathematics, and an American high school student drops out every 27 seconds.” See <http://icw.uschamber.com/publication/education-reform-initiative>.
- The high drop-out rate in Texas is a clear indicator that the system is inefficient. The drop-out rates in our public schools are unacceptable, higher than many other states, and higher than most charter schools and private schools. Lower graduation rates make for a less productive workforce and therefore contribute to greater economic hardship.
- **Remediation is a significant problem arising out of the inefficient system.** Half of public university students require remediation in the core subject areas, indicating that the public schools are not adequately or efficiently preparing their students for post-secondary education. A currently filed lawsuit notes that districts are hindered in “the preparation of their students to meet college and post-secondary preparedness standards, a task that both the Supreme Court and the Legislature have identified as central to the State’s constitutional obligation.” See Plaintiffs’ Original Petition, paragraph 43, *Calhoun County Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-001917 (419th Dist., Travis County, Tex. Dec. 9, 2011). Both the Texas Supreme Court and the legislature have identified college and post-secondary preparedness as central to the State’s constitutional education obligation, with the Court noting that “***We agree that the constitutional standard is plainly result-oriented.***” *West Orange-Cove II*, 176 S.W.3d at 788 (emphasis added). The “result” of the current inefficient system is a vast number of students not ready for the challenges of college. This is an objective indication of systemic, unconstitutional inefficiency.

IV. CAUSES OF ACTION

19. Intervenors bring the following claims under the Uniform Declaratory Judgment Act. See TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*

20. All of the foregoing factual allegations are incorporated herein by reference.

21. For the reasons stated above, **the Efficiency Intervenors request that the Court render judgment declaring that the current system of public free schools violates**

article VII, section 1 of the Texas Constitution in that it is not efficient in providing for the general diffusion of knowledge in order to preserve the liberties and rights of the people. The evidence will show that the system fails the qualitative efficiency test.

22. The Intervenors seek a judgment that Texas Education Code, Chapter 21 is not efficient as required by article VII, sec. 1 of the Texas Constitution, and are therefore unconstitutional. Such a judgment would also include the same finding as to the following code sections: 12.101(b); 25.111-112; 12.013(b)(3)(F)-(S); 21.402; 39.082; 42.102; 21.031; 21.401; 21.207, 21.209, 21.251, 21.252, 21.253, 21.254, 21.255, 21.256, 21.257, 21.258, 21.259, 21.301, 21.302, 21.304, 21.3041, 21.307, 21.206; 21.057; 21.355; 21.351; and 29.203(d), including any and all corresponding regulations in the Texas Administrative Code.

V. 83RD LEGISLATIVE SESSION

23. Legislation passed during this session, including but not limited to House Bill 5 and Senate Bill 2, exemplify the Efficiency Intervenor's claims in this lawsuit. In response to a trial where the overriding message was, "Look how bad we're doing - give us more money," the legislature simply increased funding and decreased accountability. Greater input/Less output is the textbook definition of inefficiency. Qualitative efficiency, in spite of overwhelming evidence at the trial of this case, was actually decreased. The 83rd Legislative message was, yet again, "money is the only issue." There were other bills where efficiency was not ignored, but was affirmatively hindered:

- House Bill 1751 - created yet another fund to provide district-wide grants for educator excellence, but again, skirted the real issue of paying teachers based on performance, not just length of tenure.

- House Bill 1926 - deals with the Virtual School Network and allows districts to deny access to an efficient use of technology for arbitrary reasons.
- House Bill 2012 - calls for the gathering and analysis of professional employee salary information, including cost-of-living data. In short, this bill calls for the analysis of a system that is inefficient on its face as it is not driven by market forces, but by monopsony characteristics.

24. Parents and students of any socio-economic background should have the ability to choose any school they deem appropriate for their children. It was uncontroverted at trial that only the wealthy have the choice of educational opportunities for their children. Yet, Senate Bill 1575 and House Bill 3497, allowing true parental choice, failed. This was in spite of findings by the Texas Education Agency and the Legislative Budget Board that significant savings to the State could be realized with just such a program. This despite the uncontroverted finding in trial that teachers would also benefit from school choice, and that choice would make the entire system more efficient.

25. The 83rd Legislature, without use of any relevant measure, both increased funding and decreased student performance standards. The lack of use of any relevant measure substantiates the need for this Court to address an issue that was prominent during the trial of this case. Trial Exhibit 8001, as explained by noted education finance expert, Dr. Eric Hanushek, contained a graphical representation of student performance levels, comparing various school districts and that adjusted the results based on the demographics of the various student bodies (a regression analysis of school district student performance). The analysis demonstrated that the difference in

the school districts' student performance levels was consistent irrespective of the level of funding. That is to say, regardless of the level of funding, and after adjusting for the difference in ethnicity, native English speakers and economic level, the higher performing school districts consistently out-performed the lower performing school districts. This Court even commented when presented with this study that this pattern of performance irrespective of the level of funding was not random. In spite of the Court's admonition in its February 4, 2013 ruling, suggesting that this phenomenon was appropriate for consideration by the Legislature, it did not do so. Funding was simply increased, and not tied to any efficiency considerations at all. This was in spite of the fact that *there is no showing that increased funding leads to an increase in educational outcomes*. As Ronald Reagan said in 1998, paraphrasing Education Secretary William Bennett:

If you serve a child a rotten hamburger in America, federal, state, and local agencies will investigate you, summon you, close you down, whatever. But, if you provide a child with a rotten education, nothing happens, except that you are liable to be given more money to do it with. Well, we've discovered that money alone isn't the answer.

The Court should order the State, through the Texas Education Agency, to hire an independent party to study this phenomenon and report back on its findings as to the cause.

VI. PRAYER FOR RELIEF

The Efficiency Intervenors respectfully request that this Court grant the following relief:

- a. The Efficiency Intervenors request that the Court grant the declaratory relief described more specifically above;
- b. "There remains for the Legislature and the Governor the responsibility for reforming the public school system to comply with the sovereign will of the people expressed in our Constitution." *Edgewood III* at 524. The

Efficiency Intervenors seek a permanent injunction prohibiting Defendants from giving any force and effect to the sections of the Texas Education Code relating to the financing of public school education (Chapters 41 and 42 of the Texas Education Code) and from distributing any money under the current Texas school financing system until the constitutional violation is remedied. The Efficiency Intervenors further request that the Legislature be given a reasonable opportunity to cure the constitutional deficiencies in the finance system before the foregoing prohibitions take effect;

- c. That the state be ordered to conduct a study on the efficient use of education resources by an unbiased third party;
- d. The Efficiency Intervenors request that the Court retain continuing jurisdiction over this matter until the Court has determined that the Defendants have fully and properly complied with its orders;
- e. The Efficiency Intervenors seek recovery of reasonable attorneys' fees, costs, and expenses as provided by Section 37.009 of the Texas Civil Practice and Remedies Code and as otherwise allowed by law; and
- f. The Efficiency Intervenors request that they be awarded such other relief at law and in equity to which they may be justly entitled.

Respectfully submitted,

By: _____/S/_____

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CERTIFICATE OF SERVICE

I hereby certify that, on the 7th day of August 2013 a true and correct copy of the above and foregoing has been served via email pursuant to the agreement of the parties:

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