



2015 WL 5253684 (Tex.) (Oral Argument)

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Supreme Court of Texas

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

v.

The Texas Taxpayer and Student Fairness Coalition, et al.; Calhoun County ISD, et al.; Edgewood ISD, et al.; Fort Bend ISD, et al.; Texas Charter School Association, et al.; and Joyce Coleman, et al.

No. 14-0776

September 1, 2015

Oral Argument

Appearances:

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Before:

Chief Justice Nathan L. Hecht; Justices Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, Debra H. Lehrmann, Jeffrey S. Boyd, John P. Devine and Jeffrey V. Brown.

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CHIEF JUSTICE NATHAN L. HECHT: The arguments have been allocated first for the State, then for the Efficiency Intervenors, the Texas Charter Schools Association, Fort Bend Independent School District group. Then the Court will take a brief recess and resume after that with the Calhoun County ISD group, the Edgewood ISD group and the Texas Taxpayer and Student Fairness Coalition. And then we'll conclude with argument and rebuttal from the State, the Efficiency Intervenors and The Texas Charter Schools.

We'll begin with the State.

Mr. Keller, we're ready when you are.

ORAL ARGUMENT OF SCOTT A. KELLER ON BEHALF OF PETITIONER STATE OF TEXAS

ATTORNEY SCOTT A. KELLER: May it please the Court.

The State will divide its argument into three parts. I'll use ten minutes to discuss justiciability. Mr. Craft will use 20 minutes to discuss adequacy, suitability and taxation. And Ms. Klusmann will use 15 minutes to discuss efficiency in Charter Schools.

To begin with justiciability, the Article VII claims are not justiciable under three separate doctrines which are redressability, political question, and rightness. I'll focus on redressability.

The challengers lack standing under Article VII claims because an injunction defunding Texas's public school system does not redress their injury. The Court has recognized that it cannot compel the legislature to spend taxpayer money or impose school finance laws. So the alleged injuries can only be redress through subsequent legislative action and not judicial injunctive relief.

Second, we respectfully request the Court to reconsider its precedent and hold that this is a political question. The history of school finance litigation shows that there are no judicially manageable standards here.

And finally, the challengers' Article VII claims are not ripe because the legislature appropriated billions more for school finance in 2013 and 2015 and there will be a time lag in determining the impact these changes have on student results. So there's no way to assess whether these recent changes have caused any inadequate student results.

To begin with redressability, again, the key premise here is, what was sought and obtained in district court was an injunction defunding Texas's school system. That does not cure any constitutional violation. And as this Court said in Heckman a claim and a remedy to actually have redressability, there must be a substantial likelihood that the "requested relief" will remedy the injury. Again a defunding of the Texas school system does not redress their Article VII claim. It has to be the injunction itself that is the remedy fixing the problem.



But this Court has recognized that it's the legislature -- that the legislature has the sole right to decide how to meet the standards. Because even if the Court could identify possibly whether there would be a violation at the remedial phase, for this to be redressable, the Court would have to change its position and recognize that it could order the legislature to spend taxpayer money and it could order the legislature to change Texas's school finance system.

And indeed, the Fort Bend ISD plaintiffs concede at page 57 that the Court does not have that power, that they raise the example of redistricting. Redistricting however is key -- has a key crucial difference. The courts that recognized that if the legislature does not implement an appropriate -- apportionate plan, the Court does have the power to then step in and draw a new map.

Here, in the school finance system, in the school finance context, the Court has never recognized that as a power that it has. Quite the opposite, the Court has said that this is for the legislature.

CHIEF JUSTICE NATHAN L. HECHT: Is -- is this argument confined to the Article VII issues or also that taxation issue?

ATTORNEY SCOTT A. KELLER: It is confined to the Article VII, Section 1 claims, Mr. Chief Justice. We can see that it would be a different analysis for taxation.

CHIEF JUSTICE NATHAN L. HECHT: Why is that? Why we can't grant any more direct relief with respect to taxation than -- with respect to Article VII and just say the state can't continue to tax in this particular way.

ATTORNEY SCOTT A. KELLER: Because in fixing -- the remedy for fixing the taxation violation would look different in -- than what it's targeted at -- of trying to remedy. In other words, to fix the taxation issue, really wouldn't be going on this -- you wanna prevent it so there wouldn't be "coercion," that someone would have to be taxing at the highest rate. That's a functional inquiry and -- and the remedy to fix that problem would be a more tailored-remedy, possibly at the taxation. As it goes --

CHIEF JUSTICE NATHAN L. HECHT: Well, it could be many remedies. It could be removal of the cap or the other, let the districts tax the way they want to. It could be to change the cap, as they did after the last canvass. It could be a number of ways to fix the state taxation issue, if there is one.

Why is that any different from the Article VII issue?

ATTORNEY SCOTT A. KELLER: Because, Mr. Chief Justice, the Court has recognized that it does have the power to render those types of remedies that are tailored to fixing what would be an invalid taxing scheme.

In contrast, the amount of funding that the legislature appropriates or whether it's using a two-tiered systems or a voucher system or other ways of financing school finance, that has been an issue that the Court has said that's for the legislature. So because of the power of what remedies can actually be ordered, that's why the Article VII Section 1 claims are in a different posture.

The cases we've cited at page 63 and 64 of our brief also confirm that where an alleged underfunding would take additional legislative action to cure, there is no redressability. That's precisely the posture we're in here.

An argument's been raised by the other side that every time the Court has had a school finance case the legislature has reacted and that that means that this would be redressable. Well, a few responses.

First of all, it's not guaranteed that the legislature will react in that way. In West Orange Cove II, after the district court invalidated Texas's school finance system, the legislature met in a regular session and two additional special sessions, considering the school finance and legislature did not change the system. And redressability, of course, goes to the authority of courts. So not only would there have to be a redressable remedy that can be issued by this Court but also



by the district courts.

And second of all, even if the legislature does act, it's not guaranteed that that could necessarily redress the injury. Indeed, this is now the seventh school finance case that the Court has had in last quarter century.

And if I can now turn to political question, some of this stems from the fact that the standards in this area are still amorphous, that they are not manageable standards by which one can judge what is the level of student output that achieved general diffusion of knowledge or what is the level of funding that gets there.

I would point the Court to the unanimous Nebraska Supreme Court, we cite at page 52, note 3 of our brief. After West Orange Cove II, the Nebraska Supreme Court canvassed various experiences that other states had in school finance litigation including Texas's. And unanimous Nebraska Supreme Court found this is a political question. And it says school finances cases are "legal quicksand of continuous litigation." And the Nebraska Supreme Court said that it was going to refuse to wade in to that "stygian swamp."

Other states have seen the Texas's experience and Jersey's experience and Arkansas' experience and various other states' experiences have mired courts in disputes that are left to the legislature.

JUSTICE DEBRA H. LEHRMANN: But hasn't our Court firmly rejected this argument?

ATTORNEY SCOTT A. KELLER: Justice Lehrmann, you have. And we respectfully request that you revisit that precedent in light of the Nebraska Supreme Court canvassing other states' experiences, in light of the Oklahoma Supreme Court doing the same. And we acknowledge that, yes, the Court has so held but stare decisis is also at its lowest effect in a constitutional case where only the Court rather than the legislature has the authority to modify that precedent.

JUSTICE DON R. WILLETT: Mr. Keller, turn the -- you got two minutes left, turn to rightness and talk about restoration of the funding in '13 and '15 and how that impacts our review.

ATTORNEY SCOTT A. KELLER: Absolutely, Justice Willet.

First of all, there's no way to assess whether the school finance system is unconstitutional right now in light of the changes in 2013 and 2015. The remedy being sought is for prospective injunctive relief. In other words, to knock out the current system -- so regardless of what the system looked like in 2011, that would not be the relevant metric.

And when you look at the changes in 2013 and 2015, in 2013 the legislature added nearly \$6 billion in public education funding and altered student testing requirements. This is at pages 16 to 21 of our brief.

JUSTICE EVA M. GUZMAN: But the court reopened the evidence to consider the additional funding and if we strictly apply the rightness doctrine, would we ever be able to consider such issues? Test scores are always in flux, tax rates, property values -- what about reopening the evidence and the fact that your argument seems to foreclose us examining the issue ever?

ATTORNEY SCOTT A. KELLER: Justice Guzman, I don't that follows but if I can take your question in order. First of all the reopening of the evidence, only would've reopened the evidence to hear about testing results at that time. Of course, with the time lag, you wouldn't be able to see whether the student results were actually -- how the changes were impacting the system. And in any event, the 2015 changes that just occurred would not have been part of that.

Additionally, for instance, in West Orange Cove II, when the district court, after three sessions, the legislature did nothing, perhaps that would make it more a situation where the claims would then be right. That the legislature has let the playing field sat.

But here that's not what we have. The legislature had made changes. And in any event, after the 2015 legislative



changes, even if somehow those test results could be probative of what has occurred, it could still be proper for the Court to remand the entire case for additional evidence on the 2015 changes and how that affects the school system.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

ATTORNEY SCOTT A. KELLER: Okay.

CHIEF JUSTICE NATHAN L. HECHT: Thank you, Mr. Keller.

Mr. Craft.

ORAL ARGUMENT OF RANCE CRAFT ON BEHALF OF PETITIONER STATE OF TEXAS

ATTORNEY RANCE CRAFT: May it please the Court.

As Mr. Keller said, I would address the adequacy, suitability and tax claims.

The district court's judgment on adequacy should be reversed for two principal reasons. First, all of the declarations in that judgment adjudicate the adequacy of the system's funding. And secondly, properly deferential assessment of education outputs shows that the system is currently working toward its goals and is thus constitutionally adequate.

In West Orange Cove II, this Court held that adequacy is a result-oriented standard, measured in student achievement. By contrast, the district court's judgment on adequacy in this case is input-oriented. All of the adequacy declarations state that the system or parts thereof are inadequate because of inadequate funding.

JUSTICE DEBRA H. LEHRMANN: Let me -- ask you -- I mean, let say that we accept your argument is correct. Isn't it true that we nevertheless have to look at the evidence that has to do with results on testing, that has to do with the specific briefs and how they're performing in order to really assess the system as a whole?

ATTORNEY RANCE CRAFT: That is absolutely correct, Justice Lehrmann. But, nonetheless you still should reverse these declarations that say the system funding is inadequate because those are not just musings by the district court. Those are declarations that will have a legal effect for the state after this case is over if they are to stand. But they apply the wrong standard. Only the first of those declarations actually mentions those results you're talking about and even that declaration is tainted because it says those results show that the systems is inadequate because of inadequate funding. And all --

CHIEF JUSTICE NATHAN L. HECHT: But it -- but if it is inadequate, what difference does it make? Why?

ATTORNEY RANCE CRAFT: Because those judgments that say the system is unconstitutional because it is underfunded purport to resolve the controversy in this case. I mean that's a -- that's a binding judgment and they -- those are backed by an injunction that defunds the system until this district court decides that the constitutional violations, in its view, inadequate funding, had been remedied and a finding that says the -- specifically, the reason why it's unconstitutional is because it would take \$6,404 per weighted student to achieve a general diffusion of knowledge or \$6.16 billion per year to achieve a general diffusion of knowledge.

That contradicts this Court's precedent. So --

JUSTICE PHIL JOHNSON: It seems -- it seems like regardless of whether the trial court was correct on what it would take, that the evidence that the parties presented and the arguments were all about funding, was there a minimal



amount of funding -- so it seems like that that -- that would be a very appropriate thing for the trial court to make a finding on.

ATTORNEY RANCE CRAFT: We -- we don't agree, Justice Johnson, that that was appropriate because they're -- nonetheless regardless of how they presented their case the standard of adequacy depends on results, it is results oriented. That --

JUSTICE PHIL JOHNSON: And would you -- you've seen this handout, that we just received here, that's furnished I think so a couple of days ahead of time.

ATTORNEY RANCE CRAFT: I have, your Honor.

JUSTICE PHIL JOHNSON: It says for example the percent meeting final standard exit level math exams and after West -- at the time of West Orange Cove II was 67 and now it's 47. Final standard exit level, English, 83 and 51. First question is do you agree or disagree with those figures?

ATTORNEY RANCE CRAFT: I don't dispute the accuracy of those figures but it's important that the Court know what those figures represent.

JUSTICE PHIL JOHNSON: Those are outputs, though.

ATTORNEY RANCE CRAFT: Those are outputs, that's correct. And -- and we don't dispute that the first declaration in this case does address outputs. But it's important to understand what those particular figures are talking about. They're talking about the final Level 2 standard on exams. That's not where we are now.

Those passing rates are being phased in over a period of time. That's consistent with what the legislature's trying to do. That's -- that's the chief dispute between the State and the ISD plaintiffs, is -- their position is we have to be at that final Level 2 standard now and that's how the adequacy of the system should be judged.

JUSTICE PHIL JOHNSON: Every year? Every year, whether it's modified or not, they're saying that we have to meet that proper output level. Cut's --

ATTORNEY RANCE CRAFT: Right now?

JUSTICE PHIL JOHNSON: -- cuts no slack for any new systems or anything else.

ATTORNEY RANCE CRAFT: They are not cutting any slack but -- but it certainly slack that the legislature has built into the system. As the Court said in West Orange Cove II, when we evaluate these outputs, it has to be done through the prism of looking at the goals the legislature has set up and whether the system is working towards those goals, even if it hasn't met them yet.

And there're -- there're two goals related to that, overhaul of the system that you just referred to, Justice Johnson. The first is found in Section 28.008 of the Education Code. That section says that the legislature wants to advance college-readiness in the curriculum by vertically aligning the curriculum.

Now, what does that mean? That means that we have teams of teachers and college professors get together, start with kindergarten and decide what do we need to do to the kindergarten curriculum and what standards do we need to put in there to build a foundation for the next grade, and then that would be linked to the next grade.

Then that grade will build on that foundation, the curriculum is restructured so it will set the foundation for the next grade. And so we'll have a ladder of scaffolded learning, to use the term that was used at trial, so that by the time someone gets to twelfth grade they will be college- or career-ready. That's what vertical alignment means.



Obviously that is going to take time to -- to implement. Students who are coming in right now haven't had the benefit of those years of foundation that the curriculum has been revised to implement. And so that's what the purpose of these phase ins standards are for which are not reflected on the chart that you referred to. And, again, these standards are not just the next generation of testing after the last one.

The ISD plaintiffs' own expert said that this is a quantum leap in standards. Well, a quantum leap doesn't happen overnight. This is a massive overhaul that's taken years and it's still going on today. We're still revising the curriculum, we're still implementing those standards.

JUSTICE PAUL W. GREEN: But the fact finder was completely aware of all of that, correct? And still found the deficiencies -- I'm concerned that, you know, when you're -- when you're -- and the findings of fact lay out a pretty bleak case in terms of what -- what he said that the state of Texas' education system looks like. How do we just project the future as a Court in determining -- can we just -- are we limited to what the record shows?

ATTORNEY RANCE CRAFT: Your -- we're not challenging any findings of fact. It's -- it's -- but it's the materiality of those findings of fact and -- and how that bear on the legal -- the -- they bear on the legal question of whether the system is adequate. And in our judgment, this district court did exactly what that chart does which is focused on the Level II standard right now. It took these test scores out of context but let's -- let's talk about these test scores and what -- what's --

JUSTICE PAUL W. GREEN: So wouldn't we have to say like -- I well, of course we are being asked to say as a matter of law, that the system is currently adequate. Is -- in the face of the record, it shows that it's not.

ATTORNEY RANCE CRAFT: We don't agree that the face of the record show that it's not, when it's viewed under the proper standard which is, is the system working towards its goals, and again those are long-term goals. The secondary goal the legislature has is that Texas will be among the top states in college-readiness by 2020. Again that's consistent with phasing in these standards. And so that's why that phase in standards are appropriate to look at now.

JUSTICE DON R. WILLETT: Mr. Craft, part -- part three of the judgment seems to -- appears to base all findings of inadequacy on inadequate funding. Do you agree with that characterization?

ATTORNEY RANCE CRAFT: If--[inaudible]

JUSTICE JEFFREY S. BOYD: The problem with that is, if you're right on funding and inputs not being the right approach then doesn't your rightness argument fail because your rightness argument is that in 2013 and 2015 they put \$6 billion more into it. So, doesn't your rightness argument concede that funding at least lends to the findings on adequacy?

ATTORNEY RANCE CRAFT: We're -- we're not disputing that there could be some relationship between funding and outputs. And so our -- yes, our rightness argument is that, you know, money is not pixie dust. That money extended -- it does bear on -- on results, that's not gonna be manifest yet. But if the Court does reach the merits of this case, it needs to assess the adequacy standard by what this Court has said, which is results. And I do -- I do wanna talk about of those results.

And I'll -- I'll talk about them -- first, in terms of high school students. If you look at the STAAR end of the course exam, these are -- there are the courses that must be taken for graduation and we've set out the data on pages 56 to 59 of our reply brief. The class of 2015, the first class that graduated under the STAAR testing program, 92 percent of them had passed all of their STAAR end of course exams and the cumulative passing rates on all those exams exceeds 93 percent for each subject.

Now, you've probably seen the letter brief from the ISD plaintiffs that take issue with those statistics because they include students who took the tests multiple times. First of all, this is a significantly more difficult test. It test students at a greater level of cognitive complexity than ever before. So it's not surprising that there have been retesting in this



area but what they ignore is the data on page 58 of our reply brief, which is the data for first time test takers in 2014-2015, they've taken it once. And those passing rates range from 71 percent for -- for English II -- to 94 percent for Biology. These are students who are not gonna have to take this test again.

Now we want to do better that's not where we want to be but they do show a system that is constitutionally adequate. Other --

JUSTICE JEFFREY S. BOYD: So it -- it's got to be adequate to provide a general diffusion of knowledge.

ATTORNEY RANCE CRAFT: That's correct.

JUSTICE JEFFREY S. BOYD: On this record, what is a general diffusion of knowledge?

ATTORNEY RANCE CRAFT: A -- a general diffusion of knowledge is based on the definition that -- the legislature's provided. Those statutes haven't changed. But what has changed is that the legislature has incorporated college- and career-readiness standards into the curriculum. That's what's different.

But you can't look at those standards in isolation. They have to be considered in the context of what the legislature's trying to do which is to advance college-readiness in the curriculum and meet a long-term goal.

JUSTICE EVA M. GUZMAN: How is that standard informed by a changing student body which seems to have been a -- a great focus for the trial court, the ELL and the disadvantaged students and how does that changed student body inform your definition?

ATTORNEY RANCE CRAFT: The -- the statistics that I would -- I would point to are again, the graduation rates, in the last seven years the gaps for African-American, Hispanic and economically disadvantaged students have narrowed on the NAEP scores over time. Those -- those gaps narrowed, same thing with the TAKS tests, the last test that we have before trial started.

JUSTICE EVA M. GUZMAN: They're not a lot of debate though about these statistics, how they're gathered in terms of the -- the number of minorities that you're losing, dropout rates and how those ultimately impact those graduation rates, if they're dropping out in eight and ninth grade.

ATTORNEY RANCE CRAFT: They -- they don't include students who've dropped out, they don't include students who have -- who have -- you know, moved out of state, they don't include students who have died. But this -- these are the United States Department of Education method of calculating graduation rates and Texas is near the top.

I -- I do wanna move to suitability very quickly. The district court declared the system not suitable because its structure, operation and funding prevents it from achieving a general diffusion of knowledge in a financially efficient manner?

JUSTICE DEBRA H. LEHRMANN: Can you please just explain the difference between adequacy -- adequacy and suitability.

ATTORNEY RANCE CRAFT: What the court has said is that suitability refers to the means that the legislature employs to achieve its ends specifically the constitutional standard of adequacy and efficiency. But it does not entail the searching audit of the system that the district court engaged in and that the Fort Bend plaintiffs advocated.

If you look at the opinion on West Orange Cove II the district court said that the system was not suitable because it was underfunded and that was based on a cost study. It cited outdated weights, it cited changing demographics, increasing costs --

JUSTICE DON R. WILLETT: Can a system be adequate yet unsuitable?



ATTORNEY RANCE CRAFT: The only way it would be adequate and yet unsuitable is if the school districts are not actually required to provide that education even though it was adequate. That's not an issue here because by statute, those school districts and Charter Schools are required to provide that.

JUSTICE EVA M. GUZMAN: Can you just talk about for -- just a minute, about the 1984 economic weights and -- and the -- the fact that those are still being relied upon and -- and would be --

ATTORNEY RANCE CRAFT: And that -- that was -- that was also true in West Orange Cove II and yet when this Court looked at suitability it didn't -- it didn't cite any those of things, the underfunding, the cost study. It took a 30,000-foot view and said the system provides this education from school districts, it provides on local tax revenue, therefore it's suitable.

JUSTICE EVA M. GUZMAN: But how can weights that -- economic weights that were appropriate in 1984 when Texas looked very different, be appropriate now with respect to assessing the -- the suitability and adequacy?

ATTORNEY RANCE CRAFT: If -- if we're achieving an adequate and efficient system and -- and it's our position we are, then it doesn't matter.

On the State property tax issue, the judgment on that claim should be reversed because it largely rest on two areas of State control that are not in fact providing school districts of meaningful discretion. The \$1.17 cap on tax rates and the requirement to hold a tax-ratification election for rates over \$1.04.

On the \$1.17 cap, much of the tax judgment or at least some of the tax judgment is based the idea that if most districts taxed at that \$1.17 rate, they could not achieve this \$6,404 figure that the district court relied on. Again that goes back to our earlier argument that you can't measure adequacy that way and so that's an inappropriate metric to decide whether that cap is actually controlling tax rates. And in fact they can't support a systemic claim, only 24 percent of districts with only 13 percent of the students were at the cap. Over 68 percent of districts was -- 75 percent of the students are taxing at least 13 cents below the cap.

And the district court felt that compressing the cap from \$1.50 to \$1.17 reduced the system capacity. But as of 2012 the percentage of capacity in the systems had doubled since West Orange Cove II. And that's not taking into account the substantial increases in funding in 2013 and 2015.

JUSTICE DON R. WILLET: If we -- if we find error in the adequacy finding, does that necessarily bleed over and call into question the findings on suitability, financial inefficiency, statewide property tax -- they're all sort of interconnected.

ATTORNEY RANCE CRAFT: There -- there is -- there is a connection but still the system could be adequate but not distributing money efficiently. The system could -- would -- we think it does dictate the suitability judgment because the only way it could be adequate not suitable is if it weren't actually requiring school districts to provide that.

As to the tax claim, because the -- it doesn't completely resolve the tax claim because even if it's adequate, the cap could -- there's still could be a state property tax even if the system's adequate as occurred in West Orange Cove II.

CHIEF JUSTICE NATHAN L. HECHT: Is it true that if the Tier II-B bottom threshold were not a \$1.04 and was say \$1.08 that most of districts would move immediately to \$1.08?

ATTORNEY RANCE CRAFT: We have no idea of knowing that for sure. But the -- that is relevant to when we compress the cap because if you look at those \$1.17 districts who are at the cap, most of them move to \$1.17 without considering whether they could meet state requirements at a lower rate.

And so that doesn't show that the State is actually controlling the rate through that tax cap.



CHIEF JUSTICE NATHAN L. HECHT: But it does seem like that the point of the tax rollback elections is to strongly discourage districts from going over \$1.04, I mean it very hard for them.

ATTORNEY RANCE CRAFT: What this Court said in Edgewood IV is that there is a difference between incentives that encourage districts to tax at a critical rate and a state actually requiring districts to tax.

CHIEF JUSTICE NATHAN L. HECHT: Is -- but as we said last time, the incentives can be so strong that -- I mean, we didn't use the analogy, but basically a [inaudible] and you can't do it.

ATTORNEY RANCE CRAFT: But the \$1.04 requirement of a tax ratification election is not a gun -- it's -- it's putting that in the hands of local voters. That's not the same thing as a state- controlled tax and in fact it's the opposite of a state-controlled tax. And it specifically contemplated by Article VII Section 3(E) of the Constitution, it says that -- that the legislature may authorize a tax to be ad valorem tax to be imposed by school districts subject to the -- to a vote of the voters in that district. It just can't be the case that a requirement of the Constitution is in fact evidence of a violation of another part of the Constitution, Article VIII Section 1(E) is prohibition on the state property tax.

And to that point, in West Orange Cove II this Court recognized that -- that tier system and the incentives that -- that attain whether it's for low property wealth districts who are getting a lower yield at that higher rate or whether it's property wealthy districts who are having revenue recaptured at that rate, that's necessary to have an efficient system. And so it can't be the case that the legislature has imposed an impossible task on -- that the Constitution has imposed an impossible task on the legislature. There is tension in those things, we agree but --

CHIEF JUSTICE NATHAN L. HECHT: But -- but that's not true. I mean they could do with fewer districts, they could change the basic structure. We've said that from the beginning that there might be a better way than a thousand public school districts than [inaudible] 54 caps.

ATTORNEY RANCE CRAFT: They could but -- they could, Mr. Chief Justice, but the Constitution does contemplate the creation of school districts so we don't think that it's endemic in the Constitution that the legislature is damned if they do, damned if they don't.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Craft.

Ms. Klusmann, we'll hear from you.

ORAL ARGUMENT OF BETH KLUSMANN ON BEHALF OF PETITIONER STATE OF TEXAS

ATTORNEY BETH KLUSMANN: May it please the Court.

As mentioned I will be covering financial efficiency in Charter Schools. Beginning with efficiency, the school finance system as it currently operates is within the parameters of Edgewood IV and West Orange Cove II and is therefore constitutionally efficient.

To avoid this conclusion the plaintiffs offer three general arguments. First they import their insufficient funding analysis into the efficiency argument. Second, they don't consider the system as it currently operates but in a unrealistic hypothetical situation in which everybody taxes at the same level. And third, they consider the system piecemeal and not as a whole.



And the Court should reject these arguments, apply the parameters of Edgewood IV and West Orange Cove II and hold that the system is constitutionally efficient and that the legislature has not acted arbitrarily.

Now we've thrown quite a number -- quite a lot of numbers at you in this efficiency argument and I don't intend to rehash all of those today. I do want to highlight just a few that inform our belief that the system is constitutionally efficient before moving to the legal arguments.

First, the 9-cent tax rate gap in Edgewood IV between the top and bottom 15 percent of WADA is now 7.5 cents. The 136 to 1 revenue ratio in Edgewood IV that the Court approved between property wealthy and property poor districts is now 120 to 1 when you look at the wealthiest and poorest, deciles in districts.

And a 26 percent revenue gap between Chapter 41 and 42 districts in West Orange Cove II is now 7 percent. Over 96 percent of M&O funding has been equalized. So the system is constitutionally efficient under this Court's precedent.

Now the first argument that the plaintiffs make and that the district relied on to a great extent is this idea of insufficient funding being a per se proof of inefficiency. And this -- you see mostly in the Edgewood and Fort Bend briefs where their expert says well, what if everyone had to get to \$6,500, what would the system look like, what would the tax rate gaps be? What if everyone had to get to \$7,000, what would the system look like, what would the tax rate be?

And that's not the appropriate analysis. The Court should look at this system as it is. Now the Court doesn't actually have to answer this question if it agrees with Mr. Craft that the system is constitutionally adequate in providing a general diffusion of knowledge. In that case, the Court should simply follow what it did in West Orange Cove II, look at the tax rate and revenue gaps, regardless of funding and determine the efficiency of the system.

But if the Court has questions about adequacy or believes this should be a part of the analysis, we do have to consider this question. Now the Court has never before held the school finance system inefficient because it fails to provide a certain dollar amount of funding for every student and for good reason. That would require the Court to determine as a constitutional matter what it costs to educate a student in the State of Texas and then hold the system unconstitutional until the legislature budgets that amount of money into the education system.

Now as Mr. Craft mentioned, in Finding of Fact 619 the district court here found that it would be \$6 billion a year. But the Court has said repeatedly that it may not tell the legislature how to run the public education system and that certainly includes how much money to fund or put into it. And the Court has also noted that more funding is not necessarily going to equal more results. The relationship is neither direct nor simple. So --

JUSTICE EVA M. GUZMAN: So what should we draw if we conclude that the outputs, the result don't get to the general -- general diffusion of knowledge? What should we conclude about present levels of funding?

ATTORNEY BETH KLUSMANN: The Court doesn't need to make any conclusions about present levels of funding. As the Court has noted in West Orange Cove II, the solution may or not be more funding. It might be different efficiencies in the system, it might be any of the number of things that Justice Hecht has suggested regarding how you could reorganize or restructure the system. It does not necessarily a funding decision.

But, again, that would be an adequacy claim. The Court should leave whether or not there is a general diffusion of knowledge as an adequacy claim and consider efficiency separately. And that, I think the Court made very clear in West Orange Cove II when it said that's going to be an output-based analysis. There's no reason to then -- you turn around and use an input-based analysis to try and figure out that dollar amount for purposes of analyzing the efficiency of the system. The Court should simply look at existing tax rate and revenue gaps.

JUSTICE JEFFREY S. BOYD: But efficiency is only required -- constitutional efficiency -- financial efficiency is only required up to the level of the cost of providing a general diffusion of knowledge. So don't the courts have to figure out what it costs to provide a general diffusion of knowledge in order to figure out the level to which the system has to



guarantee substantially similar resources for similar tax effort?

ATTORNEY BETH KLUSMANN: No, Your Honor. That's really more of a -- a safe harbor for the state. If -- if the tax rate gaps and the revenue gaps appear to be too large, that permits to the court to sort of look behind the scenes and say well, are we achieving a general diffusion of knowledge before we get to that point.

And so similar to what the Court did in Edgewood IV when the plaintiffs argued well, if you look at this, there's a \$600 gap that we're never, ever gonna be able to make up. The Court looked behind the scenes and said well, you're achieving a general diffusion of knowledge before you get to that allegedly inefficient point. So there's no reason for the Court to actually set a dollar amount. It's more of a looking behind the scenes if the gaps appeared too large. And in this case, because of the gaps are smaller within the bounds of Edgewood IV and West Orange Cove II, there would be no reason to trigger that analysis.

The other concept in -- in the Court's precedent that sort of blends itself to this is the idea of qualitative efficiency which goes all the way back to Edgewood I. And the Court defined that as being productive of results with little waste. And we know now that being productive of results is a general diffusion of knowledge that is an output-based adequacy claim. So whether you want to consider a qualitative efficiency as sort of being replaced by adequacy or simply the same analysis, neither one of them requires the Court to determine the amount of funding that goes into the system.

CHIEF JUSTICE NATHAN L. HECHT: But may we -- if the legislature budget board has statutorily directed to come up with the number. Is that correct?

ATTORNEY BETH KLUSMANN: Yes, Your Honor.

CHIEF JUSTICE NATHAN L. HECHT: May we infer from the fact that they haven't [inaudible] know the answer?

ATTORNEY BETH KLUSMANN: I -- I don't believe so, your Honor. The plaintiffs have the opportunity to bring a mandamus action against the legislative budget board if they wanted -- if they actually wanted us to find that number and they could've depose any of those folks. If they wanted to know the reason why they simply didn't put on that evidence and it -- you could also infer because the plaintiff don't want to know that number because they think it would help the State.

CHIEF JUSTICE NATHAN L. HECHT: Well, but the legislative budget board don't work for them. They work for the legislature. And --

ATTORNEY BETH KLUSMANN: Yes, Your Honor.

CHIEF JUSTICE NATHAN L. HECHT: My experience with them is that they respond rather swiftly and handily to the legislature's directives.

ATTORNEY BETH KLUSMANN: Well, your Honor, if -- if the legislature could direct them to do that, they have not done it. I -- there's no evidence in the record as to why or why or not.

And to your point, Justice Willet with respect to the whole idea of insufficient funding, doesn't that bleed into everything, that's one of the reasons we need to sort of distinguish these claims. The court has said these are all separate and distinct constitutional claims and the plaintiffs have used insufficient funding to prove inadequacy, inefficiency, unsuitability in a tax claim. The Court should isolate these claims and make sure that the standards are clear and not just let insufficient funding sort of blur them all together.

So what this means [inaudible] tax, is when the Court looks at the briefing and it sees all this analysis of well what are the gaps like at \$6800, that's not the relevant question. The relevant question is what are the gaps right now.



Now the second argument that the plaintiffs are making, you'll see this mostly in a taxpayer briefing, is well, what if everybody's taxed at \$1.04 or \$1.17 or \$1.67, what do the revenue gaps look like then?

That's not analysis the Court has done before and the Court in West Orange Cove II said an impending constitutional violation is not an existing one. Well, this violation, if there is [inaudible] \$1.17 or \$1.67 is not even impending because the Court has made multiple findings that districts aren't going to be able to tax \$1.17 if their voters don't want to. The Court found that 20 percent of districts don't even have an INS tax rate. To assume that they're all at 50 cents then in order to analyze the efficiency of the system simply doesn't make any sense and ignores how the system is supposed to operate. There is a, sort of, push and pull with the tax claim and the efficiency claim.

Under the tax claim, you have to create a -- a range of reasonable or meaningful discretion in which districts can tax. So there're gonna be incentives to tax higher, there will be incentives to tax lower. But in the efficiency claim you don't want that range to become too large because then they say well, you know, the -- the tax rate and the revenue gaps are too big. So what this system is designed to do and what it has done is create that range.

And so to suddenly assume for purposes of constitutional analysis that everyone's taxing at the same exact level doesn't make any sense because that's not how it operates and that's not how it was designed to operate.

The third argument that you see --

CHIEF JUSTICE NATHAN L. HECHT: Do you think the State could increase the dis-- incentives to tax above \$1.04 or \$1.06 enough that it would become a state income -- a state ad valorem tax?

ATTORNEY BETH KLUSMANN: The Court in --

CHIEF JUSTICE NATHAN L. HECHT: If it -- we do say the -- the guaranteed amount above \$1.06 to a much lower figure wouldn't that effectively set the rate at the \$1.06?

ATTORNEY BETH KLUSMANN: That would be a factor in the Court's analysis. The Court described it as sort of a continuum in Edgewood III where, you know, you have unfettered discretion on one end and an actual state-imposed tax on the other end so what you're describing might push it towards that. I don't know that it would necessarily cross the line. I have to see exactly what that look like and what districts did in response to that.

If there was still going to be, you know, for still achieving a general diffusion of knowledge at a lower tax level the fact that they may might not be able or want to tax much higher could impact that. So I mean it's -- it's a factor that the Court would consider but I don't know that it would be dispositive.

JUSTICE JEFFREY S. BOYD: Your -- your point, suitability, state property tax and efficiency are also directly connected to the question of what is a general diffusion of knowledge, correct? In other words, you have to have efficiency up to the level of funding of general diffusion of knowledge, the systems must to be suitable to provide general diffusion of knowledge, it's a state-wide property tax if the cost of providing a general diffusion of knowledge forces districts or enough districts to tax at the cap. So all of that, general diffusion of knowledge, becomes the cornerstone to the analysis, right?

ATTORNEY BETH KLUSMANN: I think that it is a cornerstone to -- to most of the constitutional analysis.

JUSTICE JEFFREY S. BOYD: So -- so what is, on this record, a general diffusion of knowledge?

ATTORNEY BETH KLUSMANN: The Court in West Orange Cove II deferred to the legislature and said an accredited education, we will assume, is an achievement of a general diffusion of knowledge.

JUSTICE JEFFREY S. BOYD: Okay -- so if the system sufficiently provides an accredited education then it is providing a general diffusion of knowledge?



ATTORNEY BETH KLUSMANN: That is what the Court said in West Orange Cove II.

Now to my third point, quickly, on efficiency, the court -- the district court and the plaintiffs pick apart pieces of the system. They considered the compressed tax rate all by itself and whether that's sufficient or target revenue all by itself and whether that's sufficient.

But the Court in West Orange Cove II made clear that the system -- that the Constitution requires an efficient system of free public schools, considering the system as a whole not as a system with efficient components. And this goes back to the point I just made. This was a system designed to work as a whole not in individual pieces. And so the Constitutional analysis should consider the system as a whole and not in pieces.

JUSTICE PAUL W. GREEN: What is -- what is the percentage, if you know, of ED and ELL students in the State?

ATTORNEY BETH KLUSMANN: In the system currently?

JUSTICE PAUL W. GREEN: Right.

ATTORNEY BETH KLUSMANN: I believe they're up to 60 percent economically disadvantaged students and 17 percent ELL students.

JUSTICE PAUL W. GREEN: And as I understand the findings that there -- there is a greater requirement for teaching those students than -- than non-ED and non-ELL students.

ATTORNEY BETH KLUSMANN: It -- they are more difficult population to educate but the system is designed to provide the school districts with the money for each one of those students so this goes to the weights that Justice Guzman mentioned. You get an extra point to -- which is about \$1,000 for every economically disadvantaged student.

So you know, that for -- you don't get a set amount, you get that for each and every student. So as you increase the number of academically disadvantaged students, you're gonna get that extra money for every student. And so the systems was designed to do that.

JUSTICE PAUL W. GREEN: So it takes into consideration school districts that -- that have a higher percentage of those kinds of students?

ATTORNEY BETH KLUSMANN: Yes. They -- they will get more money for each one of those students.

CHIEF JUSTICE NATHAN L. HECHT: The briefs say that the target revenue is going away September 1 --

ATTORNEY BETH KLUSMANN: 2017.

CHIEF JUSTICE NATHAN L. HECHT: 2017. And will there be any other, sort of, hold harmless factors after that?

ATTORNEY BETH KLUSMANN: The only one I can think of would be, sort of, original hold harmless that the Court's been discussing since, I believe, Edgewood IV that is now part of the statute. But that is the only one I'm aware of.

I do wanna turn quickly to Charter schools. Number one, our sovereign immunity point, we don't dispute that Charter Schools may sue as a participant in the school finance system for a declaration of the system as a whole, is inadequate or unsuitable, subject of course to Mr. Keller's arguments.

But we do dispute that they may seek the specific declarations that they have sought in this case that they are entitled to ear-marked facilities funding or equal funding as they see it.



Number one, the Court has said it may not tell the legislature how to run the system and that's what such a declaration would do. But number two, they did sign a contract and said we will educate students for the funding that the State provides. And so if you sort of take the constitutional question away, they are simply bringing a lawsuit to say we would like our contract to read differently than it does.

JUSTICE JEFFREY S. BOYD: Can you contractually waive an ultra vires claim?

ATTORNEY BETH KLUSMANN: What the court has said is the remedy in an ultra vires cause of action may still mean that the state is immune so if you -- you can't simply bring an ultra vires claim in -- in place of a breach of contract claim. It's still a breach of contract claim. So that -- I don't if that quite answered your question but we do believe that the action would still be barred in this case.

JUSTICE JEFFREY S. BOYD: If -- if there is a contract with the agency of which the individual defendant in his or her official capacity is named in an ultra vires claim, your position is you can't pursue the ultra vires claim against that individual for failing to fulfill administrative duties because you've contractually agree that they don't have to fulfill the duties that you're complaining about.

ATTORNEY BETH KLUSMANN: I think that is correct, Your Honor, if I follow that, yes. If you -- you've contracted away certain rights or agree to certain things then you cannot turn around and sue the State for following what it said it would in the contract.

I see that my time is up. We would ask that you would reverse the judgment regarding constitutional inefficiency and reject the arguments of the Charter school plaintiffs.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Ms. Klusmann.

We'll turn to the efficiency intervenors.

Mr. Enoch.

ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE INTERVENOR ON APPEAL EFFICIENCY INTERVENORS

ATTORNEY CRAIG T. ENOCH: May it please the Court.

I represent families with children at -- school age children. I represent Texas Association of Business and I also represent Association of Texans for Real Efficiency and Equity in Education.

I think this case is different than West Orange Cove II. It's different than any of the Edgewood cases. It's different than West Orange Cove I. And it's different in two areas. One, in West Orange Cove II, this Court has identified the standard by which you test whether the Constitution has been satisfied. In -- in West Orange Cove II, the Court articulate this particular test for Article VII Section 1, the legislature is not permitted to structure a system that is inadequate, unsuitable or inefficient regardless of whether it has a rational basis or even a compelling reason to do so.

Its choice must be informed by guiding rules and principles related to education. And if that choice is not related to education it is arbitrary. And the decision of whether the system that the State has set up is arbitrary is a question for the Court to decide, is a question of law. And in that context, it said findings of fact may be helpful but they don't --



they play a limited role in that case.

The other main point that makes this case different is this Court has experts who have come before this -- before the trial court and demonstrated efficiency as is expressed in the Constitution productive of results with little waste and have explored that discussion.

Paul Hill comes on board, he's a Fellow from Brookings Institute, he studied efficiency in education for decades. He said main-drivers of inefficiency are hidden costs, legislative mandates and lack of incentives for innovation.

Mark Hurley is a financial investigator. He studies business financials and he has made it his career to study school financials. In fact he's been commissioned by the State to study the Texas Tomorrow Fund. He reports that the reports required by the state of Texas are nearly incomprehensible. They require reports under categories that are unrelated to the educational performance. As an example 56 percent of the -- of the education budget is reported under the category instruction.

Don McAdams, two-time president of the Houston Independent School District develops business performance matrix for hospitals. He says that the school system, the State of Texas could create a -- an education performance matrix. But it has chosen not to do so. In fact it has no -- it has not developed a plan for goals or performance matrix, no performance accountability, no transparent financial information linking cost to educational performance.

And finally you have Eric Hanushek, a noted expert in finance -- school finance litigation, studying school finance litigation. I call the Court's attention to Appendix 5 of the Efficiency Intervenor's Brief. And only point that out because of the graph. The graphs that he has done for Texas school districts as a part of his work both as the chair of the Executive Committee of Texas Schools for University of Texas at Dallas and the Governor's Commission on College-Ready Texas.

He looked at performances of school districts and he factored out all of the things that the school districts say make them special. He factored out minorities in terms of -- he -- he calls it a regression analysis. So in all these graphs he has factored out minorities, he's factored out black, low English proficiency. He's factored out special education. He has factored out bilingual education and in fact he's factored -- he's factored out the differences in -- in cost of living between Houston and Midland as an example.

And by that I mean, when you see the dot on the graph, that school district has the same percentages of all of the special needs, same percentages of minorities, same percentages of low English proficiency, same percentages of economic disadvantaged. And what the graph show, there is no correlation, no correlation, between more money and better student improvement.

Now we get categorized as saying we don't care about money, money's not it. That is not the issue. It is productive results with little waste. And the question is if there is no correlation to more money and student improvement, then you don't have the fundamental basis for determining -- determining whether you are even being productive of results or even with little waste. But it goes --

CHIEF JUSTICE NATHAN L. HECHT: But if you're -- if you're correct, can, and should, the Court direct the legislature to take steps in that direction or must we not leave it up to them to tinker with the foundation school program and raise Tier-I a little bit and do the -- redo the recapture and keep doing what they've been doing for 25 years?

ATTORNEY CRAIG T. ENOCH: It is a problem. It is a problem for the Court but if the Court is not able to fashion a relief then it actually has created a constitutional duty that the legislature never has to satisfy because for this particular productive of results with little waste, the Court might conclude it cannot grant any relief.

But I don't agree, I don't agree. The court's already told the State it can't tax, it cannot spend for education until it fixes it. Why is that related just to -- just to finance? I don't think that's related just to finance, it happened to be, that's why



they came to the conclusion it did.

But the Court could say we're gonna set down the system until the legislature fixes it. And also this Court had declares tax statutes and declares them unconstitutional, not very often but it has never stopped the Court from saying it's unconstitutional therefore not enforceable and leaving it up to the legislature to figure out what to do as in example Chapter 21.

Chapter 21, the evidence in this case is decisions made under Chapter 21 which is personnel for teachers. Teachers are not evaluated based on student performance. Student performance is not a consideration in the evaluation of teachers. The evaluation of teachers is confidential not available to parents to know whether their teachers are performing. And in fact 98 percent of all the teachers, all the teachers, in good performing, low performing, no performing schools are considered proficient. There is no --

CHIEF JUSTICE NATHAN L. HECHT: Do you think the -- you think the STAAR test results are moving in the right direction?

ATTORNEY CRAIG T. ENOCH: Your Honor, in order to answer that question, I think, the STAAR test results would be moving in the right direction if the legislature didn't come along and removing the standards. Hanushek talks about that. He talks about the legislature -- if the -- if the Court ties simply money, simply money, to the -- to do this -- students pass these test, then what happens is what happened in the last legislative session, the legislature starts lowering the standards.

The real issue, the real change to education in Texas will come from productive of results with little waste.

I wanted point out -- not talk about the performance of teachers, they don't measure that. But more to the point, you heard the State say we don't know how much it costs to educate a child or, to put it in a vernacular, we don't know how much it costs to provide a general diffusion of knowledge. I can't imagine a more significant flaw in productive of results with little waste than the fact they have no idea -- they can't tie one dollar spent to one child performing in the --

JUSTICE PHIL JOHNSON: They can do that though. How do we make them do that? By shutting down the system and telling these children you're not gonna get any education at all when the statistic show that quite a few of them are college-ready?

ATTORNEY CRAIG T. ENOCH: Your Honor -- you know I'm not --

JUSTICE PHIL JOHNSON: So we're gonna just stop that and tell them we're not going to give -- we can't do that, can we?

ATTORNEY CRAIG T. ENOCH: Well, I think that we could --

JUSTICE PHIL JOHNSON: Will you then --

ATTORNEY CRAIG T. ENOCH: -- I think that'll be draconian. I actually think there's another way. I think there is a legislative requirement that if we studied their standards, these study -- to determine what it take -- and to follow up --

JUSTICE PHIL JOHNSON: But to tell them to do that?

ATTORNEY CRAIG T. ENOCH: Your Honot, I think you could -- I think you could direct them.

JUSTICE PHIL JOHNSON: How would we -- how would we phrase that in an order?

ATTORNEY CRAIG T. ENOCH: Give them two years to come back with a study and have them report back to the



legislature.

JUSTICE PHIL JOHNSON: What would we do until then? Tell them to go ahead with the current system?

ATTORNEY CRAIG T. ENOCH: Your Honor, they did that in Edgewood -- was it, I?

JUSTICE PHIL JOHNSON: So you're advocating we just say keep doing what you're doing and come back and report to this Court in two years?

ATTORNEY CRAIG T. ENOCH: The Court could do that.

JUSTICE PHIL JOHNSON: Is that what you're advocating?

ATTORNEY CRAIG T. ENOCH: Your Honor, the -- I'm not -- I'm advocating that the Court declare it unconstitutional because it is not productive of results with little waste and I think we've pointed out the Court's specific provisions in the Education Code that by eliminating those provisions would immediately increase efficiency.

JUSTICE JEFFREY S. BOYD: How do we decide what -- what's waste? And one man's trash another man's treasure and I expect on everyone of the issues you're raising you'll find political differences among different people. Some would argue that the Chapter 21 system for evaluating and paying teachers is the best way to ensure that overall we have the best faculty of teachers statewide. Some would argue that class size limits are the best way to find out or the best way to ensure that every student has the best opportunity to learn. You challenge all of these political decisions, how can we as a court decide which of those political decisions is waste?

ATTORNEY CRAIG T. ENOCH: Your Honor, the Court has already decided in West Orange Cove II by declaring that the Congress -- I mean, the legislature's reasoning is not the rational basis test. Just because you can think of a reason or even a compelling reason for the choices it makes, its reasons have to be related to education, in this case general fusion of knowledge.

If, as the evidence shows, there's no correlation, no correlation, between a teacher being certified, which is a cost, and performance in the courtroom -- in the -- in the classroom, that would be -- that would meet the Court's definition of an arbitrary choice by the legislature because it is unrelated to education. And the cost itself would be a waste.

But we have massive waste. We have billions of dollars. The CEI as an example. That cost of education index, it is a first factor in all of the foundation formula, it's off by 25 years. The legislature chose not to update that, that is massive waste, billions being allocated wrongly. And that -- that is not even contested in the case.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions for Mr. Enoch?

Thank you.

We'll hear from the Texas Charter School.

Mr. Ho.

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF RESPONDENT TEXAS CHARTER SCHOOL ASSOCIATION

ATTORNEY JAMES C. HO: Mr. Chief Justice, and may it please the Court.

The Charter Schools wish all of the plaintiffs well in this case but Charter students and parents suffer unique constitutional violations and thus are uniquely entitled to judgments. There are a lot of doctrinal issues in this case but for the Charter Schools it ultimately boils down to one simple thing. For us, this is a case about discrimination. The school finance system discriminates against Charters by funding facilities for everybody except Charters. And that of course forces Charters to cannibalize our instructional budgets.

And the State's litigation strategy discriminate against Charters by invoking sovereign immunity to violate constitutional rights but only when it comes to Charters.

But before I get to discrimination let me address briefly the State's threshold political question arguments which was essentially for all the plaintiff's out of court, no matter how badly our constitutional rights might've been violated, and would advocate any role for this Court in protecting the constitutional rights of Texas' parents and students.

Now this Court has, of course, repeatedly rejected this argument. And that's not surprising, we don't get to pick and choose which provisions of the Texas Constitution we're going to enforce. Indeed, we're not aware of any contrary case law from this Court.

Now the State in their briefs cite two court of appeals cases, but their Corpus Christi case was reversed by this Court just a few weeks ago. And their Houston case actually rejected the use of the political question doctrine. The State this morning asked you to be like Oklahoma. We ask you to be better than Oklahoma.

Unless this Court is seriously considering revisiting the political question doctrine or has any questions about redressability or ripeness, we will leave it at that. I think Justice Guzman had it exactly right, the ripeness argument essentially is a get-out-of-jail-free card for the State.

CHIEF JUSTICE NATHAN L. HECHT: Do you agree that the only two political question cases are the two that state cites, the two court of appeals -- those are the only two political question cases in Texas?

ATTORNEY JAMES C. HO: In Texas that they've cited, that's right.

Turning to the issue of sovereign immunity, our position is simple. The State does not have sovereign immunity to violate the Constitution. This Court has repeatedly allowed suits to stop constitutional violations. It did so in in this Court's landmark Heinrich case, in Klumb, many other cases, and again, just a few months ago, in Patel.

This -- now the State claims that it has sovereign immunity to violate constitutional rights only with respect to Charter students and parents. They say essentially that this Court's sovereign immunity jurisprudence basically discriminates against Charters because Charters have contracts with the State.

But as Chief Justice Hecht -- as you said, an explained in Federal Sign, the execution of a contract neither waives nor creates immunity. Our position is very simple, we're not saying there's no immunity because there's a contract. We're saying there's no immunity because there's a Constitution. The State doesn't mention let alone address the Federal Sign. Instead in their reply brief, they cite Sawyer's Trust and [inaudible].

But both of those case confer that there is no sovereign immunity when it comes to valid constitutional claims. Those cases simply rejected particular constitutional claims on their merits. They also cite W.D. Haden which doesn't involve any constitutional claim at all.

And let's remember, we represent Charter parents and students as well as schools. Charter parents and students didn't sign any contract, they're not a party of any contract, they're not here to enforce any contract nor are the Charters Schools. We're here to enforce the Constitution.

And turning to the Constitution, turning to merits --



CHIEF JUSTICE NATHAN L. HECHT: Just one other question, you -- you do have to volunteer to be at Charter school? So it sounds a little bit as if the Charters are volunteering to be in the position they're in then complaining about it. What -- if that's not immunity, it does seem to be some inequity and accepting the deal and then asking for more.

ATTORNEY JAMES C. HO: Well, to be clear, we're asking to change a single word of the contract. We made this clear in our briefs, check the contracts, check the Charters. Under our view, of the of the case, not a single word of the contract would change. What we're talking about is changing statutes, striking out statutes as unconstitutional.

In any event, as I've said, Charter students and parents are no different than ISD's. We didn't sign any contract whatsoever. We're here to enforce the Constitution.

JUSTICE JEFFREY S. BOYD: Except that -- except, as the Chief says, though you -- you chose to put yourself in the unique position of a Charter school parent and student. You -- you voluntarily, unilaterally chose that, no one forced your clients to that. Does -- is that just wholly irrelevant to our analysis?

ATTORNEY JAMES C. HO: It is, your Honor. Let me explain. Why did the Charters -- why did the legislature create Charter Schools? Legislature created Charter Schools to provide a diverse range of educational options for the students and parents of Texas.

Now, if the legislature going to do that, we're gonna create Charter Schools, and if we're gonna make them, "part of the public school system of the state." And if we're gonna give, "primary responsibility" along with the ISD's, equal to the ISD's to implement the state's educational system, it's only natural we should apply the same constitutional standards under our -- under our Constitution, under Article VII.

And the State does not contend otherwise, they don't ultimately claim that different constitutional standards should apply to Charters. [Inaudible] we suffer the same constitutional violations as the ISD's. So if the ISD's win their case, we should win, too as the State admits.

JUSTICE EVA M. GUZMAN: We judge, though that the treatment towards the Charter Schools under the arbitrary standard, and since you operate so differently can that stand -- do we look at it the same way?

ATTORNEY JAMES C. HO: You should look at it the same way. There are some differences, just like there are differences across likely various other entities. But ultimately there is no evidence, and the State certainly doesn't put forth any claim or evidence that the any sort of modest regulatory differences in any way explains the \$1,000 per WADA undisputed gap that we have between Charters and ISD's.

We're and -- and that's exactly my point. We're -- we are uniquely deprived, and that's what I like to focus my time on. The State discriminates against Charters by funding facilities for everyone except Charters thus forcing Charters to cannibalize our education budget. Charters --

JUSTICE EVA M. GUZMAN: Does the NAEP program, as the State points out provide any facilities funding that -- that's meaningful under the analysis --

ATTORNEY JAMES C. HO: It -- it's not meaningful, I think the record establishes that that is not meaningful at all. And again, at the end of day, the State's own expert, Lisa Dawn-Fisher admits that we do not get meaningful facilities funding.

Our entire -- I only have three minutes left, but our entire argument, thankfully, boils down to really five undisputed facts. It's undisputed that we get \$1,000 less per WADA, less per students than other public schools. It's undisputed that we get no facilities funding, zero.

Now we recognize of course -- but the Constitution does not -- the Constitution entitles us to an adequate education,



not to facilities funding per se but it's undisputed that we have to cannibalize our education budget in order to build and maintain facilities. The State's brief specifically makes that point.

It's undisputed that we educate a greater proportion of economically disadvantaged students than -- than other public schools. And finally, despite our best efforts, our popularity, our long waitlists, it's undisputed that only 11 percent of Charter Schools are testing college and career-ready according to SAT scores in 2013. And for these reasons the system is inadequate, inefficient, unsuitable as applied to Charter Schools.

JUSTICE JEFFREY S. BOYD: I only counted four. Did you have five or --

ATTORNEY JAMES C. HO: I believe I have five, \$1,000 less, no facilities funding, the fact that we have to cannibalize our education budget to take -- that's the third one.

JUSTICE JEFFREY S. BOYD: What's the -- what -- there's -- there's a sixth one, what's the current waiting list for Charter Schools? Does the record reflect is the current [inaudible]

ATTORNEY JAMES C. HO: I believe it's over 100,000 or more -- we'll get that on reply time for you, Your Honor.

Now, the State says basically the Charters cannot claim a constitutional violation on their own, that it's an all or nothing proposition, you need -- either the system is constitutional or none of this.

But this Court, of course, held precisely the opposite, in cases like West Orange Cove II and Edgewood I and for good reason. It's contrary, not only to the Texan original understanding of the Texas Constitution but to our foundational belief as Americans in individual -- and as Texans, in individual rather than collective rights. After all, the Texas Constitution expressly requires a general diffusion of knowledge, not just the education of the property rich ISD's students who, of course, generally speaking are easier to teach.

At the end of the day, the only way the State can prevail as to the Charters is to overturn a series of established precedents supported by some of the most respected jurists ever to have served on this Court, precedents rejecting political question, precedents confirming standing -- precedents rejecting their sovereign immunity arguments, precedents rejecting their all or nothing collective rather than individual rights theory of the Constitution, precedents confirming the use of WADA, all we've heard this morning from the State is WADA, that of course is the proper standard for judging constitutional rights, and finally, precedents as to the relevance of career- and college-readiness for determining our constitutional rights.

In closing, we ask this Court to basically do two things. One, please tell the State not to discriminate against Charter Schools by using sovereign immunity to violate our constitutional rights but nobody else's and finally tell the legislature that you can't discriminate against Charter students by providing facilities funding to everybody except to our schools thereby forcing us to cannibalize our education budget.

Thank you.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Ho.

We'll turn to the school districts now. Fort Bend School District, Mr. Jefferson.

ORAL ARGUMENT OF WALLACE B. JEFFERSON ON BEHALF OF RESPONDENT FORT BEND ISD

ATTORNEY WALLACE B. JEFFERSON: Mr. Chief Justice, and may it please the Court.

Now is not the time, and this is not the case to abandon judicial review. If as we contend and the trial court held the legislature has not provided a general diffusion of knowledge, and the Court must say so, and we believe we have proved that the system failed the Constitution because we have done the analytical works that the legislature has refused to do.

I'd like to analogize to Havner, and to Robinson, and to Borg-Wamer, those are cases in which this Court led the way in saying they were not going -- the court system is not gonna rely on junk science but must see empirical evidence to connect a cause of action to a remedy that is sought by a party. Without that analytical framework, the system is completely arbitrary as it stands.

Now, the legislature has sprung into action in response to this Court's decision in this area. Despite all rhetoric to the contrary, the legislature can, I believe, be expected to fulfill its duties under the Constitution if this Court declares an affirmation to the trial court's judgment.

Now, school finance just happens to be extraordinarily difficult because of money at stake, the competing political interest, the urban versus rural, local versus state, rich versus poor, Charter as we've heard, home schools, small government, you name it, but this is where the Court has done its best work. You have ruled and the legislature has responded time and again.

I'm here on behalf of the Fort Bend Independent School District plaintiffs, a group of 81 school districts including Houston, Dallas, Fort Worth, Northside -- my home district -- Austin ISD. Our districts educate 1.8 million of the 5.3 million Texas children. My clients are one of the four school district plaintiff groups asking the Court to remedy a system that does not comply with Article VII Section 1.

I will address the School District's suitability claim, and then turn to their property tax claim. And attorneys for other school districts after the break will speak to the adequacy and equity issues.

Now, what's the reason that we have a public school system? It's found in the text of the Constitution itself, a general diffusion of knowledge is essential to the preservation of the liberties and right to the people.

Justice Willett, the liberties of the people, you cannot have a general diffusion of knowledge that does what it's supposed to do unless you imbue society with the liberty, and that is a general education. And the Court has recognized that the level of education necessary to preserve these liberties and rights evolve with changing times, needs, and public expectation.

We've handed you a chart that shows some of the changing needs, expectations, and public expectations since this Court's decision in West Orange-Cove II. The legislature has determined that today -- today our public schools must enable all students to continue to learn in postsecondary educational, training, or employment setting.

This is the college readiness and a career readiness standard. They must graduate from high school prepared for college or for career. But the legislature has failed to connect the design of this system that they put in place themselves to this goal. And so the School Districts cannot meet the expectation.

JUSTICE PAUL W. GREEN: That's -- let me interrupt you there. That's -- in your brief that's what you said that we -- that we should be required to -- to -- to require the legislature to connect those things. Going back to Justice Johnson's comment, how -- is the injunction the remedy? Shut the school system down? How's that gonna fix the problem?

ATTORNEY WALLACE B. JEFFERSON: I'll tell you what I -- what I believe would fix the problem. Number one, when the legislature defaulted on its obligation that it imposed on itself through these standards, our districts came forward and brought experts, and explained how the system is failing and what it would take to make it better.



JUSTICE PAUL W. GREEN: You're telling the legislature that. This district is telling the legislature that. How can we tell the legislature how to do -- to fix the problem? An injunction doesn't seem to be accomplishing anything.

ATTORNEY WALLACE B. JEFFERSON: It has accomplished much in the past. What the Court in West Orange-Cove II -- I disagree with the state. They said that the legislature didn't act after West Orange-Cove II. And this is after the Court affirmed that Article VIII was not being satisfied. The legislature did in fact take action.

In House Bill 1, immediately after West Orange-Cove II, it compressed rates and it started funding at a higher level as the local property -- the revenue for school districts. And it supplemented that revenue with a budget surplus in 2007 and in 2009. But what happened was, the legislature then increased the standards in 2009 dramatically. I think they called it a quantum leap.

JUSTICE EVA M. GUZMAN: We have said though that suitability refers to the means chosen to achieve an adequate education. And we don't get into how the legislature meets those standards only whether they've been met. So your -- your -- the crux of your argument at least at this point seems to be that they raised the standards. And so, how do we evaluate that if we don't -- in the suitability aspect of this?

ATTORNEY WALLACE B. JEFFERSON: Well, I think, there are two things going on. I mean, I think, you're right. We're not asking the Court to command the legislature to take actions A, B and C. I mean, that is, the Court have said time and again that --

JUSTICE PHIL JOHNSON: Let me interrupt you there just a minute. You're -- you're in favor of affirming the trial court's injunction, shut it down or fix it.

ATTORNEY WALLACE B. JEFFERSON: Right.

JUSTICE PHIL JOHNSON: As opposed to Mr. Enoch's position that it seems like we might be able to pick and choose, and say fix this and not the other. And I may be mischaracterizing it. But you're in favor of doing exactly what we did before, shut it down or fix it, you choose?

ATTORNEY WALLACE B. JEFFERSON: Yes, we are, and we think the legislature will act and will fix it indeed. And I think, that's the history of this litigation and I think, indeed the legislature, you know, you won't see it in writing but they're crying out for the Court to -- to have them act so that we can get the system in proper --

JUSTICE PHIL JOHNSON: But aren't we just building in another surround of litigation where someone -- someone in this state with over a thousand school districts is going to say they didn't fix it and are going to sue the state again? Aren't we just building in a continual litigation process with the state here? They -- I mean, it does seem like the State has a point in saying this is a never-ending process once the courts get into it.

ATTORNEY WALLACE B. JEFFERSON: It's a constitutional question that has to be answered. And whether that spawns litigation in the future, it may, and indeed it probably will at some point in time. But this -- of the three branches of government, this branch, the judicial branch has been the one that has done the most to advance the ball and would do so in the future.

Justice Guzman, I -- I agree that -- that -- that the suitability, we have to talk about the operation and structure. And what we're saying is structurally right now the way the legislature has acted, it has refused to analyze to crunch the numbers. It has not directed the Legislative Budget Board to update the -- the numbers. And that makes this whole system structurally inadequate.

And I think, it is appropriate for the Court to say to the legislature, when you default, the plaintiffs -- the school districts can develop the record like it has here, and the trial court can make findings that do implicate how the system is going to operate in the future.



JUSTICE EVA M. GUZMAN: So that's what I was looking for, fundamental and structural flaws --

ATTORNEY WALLACE B. JEFFERSON: Yes.

JUSTICE EVA M. GUZMAN: -- to get within the suitability prong.

ATTORNEY WALLACE B. JEFFERSON: And I think that's exactly the -- the flaw that we're talking about here because how do you -- under -- under *Havner*, how do you evaluate an expert's testimony? You look at the -- the empirical work. You look at the studies that have been done. You -- you look at whether other experts have -- have cited to that work, and you -- you -- you evaluate it. You can't do that if the work is not being done at all in the first place. And I think, that is the structural -- that is the main structural problem here.

The other is -- when you look at the evolution of our system, this past spring, it's devastating when you read the -- the statistics and the findings, and you look at these charts, only 38 percent of economically-disadvantaged freshmen met the final standard on English 1, and only 36 percent met that standard on Algebra 1.

Now, we're talking about a population that is 60 percent and rising in this state that are not able to make the -- so over half of our low-income freshmen -- over half are not on track to have even a 60 percent chance of getting a "C" in an introductory college level course.

As the "Raise Your Hand Texas" amicus brief notes -- and I really commend that brief to your attention. We are not preparing students in Texas for the 21st century. Our public education system will be unable -- it will be an obstacle to the privileges and liberties a suitable education brings.

And Texas former state demographer testified in this case that if education and income gaps remain as they are, Texas will suffer billions in less income, consumer spending, and tax and revenue. That's where we are.

So we're looking at this record and I demonstrate that the legislature has steadily increased academic standards for an increasingly challenging population, economically-disadvantaged English language learners in which a number of kids struggling with that English has increased and a percentage of economically-disadvantaged students has skyrocketed.

This -- this -- yes.

JUSTICE EVA M. GUZMAN: With -- with -- excuse me. With respect to the legislature's increasing the standards though, is there a -- a gap, if you will, in -- in the numbers -- I guess, will we see improvement if past performance is indicative of schools catching up with the new requirements?

ATTORNEY WALLACE B. JEFFERSON: Oh, that's a great question because at the same time they increased these standards. In 2011 they cut \$5.3 billion. You can't have both -- you can't have it both ways, and so the trend is in the wrong direction not in the right direction, and that has been proven out just in last -- the last couple of years 2013, and '14, and '15, '16.

JUSTICE EVA M. GUZMAN: Of course they put more money in -- I don't have those numbers in front of me -- but since 2011 they've put more money in those sessions.

ATTORNEY WALLACE B. JEFFERSON: They put more money and -- yes, they did, but most of that money -- the primary portion of that was just an increase in -- just an increase in enrollment. The state has been growing and so they have to, and that doesn't say anything about whether they have met the general diffusion of knowledge. Of course they're gonna increase and put more money in --

JUSTICE JEFFREY S. BOYD: I thought most of the money was -- was actually additional cooperation like 2.2 billion

was for increased enrollment, and 3-point something billion was operational addition.

ATTORNEY WALLACE B. JEFFERSON: The -- the -- when you look at the final numbers, the amount that they put in have not -- have not replaced the amount that they reduced in 2011, that \$5.3 billion cut. And so you're looking at net. I mean, just looking at the numbers on this chart the net amount that is now in place is less than it was in West Orange-Cove II after this huge budget reduction. And so you're going in exactly the opposite direction, increased standards which is harder to meet when you're given fewer resources.

JUSTICE JEFFREY S. BOYD: Could the legislature fix this problem by just lowering the standards?

ATTORNEY WALLACE B. JEFFERSON: I think that's what they've done. And -- and -- and, you know --

JUSTICE JEFFREY S. BOYD: You just said they've -- was STAAR testing and --

ATTORNEY WALLACE B. JEFFERSON: They've increased the standards but they're -- if you look at their briefs, they're saying we -- our graduation rates are good.

And so their -- the -- the STAAR standards are good for college readiness. The graduation rates are not preparing kids for college. Many of these kids are graduating, but they can't pass the first level introductory course. I mean, that is the issue and that's the problem, and it needs to be -- needs to be remedied.

JUSTICE JEFFREY S. BOYD: Okay. So -- so why is lowering the standards then to focus on graduation rates rather than STAAR test constitutionally insufficient?

ATTORNEY WALLACE B. JEFFERSON: West Orange-Cove II said you cannot just lower the standards to meet your -- the -- the this definition of general diffusion of knowledge, and it says that expressly. That's not the answer.

The other that -- yes -- yes.

JUSTICE EVA M. GUZMAN: One more -- just one more question. Does our holding on the adequacy challenge decide the suitability challenge?

ATTORNEY WALLACE B. JEFFERSON: You know, this has been vexing for me, Justice Guzman, for a long time, and -- and I know that we've said that these are separate standards, but it's hard for me to -- to look at property tax separate from efficiency, separate from suitability and adequacy. I think, they're sort of all together, and this is the first time that the Court really has had have all of these in the same bucket to look at all together.

I wanna quickly turn to the state property tax. The failures that I have just talked about also means that local districts are once again without meaningful discretion over their rates. Now, it is true, and as the State has said, that not all districts are currently taxing at the statutory cap -- that's right. But this Court has twice rejected the argument that impermissible state control depended on the number of districts affected. Instead, the test is whether the state so completely controls to levy this person and distribute -- distribution of revenue that local school districts are left without meaningful discretion.

Now, the average Texan paid more in property taxes this year than last year even if the tax rate stayed the same. And why is that? Because property values are going up all over the state. But that does not mean the school districts you live in or I live in have received any additional revenue from the property. And the reason is, because the legislature has structured a system in which it -- the State and not the district benefits from arising property tax values.

If you live in a property wealthy district, the state receives more in recapture funds. If you live in a property poor district, the state reduces its appropriation to the district. That's how it operates. In fact the state counts the additional taxes paid to a local school district as a credit for general revenue that is not directed necessarily to schools. It can be used for any purpose not just education.



So as an example, this January, the comptroller noted that the state's revenue surplus was due in part -- their surplus to strongly rising local property value. And likewise the LBB characterized increased local revenue as general revenue savings when it presented the starting budget to the legislature.

So the legislature has used this local property tax fund, 2.5 billion in enrollment growth, 1.2 billion increased mandatory homestead exemption, and 1.5 billion for an increase in form of a funding. That adds up to 5.2 billion. What happened to the other 1.4? It went to general revenue -- to the budget instead of the schools the taxpayers write their checks to.

It -- it reminds me of the sales tax, you know, you pay it and -- but it doesn't benefit the innkeeper of the store, instead it's turned over to the state's general revenue fund. This sort of control is why we say Article VIII is implicated here because the additional taxes you pay or paid when your property value grows to the state for general purposes.

For these reasons -- I see my red light is on, and I don't know if the Justice Wainwright rule is still in effect. I will --

CHIEF JUSTICE NATHAN L. HECHT: I'm not as strict as you were.

ATTORNEY WALLACE B. JEFFERSON: We ask that the Court affirm the trial court's judgment.

Thank you.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Jefferson.

We'll take a brief recess.

MARSHAL: All rise.

All rise.

CHIEF JUSTICE NATHAN L. HECHT: Please be seated.

We'll hear now from the Calhoun County District, Mr. Trachtenberg.

ORAL ARGUMENT OF MARK TRACHTENBERG ON BEHALF OF RESPONDENT CALHOUN COUNTY ISD

ATTORNEY MARK TRACHTENBERG: May it please the Court.

I will be focusing my argument on the adequacy and state property tax claims being brought by all of the ISD plaintiff groups, the success of which are critical to the future of Texas. I will focus on three primary points before turning to some of the other issues that were addressed.

First, looking at student performance measures or outputs, the legislature is most certainly not delivering on its constitutional duty to provide a general diffusion of knowledge, a duty that the constitution itself says is essential to the preservation of the -- the liberties and rights of the people.

Second, consistent with this Court's guidance in *West Orange-Cove II* the trial court properly examined the

relationship between inputs and outputs and evaluating the constitutionality of the system.

And third, the trial court correctly determined based on an extensive record that school districts cannot access sufficient funding to provide a general diffusion of knowledge within the existing school funding framework and certainly not within the range of their authority that is available without a tax ratification election.

If this Court meant what it said in *West Orange-Cove II* that it would be arbitrary for the legislature to define the goals for accomplishing the constitutionally-required general diffusion of knowledge, and then to provide insufficient means for achieving those goals, then this Court should affirm.

Turning to my first point, trial court's conclusion that Texas is not accomplishing a general diffusion of knowledge was both correct and inescapable. The legislature has set college and career readiness as the outcome goal of the Texas education system, and made clear that Texas students need to achieve this goal in order to compete successfully in the 21st century global economy.

Through dozens of studies, Texas has empirically linked performance on the STAAR exams to actual performance of college course work and to predict the levels of achievement and other student -- other student performance measures. But the STAAR results from the very first administration of the exam in 2012 through today demonstrate just how far Texas is from accomplishing those goals.

JUSTICE EVA M. GUZMAN: Does that constitutional standard require immediately significant results? I mean, even under our standard, shouldn't we have some time for school districts to accomplish the goal?

ATTORNEY MARK TRACHTENBERG: And that's what this Court found in *West Orange-Cove II*. If this system were making meaningful progress towards that goal, that is what saved the system from an adequacy violation at the time of *West Orange-Cove II*. But here we have the situation where the state is asking for an indefinite pass. The Level II standard that was supposed to be in place today for graduation, which is associated with the 60 percent chance of a "C" or better in college course work of the same subject, that's -- that's been pushed back now all the way to 2021.

JUSTICE DEBRA H. LEHRMANN: But in the spring of 2015, didn't those test results go up substantially?

ATTORNEY MARK TRACHTENBERG: No, they didn't, your Honor. There was -- if you look at the third through the eighth grade exams, there were -- they've been stagnant. The TEA press release basically acknowledges that there's been no meaningful improvement in Grade III through VIII.

If you look at the Level II -- if you look at performance at the Level II -- at the Level II standard -- the final standard that was supposed to be in place this year, you still see [inaudible] and those grades range -- test scores ranging from mid-20s to maybe up -- upper 40s -- still very, very large percentage of students not achieving that level of performance.

You've seen on the -- on the few tests that you can make a -- kind of head to head comparison -- comparison you've seen an up -- slight uptake in performance, but I just wanna remind the Court that -- that -- the TAKS regime that the STAAR replaced was phased in over a three-year period, and you saw really dramatic improvements in performance -- significant improvements of performance during the early stages of that test that you simply don't see under the current -- under the current exam.

The -- the percentage of students that are reaching Level III are -- that's associated with the 75 percent chance of a "C" or a better in college course work, those are microscopic. I think, at the time of trial only 1 percent of students in Texas could achieve that level in all the exams. You still -- even 2015 economically this -- sorry, your Honor.

JUSTICE EVA M. GUZMAN: I was just gonna ask you before you went too far, so when the TAKS test were first implemented you saw improvement over a three-year period, what did the student body look like at that time versus what it looks like now? And -- and do those differences then impact the improvement that -- that you should see?



ATTORNEY MARK TRACHTENBERG: Well, I think, at the time of *West Orange-Cove II*, I believe, we've -- we're close to about half economically-disadvantaged so we've -- we're now up to 60 percent. Virtually all of the growth in -- in population that we've seen since *West Orange-Cove II* has been economically-disadvantaged students.

And they're the ones -- Ms. Bono will address some of the statistics on STAAR with respect to economically-disadvantaged populations and -- and the numbers there. I've been talking about general numbers -- the numbers with respect to economically-disadvantaged students are simply staggering and unacceptable --

JUSTICE EVA M. GUZMAN: But I guess when you measure the relevant improvement over the -- you use a three-year period -- I'm wondering if those differences are statistically significant such that they should be factored into measuring the rate of improvement.

ATTORNEY MARK TRACHTENBERG: One important difference, your Honor, at the time there was an infusion of funding after *West Orange-Cove II* which we -- the opposite is -- is true now. We've had -- at the same time we've been implementing the STAAR test. We -- we actually -- at the same year we cut \$5.4 billion out of -- out of public ed. But I --

CHIEF JUSTICE NATHAN L. HECHT: Is the -- is the STAAR test harder than its predecessors?

ATTORNEY MARK TRACHTENBERG: No doubt about it. That's -- that's undisputed. But it is the proper -- it is the test of college and career readiness. Texas is not an outlier here in setting college and career readiness as the -- as the outcome goal of its system. That's something that almost every state is doing. And what we have now is a system -- a STAAR exam that is empirically validated as a measure of college readiness through -- through dozens of tests linking performance on STAAR to actual college readiness. It's a great measure of where we are. Unfortunately --

CHIEF JUSTICE NATHAN L. HECHT: But I take it if we were arguing this case on the predecessor test rather than STAAR, you have a weaker case.

ATTORNEY MARK TRACHTENBERG: If we were -- I'm sorry -- if we were -- if we're still under the TAKS regime?

CHIEF JUSTICE NATHAN L. HECHT: Mm- hmm.

ATTORNEY MARK TRACHTENBERG: That's probably correct.

JUSTICE JEFFREY S. BOYD: So -- so then what is to prevent the legislature through TEA SBOE from just getting rid of the STAAR test, going back to TAKS or TEKS, showing good results and claiming that the system is constitutional?

ATTORNEY MARK TRACHTENBERG: I believe this Court said in *West Orange-Cove II* that it couldn't -- it couldn't -- the legislature can't get out of its constitutional obligation just by setting the standard too low. Obviously, there are some --

JUSTICE JEFFREY S. BOYD: Well, but what we said though was obviously if you require nothing but first grade reading that's too low if that's all the system requires. On the other hand it can't require -- I forget what we said -- biomedical -- nuclear biometrics or something --

ATTORNEY MARK TRACHTENBERG: [inaudible]

JUSTICE JEFFREY S. BOYD: -- somewhere in between we defer to the legislature. So how can the Court say, well, the STAAR -- the -- the legislature's decision that the STAAR is too rigorous and therefore we're gonna go back to TAKS or TEKS, on what standard should we -- can we say, no, you can't make that incremental decline because it

violates the Constitution?

ATTORNEY MARK TRACHTENBERG: That's not the present case and certainly, you know, I think, the legislature can certainly play at the margins. But I wanna distinguish between the -- the outcome goal and -- and then the various ways we measure that goal because Texas has firmly stated that the outcome goal is college and career readiness. They painted around the edges as far as the consequences and -- and various aspects of how we measure in that goal so that is -- that is --

JUSTICE JEFFREY S. BOYD: Is -- is that a general diffusion of -- what is a general diffusion -- I wanna give you chance to answer the same question. I think one counsel -- Ms. Klusmann said that was an accredited education -- if the system provides an accredited education then it's providing a general diffusion of knowledge. Do you agree or do you disagree?

ATTORNEY MARK TRACHTENBERG: [inaudible] disagree with that, your Honor, and I think, number one, I think this Court defined general diffusion of knowledge quite well in *West Orange-Cove II*. And that it -- it basically, the districts were able to provide a meaningful opportunity for students to achieve the legislature's own curriculum -- the legislature's own standards, that is, how you measure it.

And I wanna make clear, it's not a guaranteed outcome. There are students that won't be able to take advantage of that opportunity, but if you're an economically-disadvantaged student and there -- they're -- billions of them are in our system -- many of them come from single-parent homes that face enormous challenges that are reflected in the trial court's record.

Simply putting them in a class without pre-K and putting on the class size of 30 without after-school, and without extended-day programming, and the types of interventions that are needed to really move the needle, that's not giving that student a meaningful opportunity to learn the state standards and that's -- those are the types of interventions that our districts definitely wanna do, and need to do, and haven't been able to do based on their funding limitations.

JUSTICE EVA M. GUZMAN: When we're looking at college readiness in terms of this option of just going back to TAKS -- to TAKS, if you look at advances in technology, and medicine, and science in college readiness, for those particular areas, can you just achieve a general diffusion of knowledge by going back when the, you know, our system is pushing forward?

ATTORNEY MARK TRACHTENBERG: I think your -- you recognize a very important point. But taking a step backward for the legislature when the rest of the world is moving forward, when all the other states are moving forward would be an unfortunate development. I think this ties into one of the arguments from the state's reply brief. It's about how -- incentivizing the legislature -- are we incentivizing the legislature if you affirm this case to dumb down standards.

I would say -- sorry.

JUSTICE EVA M. GUZMAN: Practice incentivizing to lower the standards, but can that action be constitutional when you consider it in light of where we are in 2015?

ATTORNEY MARK TRACHTENBERG: I -- I don't believe so. And I think -- I think what an affirmance here would do would properly incentivize the legislature. Unfortunately, we're in a situation -- situation now where the legislature felt free to implement this college and career readiness standards while cutting \$5.4 billion literally in the same year we're implementing STAAR. And I think an -- an affirmance here will send a signal that, yes, you should -- if you raise standards you need to provide districts resources to do that.

It's -- going back to the -- the -- the quote from Lieutenant Governor Ratliff at this -- former Lieutenant Governor Ratliff that this Court cited favorably in *West Orange-Cove II*. If -- you can't make -- you can't make bricks without straw. We're just asking for the straw here. I wanna go --



JUSTICE JEFFREY S. BOYD: So setting aside the efficiency equity issue, just focused on adequacy and to the extent that suitability relates them, what would be enough? What would the state have to come in and prove if you are going to trial this year -- this fall, what would they have to prove that would satisfy your theory of adequacy to provide a general diffusion of knowledge?

ATTORNEY MARK TRACHTENBERG: Well, I think, what -- what -- how we envision the remedy playing out, I think, that's the --

JUSTICE JEFFREY S. BOYD: No, not -- not the remedy --

ATTORNEY MARK TRACHTENBERG: Okay.

JUSTICE JEFFREY S. BOYD: -- the -- the result. The -- either -- either the input -- I mean, obviously your focus is on input because you can't make bricks out of straw so you got to have enough money to enable the system to provide the general diffusion of knowledge. What would the state have to prove -- to prove that it is providing a general diffusion of knowledge?

ATTORNEY MARK TRACHTENBERG: I think that they would have to come back, assuming there's an affirmance and we have an -- an injunction -- changed circumstances. The legislature would, at that point, presumably pass remedial legislation, the -- the state would be in a -- in a -- have the burden of coming forward and -- and -- try to establish why whatever the legislative remedial action -- why that would address the constitutional deficiencies that this Court found. But getting to your question --

JUSTICE JEFFREY S. BOYD: What's the constitutional deficiency? How did -- how would -- how could the state ever meet the requirements of the Constitution as you interpret them? That --

ATTORNEY MARK TRACHTENBERG: Well, the -- the trial courts -- this Court has never before -- taking a step back, has never said explicitly you need to provide whenever it's ruled on meaningful discretion last time. You didn't say you had to -- you didn't tell the legislature you have to provide 15 cents worth of meaningful discretion.

What this Court's job is, is to describe the nature of the violation -- the scope of the violation, and -- and then the legislature came back, and *West Orange-Cove II* provided 17 cents of discretion after they compressed the factor --

JUSTICE JEFFREY S. BOYD: That's the efficiency claim. Now, I'm talking about the adequacy -- I mean, the state property claim. I'm talking about the adequacy claim. How could they ever meet your standard for adequacy?

ATTORNEY MARK TRACHTENBERG: I think they could -- the trial court can -- I mean, once we go back in the trial court, the -- we look at the remedial legislation. We will -- we will look and see whether the -- whether there's sufficient revenues -- I mean, the trial court's findings, I think, provide guidance as to what the nature of -- extent of the violation is, and I think what -- what the trial court would be looking at is -- are -- are -- is a remedy do we create a new finance system that enables districts to do the bread and butter things like -- like -- like early childhood, like after school and extended day.

And -- I mean, we have --

JUSTICE JEFFREY S. BOYD: What if they do all that and the college readiness rate is still 10 percent? I mean, that -- that's not good -- that wouldn't be good enough, right?

ATTORNEY MARK TRACHTENBERG: Well, no, I think -- I mean, our -- the evidence does extensively support a causal connection between the types of interventions that we wanna make extensively for -- throughout the record and student performance. That is -- that is established thoroughly through the trial court's findings and that's what all our superintendents testified to. The kind of -- the kind of tools that they need and able to move the needle, that's what --



that's what we've got to have.

I wanna make sure I address one really important point on state properties tax, and that is the -- the dollar-floor-ceiling issue. Justice Hecht -- Chief Justice Hecht made reference to this. And I -- our districts are in a particularly unique position here because to the extent the districts -- our districts have voters who are asked to pass the TRE are the property wealthy group remember.

A significant portion of the money that will be generated from any -- any TRE would be recaptured by the state. So in essence you're asking the voters to pass a tax wherein -- in some cases have for 60 percent -- 70 percent of the money will be going to other districts, and not shared in that district which makes it, in all due respect, a political impossibility --

CHIEF JUSTICE NATHAN L. HECHT: How have the ones who have gotten the 1.17 done it?

ATTORNEY MARK TRACHTENBERG: I'm sorry?

CHIEF JUSTICE NATHAN L. HECHT: How have the ones who have gotten the 1.17 done it?

ATTORNEY MARK TRACHTENBERG: There have been -- well, a lot of them have not been in Chapter 41 districts. Chapter 41 districts face problem. I think there is some data in the record about -- of the 113 districts that have a property wealth in excess of the Austin yield, only three have been able to tap into that copper-penny tier.

And -- and in addition I think, we actually introduced polling data for [inaudible] to show how just how -- how much that moves the needle when you -- when recapture is an element of that. So --

CHIEF JUSTICE NATHAN L. HECHT: The argument is that the guarantee being a lot less discourages Chapter 42 districts from raising their rate but it -- that hasn't been as pronounced?

ATTORNEY MARK TRACHTENBERG: In -- it's a little bit -- a different situation for Chapter 42's, but there are some unique challenges in 42's as well particularly for fast-growth districts that the -- that the trial court pointed out.

I do wanna -- I just -- I see I have just a minute here left, I do wanna say this is not just an issue of funding. It's also an issue of local control on its -- on the state property tax issue. This Court held in *West Orange-Cove I* and *II* that the state can't coop a school districts' entire taxing authority just to meet state standards or mandates. When the state reduces funding and -- when the state reduces funding and increases its standard of mandates in an era of increasing costs and more challenging student demographics. That's exactly what happened.

We -- we ask the Court to affirm the state property tax violation, and we ask this Court to affirm the adequacy claim as well. Absent that finding, millions of Texas students will be denied a meaningful opportunity to graduate college, and career ready, and will lack the tools needed to succeed in the 21st century global economy.

Thank you very much.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Trachtenberg.

We'll hear from Edgewood District, Ms. Bono.

ORAL ARGUMENT OF MARISA BONO ON BEHALF OF RESPONDENT EDGEWOOD ISD.



ATTORNEY MARISA BONO: May it please the Court.

Marisa Bono for the Edgewood plaintiffs.

I will address the adequacy for low income and ELL students, and financial efficiency.

The future workforce at Texas attends public school today. How well our students do is how well Texas will do. But every year the state delivers tens of thousands of young people into our economy who are wholly unprepared for college and career. The state systematically fails to provide an adequate education, and it provides more advantages to students who already live in the most advantaged school districts.

The state's failure jeopardizes our economy and our way of life. This Court has said that the state must provide an adequate education for all students, yet the school finance system is failing low income and English Language Learner, or ELL students who make up over two-thirds of our student population.

In *West Orange-Cove II*, this Court stated explicitly that the state's discretion in public education is not unfettered and the state does not have free rein. It cannot act in this area without guiding rules and principles, and the state has failed to do that in this case in three primary ways.

First, there's the issue of the weights. The state is relying on weights and the school funding formula for low income and ELL students that are wholly unrelated to the needs of those students. They're outdated by over three decades and even though the state acknowledges and recognizes that these students need additional targeted interventions in order to meet state standards, the -- the weights are not empirically based and they have no relationship to actual student need.

Second, the issue of the statutorily-required cost study. The state hasn't made any attempt in over a decade to quantify the costs for these students. And that's especially important after all of the argument you've heard today about the increase, the quantum leap in state standards. The ushering in of the new testing regime which the state acknowledges is more rigorous and has a higher standard than this state has ever seen. The state has ramped up its standard to college and career readiness without quantifying the cost for low income and ELL students, and what it's gonna take them to get there.

And finally, it slashed \$5.3 billion from our public schools at the same time that it was ramping up these standards. The system is deeply and structurally flawed, and these arbitrary decisions that the state has made, its action and also its inaction have left the school districts unable to provide low income and ELL students with the services that they need to achieve the state's own standards.

JUSTICE EVA M. GUZMAN: Ten years ago when they did the last -- quantified the cost of the last study, was -- was the population of ELL and disadvantaged 50 percent?

ATTORNEY MARISA BONO: At the time of *West Orange-Cove*, it was 52 percent and it was slightly below that before then.

JUSTICE EVA M. GUZMAN: And so we're about 10 percent higher now?

ATTORNEY MARISA BONO: We're 10 percent higher and those populations are growing exponentially. They're showing no sign of stopping, and there are experts in *West Orange-Cove II* who warned about this situation.

JUSTICE EVA M. GUZMAN: Well, they grown 10 percent in ten years?

ATTORNEY MARISA BONO: That's right, and the state is required --

JUSTICE EVA M. GUZMAN: So can you extrapolate the growth rate from that?



ATTORNEY MARISA BONO: We've seen over 800,000 economically-disadvantaged students -- into new -- new economically- disadvantaged students into the system over the past ten years. We're not talking about --

JUSTICE EVA M. GUZMAN: I have a question on that, it may be in the record and I just haven't looked at that, but what percentage of economically-disadvantaged students are ELL?

ATTORNEY MARISA BONO: It's about 17 percent over 800,000 now. We have the second highest ELL population in the country, and again that's one of our fastest growing groups.

CHIEF JUSTICE NATHAN L. HECHT: What percentage of the economically-disadvantaged are Hispanic?

ATTORNEY MARISA BONO: I -- I certainly can provide that answer to the Court. I don't have the number off the top of my head, but a majority of those students are Latino and the Hispanic population is growing in state.

JUSTICE JEFFREY S. BOYD: Can I ask for just a clarification. As I've noticed but the -- it's a big record. I'm trying to remember, you -- you talked about -- your first point, the weights for ED and ELL are wholly unrelated and -- to reality and are outdated by 30 years. The weights that turn ADA into WADA are different from the adjustments like the COI -- the cost of education index that is 30 years old, right? But are you saying the weights are also 30 years old?

ATTORNEY MARISA BONO: That's right. The weights --

JUSTICE JEFFREY S. BOYD: Okay.

ATTORNEY MARISA BONO: -- the weights were set back in 1984, and they're actually half of what was actually recommended at that time so they've been -- they've been too small from the beginning. So --

JUSTICE JEFFREY S. BOYD: But that's different than the cost of education index which was also set back in 1984 or somewhere around that time.

ATTORNEY MARISA BONO: That's -- that's right, Your Honor. I'm laser focused on low income and ELL students --

JUSTICE JEFFREY S. BOYD: So -- so --

ATTORNEY MARISA BONO: -- but there are a number of other defects in -- in the formula.

JUSTICE JEFFREY S. BOYD: All of the efforts under the structure of the system to adjust the dollar amounts to accommodate extra cost or less cost perhaps needed depending on geography, size of districts, sparcity of population, ELL, ED, all of those you're saying under this record are 30 years old or -- or around there.

ATTORNEY MARISA BONO: I -- I'm -- I'm actually not positive that all of them are 30 years old, but the ones that you've pointed out are, and that's exactly what makes the system so arbitrary. This Court has said that the state has discretion in two areas. You can set the level of education and then provide the funds to get there, and it's got to act with guiding rules and principles. Well, when you're making all of these changes, it's a good thing because we want high standards for our kids but you've got to give them the resources to get there.

And when you look at the system now we know that the system is at a point where low income and ELL students can no longer make forward progress. This Court in *West Orange-Cove II* said that forward progress was what saved the system from being unconstitutional.

Now, the state argues that the trial court overstepped its --



JUSTICE DEBRA H. LEHRMANN: Let me ask you something. You -- you are categorizing based upon these certain groups of students. And in *WOC II* Justice Brister had dissented by warning that -- that if we go down this path of categorizing different groups of people then there's no end in sight because you can get categorized in a lot of different manners, so what is your response to that?

ATTORNEY MARISA BONO: First, the system -- the constitutional promise belongs to all students not just some students, and we're talking about groups that the state itself has recognized as discrete and insular groups. Their performance is disaggregated in reporting both from the districts to the state, and then the state to the public. And the state itself has recognized that these are groups that because of their particular characteristics need additional services to reach state's standard.

JUSTICE DEBRA H. LEHRMANN: So you're saying that -- that -- that the problem that Justice Brister feared is not going to exist because it's limited to the -- to these particular groups that you're talking about because of the issues that surround them?

ATTORNEY MARISA BONO: In this case it is, and we're not talking about a small percentage of students. We're talking about two-thirds of the student population. But I -- I would say even if they weren't -- even if they weren't a majority -- even when they were close to the 50 percent, the -- the standard still applies to them and they have the ability to raise this claim. And when we look across the board the data doesn't lie.

The performance for these kids hasn't only stagnated, it's actually declined. When you look at the data that the state cited in its reply, the 2015 STAAR test, you can look at the lower grades -- Grades III through VIII and you can see that low income kids are already seeing declines in reading and other subjects across grade levels.

ELL seventh graders had failed the Math STAAR exam at higher levels in 2014 than they were in 2012. And that was only after three years of testing. The constitutional violation that this Court predicted in *West Orange-Cove II* has come to fruition and it's led us to the point where these students are not receiving meaningful opportunities to achieve state standards.

JUSTICE DON R. WILLET: You earlier described the system as -- as deeply and structurally flawed, and I wonder beyond lack of adequate financial resources, what are the other deep instructional flaws? Would you say that?

ATTORNEY MARISA BONO: Sure. So we've been talking about adequacy, when we turn to a financial efficiency we know that tax and revenue gaps have increased to the point where the system is no longer efficient. The Court stated -- has stated that the standard for efficiency is whether or not property-poor school districts and property-wealthy school districts has substantially equal access to similar revenue at similar levels of tax --

JUSTICE DON R. WILLET: What are the nonrevenue flaws in the system? You mentioned deep instructional flaws, what are the nonrevenue flaws in the way we structure public education in our state?

ATTORNEY MARISA BONO: I -- I would characterize the -- the outdated weights. Yes, it has something to do with funding, but it's -- it's a flaw in the system because the -- the state has set the ends but it has not examined the means, right? The fit is off, and by affirming the trial court's ruling this Court will tell the state you need to reexamine that fit because your means don't meet the ends. And --

JUSTICE PAUL W. GREEN: But will over a thousand school districts have anything to do with it?

ATTORNEY MARISA BONO: Well, it certainly is a complex system, and these are difficult issues as this Court has recognized, and that's part of the reason that the Court has had to intervene because as -- as this Court recognized in its past cases, the problem is not the standard. The problem is that the legislature is -- is subject to divergent political interest and these are very politically charged questions, and without the Court's intervention these meaningful reforms don't happen.



JUSTICE PAUL W. GREEN: Issues of local control and you have school districts, some of which are more efficient than others, and administration, and overhead, that sort of thing?

ATTORNEY MARISA BONO: Well, there's no evidence to support that in this case and in fact, using the state's own methods to measure a financial accountability what the -- what are called the first reports, 98 percent of districts came out okay according to the state's report. And obviously the Efficiency Intervenors and the state were highly motivated to find examples of inefficient spending in the school districts and they were unsuccessful.

Turning --

CHIEF JUSTICE NATHAN L. HECHT: A large part of the complaint among the districts and maybe the motivating impetus for the case was the cut back in 2011. Do you agree that -- that was largely for reasons having to do with the economy as a whole, and is that a legitimate reason for the state to do -- to make the cut back to education.

ATTORNEY MARISA BONO: Well, there aren't any -- there aren't any caveats for economic circumstances, and the standards of this Court has set out. But actually what -- what happened -- what happened after *West Orange-Cove II* was in -- in 2006 the legislature passed HB 1 and that resulted in revenue losses of over \$6 billion. The state was saved 'cause it had federal stimulus funds, but when those funds run out that was when the state made the \$5.3 billion in cuts to the public school system.

So the state saw this train coming and certainly there were economic factors external to the state, but with the violation here caused by a system that was caused by a systematic disregard for the growing demographics in the state, and what it takes for them to achieve educational standards.

CHIEF JUSTICE NATHAN L. HECHT: So do you think -- if somehow we can ignore 11 and 13 and we could just go from 9 to 15 would we still be here or would the state be making sort of incremental progress?

ATTORNEY MARISA BONO: Well, the -- the budget cuts make this question not a close call. Had we not had the budget cuts, I -- I think there still would be an adequacy violation for some of the other reasons that I've discussed and my cocounsel has discussed. But I think it might be a closer question but, you know, the -- the Court has ruled that we need to look at the system as a whole and all of these -- this series of action and -- and inaction is what has created the violation here.

Turning back to efficiency, I wanna emphasize because I think -- I think -- I -- I don't think that this was something that the state remembered to mention in their argument, but the Court tied efficiency with adequacy in *Edgewood IV*. This Court ruled that the system has to be efficient up to a level of a general diffusion of knowledge. So it's not good enough just to make comparisons willy-nilly, grouping large groups of school districts together and then finding a gap and saying, well, this gap is smaller than *Edgewood IV*.

Whatever analysis the Court used -- uses, it needs to determine whether or not we have efficiency up to the level of general diffusion of knowledge. And in fact this Court provided the proper analysis in *Edgewood IV*. It -- it used what we call the seminal test. It compared the tax rate gaps between property-poor and property-wealthy districts. And there the Court found a 9-cent tax rate gap in a system that it called barely constitutional.

We replicated that analysis for this case and it's doubled using the estimate of GDK, adjusted for inflation that this Court used in *Edgewood IV*. In addition to that, what we've discussed, we've had this ramping up of standards, and we've had this growing demographics of students who are more expensive to educate. And so these pennies are worth more, and this Court has specifically stated that the system needs to keep up with the changing times, needs and public expectations, and this is an example of how the Court is not done that.

JUSTICE JEFFREY S. BOYD: Chief, may I --

CHIEF JUSTICE NATHAN L. HECHT: Yes.



JUSTICE JEFFREY S. BOYD: -- just have one quick question.

You referred to the cost -- the findings here regarding the cost of providing a general diffusion of knowledge which is based on the \$3,500 that this Court recognized the record established in *Edgewood IV*, and now adjusted for inflation so 6,500 or 6,800 next year, whatever those numbers are. Am I correct from reading the briefs that there's -- there's actually no evidence or findings here of an actual number for the years studied in this trial as opposed to merely adjusting that old number for inflation?

ATTORNEY MARISA BONO: That's incorrect.

JUSTICE JEFFREY S. BOYD: Okay.

ATTORNEY MARISA BONO: We provided -- we -- and I know the findings are voluminous, and our briefing is voluminous, but there are a number of estimates that various experts provided using cost study methods that have been accepted widely across the country both in litigation and also in policymaking. And I misspoke \$6,500 is the -- is the inflation adjusted number for 2013. That's actually closer to \$7,000 today which is actually one of the estimates Mr. Moak came up with during the trial.

JUSTICE JEFFREY S. BOYD: Okay. So the -- the -- the cost study based numbers that the experts came up with in this trial for the '11-'12, '12-'13 school years come out to be about the same as the inflation adjusted number from the 3,500?

ATTORNEY MARISA BONO: Actually in that case it did. Today and -- today I think, the inflation adjusted number was 6,900-some odd and his estimate was around 7,000 so they actually do line up.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Ms. Bono.

We'll hear from the Texas Taxpayer & Student Fairness Coalition, Mr. Gray.

ORAL ARGUMENT OF RICHARD E. GRAY ON BEHALF OF RESPONDENT TEXAS TAXPAYER & STUDENT FAIRNESS COALITION

ATTORNEY RICHARD E. GRAY: May it please the Court.

Rick Gray on behalf of the Texas Taxpayer & Student Fairness Coalition.

It's a coalition of 443 school districts representing approximately or educating approximately 1.3 million students, and also representing a number of parents and taxpayers throughout Texas.

CHIEF JUSTICE NATHAN L. HECHT: And you initiated the -- this litigation?

ATTORNEY RICHARD E. GRAY: We were the founding group in this litigation, your Honor -- yes, your Honor.

The -- I'm here to speak on the financial efficiency aspects of the case and then respond any questions on other topics the Justices may have. I hope to give you some time back frankly.

CHIEF JUSTICE NATHAN L. HECHT: Before you get into it, let me ask you. This seems to have been an



exceptionally long trial just in and of itself, and compared to the prior litigation. What -- what accounts for that in your view?

ATTORNEY RICHARD E. GRAY: It account -- two things account for them. As the Court may or may not know, I was lead counsel for a large group at *Edgewood I, II* and *III* as well. Retired from school finance, so to speak, and then came -- I was brought back for this aspect --

CHIEF JUSTICE NATHAN L. HECHT: This has been kind of a career for you.

ATTORNEY RICHARD E. GRAY: It has not been a career for me, and it -- it will not be a career for me.

The -- what accounts for this is two things. One, suitability is the first time it was ever brought as a separate aspect of the case. And two, the -- well, actually three things -- two, adequacy, we believe as a group -- ISD group had to be better fleshed out to the record to present to this Court. And three, since *Edgewood IV*, the financial efficiency standard was changed in *Edgewood IV* to be -- what I call equity up to adequacy -- well, that's not where the inquiry stops. The Court also said that there still can be so much inefficiency in the system or so much inequity in the system as to violate the efficiency cost even if it was adequate.

JUSTICE EVA M. GUZMAN: When you --

ATTORNEY RICHARD E. GRAY: So -- so, your Honor, that's where -- why I think it took on much longer. We made a much -- a much better concerted effort to develop a record and it's the, I believe, the most thorough record on school finance that's ever been developed.

JUSTICE EVA M. GUZMAN: And that's what I wanna ask you about. When you fleshed it out there was a lot of focus on best practices, things that could be done better -- those are inputs. The -- the standard requires us to look at outputs.

ATTORNEY RICHARD E. GRAY: Right.

JUSTICE EVA M. GUZMAN: And so do you agree that those findings on best practices have a limited role in our determination?

ATTORNEY RICHARD E. GRAY: Well, I think -- I think they have a role and it's up for the Court to decide how -- what -- how large a role they have.

JUSTICE EVA M. GUZMAN: But can we focus on those inputs?

ATTORNEY RICHARD E. GRAY: Well, I think, you can focus on what the courts have done in the past is focus on outputs, and I think, you can look at the state's own data -- in response to Justice Boyd, the state sets the standard. They, you know, they have set college and career ready as the standard, and they've set the measuring tools being the STAAR test as how to measure if we're -- the state is accomplishing that.

And what the results are showing is for economically-deprived -- disadvantaged and English Language Learners, 38 percent are passing. What the record shows for everybody else barely 50 percent are passing, some says it's 49 percent, some says it's 41 percent. And what passing means is, you have a 60 percent chance to pass, make a "C," on an entry-level course.

This is not some high standard the state has imposed. This is -- and it's not rocket science but that's what the state is saying is the standard, and when you have a third of your economically-disadvantaged not even being able to get to that minimum standard, and when you have half of everybody else not being to get to that minimum standard I think, the outputs scream at you that this system is not doing what it's designed to do.



JUSTICE EVA M. GUZMAN: Does Texas rank second in the nation in graduation rates?

ATTORNEY RICHARD E. GRAY: Pardon?

JUSTICE EVA M. GUZMAN: Does Texas rank second in the nation in graduation rates?

ATTORNEY RICHARD E. GRAY: I don't know where Texas ranks now.

JUSTICE EVA M. GUZMAN: That was in the brief from somewhere.

ATTORNEY RICHARD E. GRAY: But what I -- what I do know that the state can point to statistics that will make the system work better, but they choose to ignore their own standards -- their own model. The STAAR test was the state's model that they developed to measure this. And when they got the results that they got which are abysmal by anybody's standards then they run to other things to say, oh, but look at this, oh, but look at that, such as accreditation.

JUSTICE EVA M. GUZMAN: What is the 2015 pass rate on the STAAR?

ATTORNEY RICHARD E. GRAY: The -- well, it depends on what brief you're looking at. If you're looking at the group as a whole all test takers, one of the -- the -- one test and I forget -- I get my two tests confused, but one is 49 percent and one is 51 percent.

So we have roughly half failing is what I'm saying, and that's for everybody. Then if you look at the -- the most fastest growing population we have, and the most population in need of the most help to raise up, you've got about a third of passing or about two-thirds failing. And, you know, we can sugarcoat this how ever you want to sugarcoat it, but the reality is the face of Texas is changing -- it's changing dramatically.

Steve Murdock, the state -- former state demographer testified all of the growth from the last decade in Texas was minority population growth. Anglo population, as a percent, slightly declined. African-American population slightly increased, and Hispanic population grew expeditiously. That's the population that we're seeing more and more in our schools, and that's the population that we have to educate for a long-term prosperity for Texas.

Dr. Murdock -- and I happen to put Dr. Murdock on the witness stand, but his -- his thesis was -- and it was undisputed and un rebutted -- is that it's pay-me-now or pay-me-later. If we don't educate our kids, we won't have a -- a trained workforce. We will lose over \$11 billion a year in sales tax, and our social service cost whether it'd be prisons, welfare, whatever, go off the charts. That's the reality and nobody has disputed that.

Now, if I might, I need to talk on financial efficiency briefly. At the time of *Edgewood IV*, this Court was confronted with a \$600 systemic gap built into the system. And by that I mean the richest 15 percent, taxing at a max, compared to poorest 15 percent of districts taxing at the max. The richest have \$600 more.

Fast forward to today, that \$600 gap has grown to \$3,436, five times, almost six times. The poorest 15 percent taxing at a \$1.17 compared to the richest 15 percent taxing at \$1.17, the poorest end up with 34 or 36 less per rata, and on the classroom that translates into -- right at a \$100,000 less per classroom.

Two, *Edgewood IV*, this Court adopted the trial court's finding that it costs \$3,500 to provide a general diffusion of knowledge in 1994. That's when *Edgewood IV* was decided. It's undisputed that since 1994 there's been an expediential increase in standards put upon school districts.

The most recent one, the STAAR test, college and career ready, very rigorous, undisputed more costly, but ignore all that and just inflation, adjust \$3,500 over the last 20 years and what you get to is \$6,576 as of 2012 when we're putting our evidence on. It's slightly higher than that now because inflation has continued on.

So if you look at, the 9-cent tax gap in *Edgewood IV*, one, everybody in *Edgewood IV* could get to \$3,500. The poor

had to tax 9 cents higher to get there, but everybody could get there. On this record, if you look at \$6,576 being today's tax adjustment -- inflation-adjusted 3,500, only 202 districts -- 202 advantaged districts, I might add, taxing at a \$1.17 can get to 6,576. Over 818 districts, 80 percent of the districts in this state majorly can't get there.

Now, if you wanna compare the Edgewood IV calculation -- and just down in footnote 12 of the opinion -- then you may say, okay, how -- if the poor can't get there, just hypothetically, what will we do? Well, let's ignore the statutory ceiling of \$1.17 and say, poor, you can tax whatever you want to.

And two, let's say, we'll equalize like we're equalizing up to a \$1.17, we'll use the same formulas and take you up as high as you tax. It takes to four -- a \$1.31 to raise \$6,576, and the wealthiest 15 percent raises \$6,576 at 94 cents. So your 9-cents tax gap has quadrupled. It's now more than four times what it was in *Edgewood IV*.

Two, you say how can this be? Well, looking back at *Edgewood IV* you see that the yield in which is how much you get a district got per penny of tax effort, the yield gap in *Edgewood IV* -- and this is set forth in footnote 12 -- was \$2. The rich -- the rich got \$2 more for WADA -- per penny of tax effort then -- than the poor. That yield gap today has jumped to \$21 -- ten times increase. Consequently, the poor can't get there, but the wealthy get there at 94 cents.

Now, the state says, oh, oh, oh, it's just the same as *West Orange-Cove II*, you've got to affirm and look at the ratio between 41s and 42s. State doesn't tell you that since *West Orange-Cove II*, they changed the definition of what it makes to be a 41. When you heard this case in *West Orange-Cove II* -- and it's in the opinion -- in *West Orange-Cove II* opinion there was about a 130 41s. Today in our case there are 395 41s.

So when they say, computer, how 41s doing in *West Orange-Cove II* and see how they did today in this case, that's not apples to apples comparison because they changed the definition. That's what -- what you did do in *West Orange-Cove II* and what you've done in every single school finance case is compare top 5 percent, bottom 5 percent; top 15 percent, bottom 15 percent. So you're comparing apples to apples all way through.

And I've -- read through, and as carefully as my almost 65-year-old eyes could get us to on *West Orange-Cove II*, and I found one comparison that this Court made in *West Orange-Cove II*, and it was the top 5 percent and bottom 5 percent based on revenue. And what the gap was as set forth in *West Orange-Cove II* was over \$1,678 difference between what the richest 5 percent had compares -- compared to the poorest 5 percent. Today, that's doubled. Today, the *West Orange-Cove II* gap between top 5 and bottom 5 percent is 3,265. It's doubled since then.

Now, going back to the more -- and that means that roughly 3,265 translates into about a \$100,000 difference per classroom. I mean, we're not talking small numbers here. We're talking huge numbers as far as what's available to educate kids. Better teachers, more aids, more equipment, better counselors, more counselors, you name it. With \$100,000 per classroom, you can do a whole lot more.

And we don't begrudge -- I represent all four districts, and we don't begrudge the wealthy districts for having this advantage. What -- what this isn't -- and one of the things and going back to the suitability question and I'll keep moving is, how can a system be suitable that -- that literally pitches poor districts against rich districts, and rich districts against poor districts.

We're all in the same boat. We're all here to educate kids and provide the best you can but this system itself literally gives a -- puts the -- those that have in a situation of trying to prevent those that have not because they're afraid that they have to give it up. And how can that be a suitable system?

CHIEF JUSTICE NATHAN L. HECHT: Would House Bill 1759 have helped or not?

ATTORNEY RICHARD E. GRAY: The -- I don't -- I get my numbers confused, but if that was Representative Aycock's bill?

CHIEF JUSTICE NATHAN L. HECHT: Yes.



ATTORNEY RICHARD E. GRAY: It clearly would have helped on the funding differential. It -- it put about \$3 billion into the system. And it clearly would have -- and it was going in at the basic allotment level which would have -- have the effect of raising the poor up -- raising everybody up some, with the poor up the most, and would have to a very large extent close the gaps that I've been talking about. Unfortunately, it -- it went nowhere.

I wanna make two quick points and I know I'm out of -- almost out of time. Today, in *West Orange-Cove II*, this Court said you look at the system as a whole. The -- you look at -- the taxing of both M&O and I&S together, and see what kind of revenue that -- that produces.

When you look at today's situation, you find that the poor are taxing 9.6 cents more than -- when I say poor I'm talking about the poorest 15 percent districts compared to the richest 15 percent districts -- they're taxing on average 9.6 cents more and they're getting \$3,072 less. That's the reality of where we are, and the reality also where we are is none of my clients can get to the *Edgewood IV* inflation-adjusted number, much less the number that will be associated with the higher, more rigorous standards.

JUSTICE DON R. WILLETT: If you were in charge, to what degree should policy makers pour more money into the current system as opposed to altering the system?

ATTORNEY RICHARD E. GRAY: That's their option, and that was where I wanted to close, Justice Willett, so that's a perfect segue.

First, I think, it is completely arbitrary on behalf of the state to make these impositions on districts, these demands on districts, and not have a clue what -- what it costs, rely on 30-year-old studies that were arguably not -- not very good at the time, but nevertheless clearly outdated today.

Two, as you all are well aware of, 'cause you warned the legislature at least four times by my count that the system needs structural changes. Nobody has said what that necessarily means but, Justice Green, when you said, well, there's 1021 districts, does that contribute to the inefficiency? I guarantee you from the property-poor districts it does because you've got this huge different array of property values.

When I first tried this case in *Edgewood I*, the range was 700 to 1, richest district versus the poorest district. When we tried the case before Judge Dietz this last time around, it had dropped to 423 to 1. Today, as I sit here before you, having checked the TEA's Web site for the March -- up to March 15 updates -- its most recent updates -- it's gone to 824 to 1.

And you say, how can that be? Well, it is fracking comes along, and poor -- poor district that you couldn't get the oil out of -- now, you can, boom, you're rich. Price of oil drops to \$40, and they stop fracking, boom, you're poor.

A -- a power plant moves into your -- a farming community, boom, you're rich. The power plant has environmental problems, and it -- it shut down, boom, you're poor. That's the kind of thing that this whole system is hedged on, and the state for whatever reason has funded historically over -- over 50 percent of the total cost of public education has been put on the local property taxpayer's tax back and with this wide array of -- of values.

It's simply not an efficient way to do -- run a railroad, but if the state chooses to run a railroad that way, they at least need to fund at such a point where all districts can get to the level of -- of GDK at or about the same tax rate.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Gray.

We'll turn back to the state now, Mr. Craft.

REBUTTAL ARGUMENT OF RANCE CRAFT ON BEHALF OF PETITIONER STATE OF TEXAS

ATTORNEY RANCE CRAFT: To give my colleagues a chance to shuffle chairs before I begin.

JUSTICE DON R. WILLETT: Mr. Craft, while you're -- while you're waiting, we've heard, you know, talk today about the, you know, the 21st century global economy, and -- and it's really hard to fathom, at least to me, that, you know, Texas policymakers began with a blank sheet of paper today that they would create anything resembling sort of the complex, sort of, Rube Goldberg contraption that we have which seems to lurch from one lawsuit to another, you know, Band-Aid on top of Band-Aid, on top of Post-It note, on top of paper clips, sort of all -- you know, bound together with a rubber band.

And I'll ask you, sort of, I guess what I -- sort of, suggested to opposing counsel, again, this sort of, lurches from kind of finger-wagging lawsuit to finger-wagging lawsuit, and how should lawmakers dedicate their focus as opposed to pouring just additional revenue and money into a current system versus kind of altering the system in a more fundamental or structural fashion?

ATTORNEY RANCE CRAFT: I don't have an answer, Justice Willett, because that's for them to decide. It's not for anyone in this room to decide. And that does go to the intervenor's structural efficiency claim which is what I wanted to address first before moving to our rebuttal points.

The Court should dismiss that claim for the reasons discussed by Mr. Keller, but alternatively the Court should affirm the judgment rejecting the intervenor's claim for two principal reasons.

One, that claim is not cognizable 'cause there's no workable standard for assessing qualitative efficiency or waste.

And second, even if that claim were cognizable, the intervenors failed to prove that the system features they attacked arbitrarily caused systemic inefficiency.

Now, the intervenors tried to prove their claim through a series of comparative analyses, that is, some feature of the system is inefficient because there's a better mousetrap out there that's more efficient. For example, merit-based teacher pay would be better than the current system we have now or unlimited class sizes which are better than what we have now.

That can't be the motive analysis for several reasons. It cast the courts in the role of the arbiter of education policy. If the court holds that some feature of the system is inefficient because there's some feature out there that's more efficient, that crosses the line into prescribing how the legislature is to do that restructuring you were talking about, Justice Willett.

Also, just showing that the system can be improved in some way doesn't necessarily mean the existing system is inefficient. That's tantamount to saying the system has to be optimal, and we know that's not the standard from your precedent.

And finally, showing that one feature is less efficient still doesn't leave us with any way to show that the whole system is inefficient.

Beyond those comparisons, the -- the intervenors didn't identify any metric by which we can measure this. Their -- their expert said there is no recognized standard of efficiency in the scientific community. And in their reply, they said, we don't need a metric other than waste. And today you said -- you heard Judge Enoch say, well, it's just arbitrariness.

Well, arbitrariness is the -- is the standard to which the court views the constitutional requirement, but there still has to be a substantive standard behind that. Article VII just doesn't require that the system not be arbitrary. It requires adequacy, efficiency, suitability. And they didn't provide any metric for waste other than waste. And I believe the question was asked, how do we know that? They didn't offer any metric.

Now, if you do say this claim is cognizable, they simply failed to prove their case. The way they described their claim is that the inquiry should be whether the system's structure is productive of educational results for Texas school children with little waste. They then march through some mandates and lack of competition, and then their judgment allegedly demonstrates systemic inefficiency.

In our response brief, we went through each of those features they attacked, and demonstrated that they were not arbitrary, did not cause systemic inefficiency or both. I won't go through those here because they all went un rebutted in the intervenor's reply. What they said was, the court has never held that it's necessary for a party to prove that each particular statute in the education code is arbitrary to prevail on an efficiency challenge.

Two responses to that. First, the court has said that arbitrariness is the standard for all Article VII Section 1 claims so that it has to be part of their case. But second, we didn't say they had to prove that each and every statute in the education code was arbitrary to prevail. But surely they had to prove that the statutes that they attacked, that they identified as causing systemic inefficiency were arbitrary and they failed to do that for any of them.

Now, we do have common ground with the intervenors on one point, and that is that funding is no guarantee of better student outcomes. This Court has already said that. There's not a simple and direct relationship between funding and student performance, and that more money doesn't necessarily guarantee better educated students.

But that is the foundation for their case, for their adequacy, suitability, efficiency tax claims. They all trace back to this idea that we can figure out this dollar figure that is necessary to achieve a general diffusion of knowledge and work everything off of that. Those are based on these cost studies that were referenced in Justice Boyd's question to Ms. Bono. The Court should be very wary going down that road because none of those cost studies were actually linked to improvements in student performance.

And in fact, one of those cost studies that -- that is a cornerstone of their case that the district court relied on to make its finding that it cost X dollars to achieve a general diffusion of knowledge was from Dr. Odden. And there are at least four other states where they bought into his model, and funded more education based on his model. And the results showed no measureable improvement in student outcomes. Texas should not go down that same road.

JUSTICE EVA M. GUZMAN: Should Texas determine though, as a policy matter, what it costs to achieve a general diffusion of knowledge?

ATTORNEY RANCE CRAFT: The statute that they're referring to as a requirement to -- to make that study refers to the Legislative Budget Board. And -- and what's I believe the Chief Justice asked about this too, what that statute actually says is that the Legislative Budget Board is to promulgate rules for the calculation of the funding elements necessary for the state policy. It's -- it's unclear whether the Legislative Budget Board as a joint committee of the legislature has that kind of rule making authority.

But in any event, Section 322.008 of the government code says that those elements may be included in the General Appropriations Act for informational purposes. So in our judgment that makes that entire exercise directory. But whether it is or not, we won't know from this lawsuit because for all they're complaining about it, they didn't sue the Legislative Budget Board. They didn't sue the entity charged with that duty under the statute.

And if you do go down this road of deciding this case based on funding, Mr. Trachtenberg provided a -- a picture of how that's going to work if you affirm the judgment. What he said is going to happen is that after you -- if you affirm the judgment, the legislature will act, then we'll go back to the district court, and it will be up to the state to say sufficient funding has been added to the system, or necessary interventions have been added to the system. That's not



a proper role for a court to decide whether what the legislature did that that funding or those interventions through the constitutional violation that's -- how is it going to do that after the ink is dry on that legislation anyway?

JUSTICE EVA M. GUZMAN: Under the present framework, whose burden is it to prove the funding is not sufficient in the trial court?

ATTORNEY RANCE CRAFT: It's nobody's burden because funding is not the standard. Funding is not the standard for any of these claims. And that's what -- that's why the court should stay away from the foundation of their case which is -- which is all premised on --

JUSTICE JEFFREY S. BOYD: But looking at outputs, then give us your best response to what I heard to be their best argument, which is if we're gonna focus solely on outputs, currently the results indicate that less than 30 percent of our high school students leave high school with a greater than 60 percent chance of making a "C" in college.

ATTORNEY RANCE CRAFT: What -- what that -- that particular statistic is referring to is Section 39.024 of the education code which defines college-readiness as the ability to take an entry level class in English language arts or math without remediation and pass. What TEA did was they tied that particular outcome to achieving the final Level II standard on the Algebra II and English III exams.

But then since that time the legislature has eliminated those exams as a requirement for graduation so those measures are suspended. They won't come back again until those tests begin being given on a voluntary basis this school year so we don't have that as a standard. So what they do instead is they point to this final Level II standard. But that standard is still being phased in and that's commensurate with the idea that we're vertically aligning the curriculum which is a -- a multiyear process, and we have long-term goals for college readiness.

All of their output argument is based on the idea that the standard is, students must be college- and career-ready right now. That's why the accreditation system -- which going back to your other question, Justice Boyd -- is, you know, what is a general diffusion of knowledge? The court presumes that the accreditation system measures a general diffusion of knowledge. We -- the parties dispute whether it is actually doing that, and I'll leave that to the briefing.

But in our judgment, it does reflect where the districts need to be, and Charter Schools need to be right now, and they are providing a general diffusion of knowledge. But when the court has looked past that to other measures, it's not just STAAR exams, but if you do look at the STAAR exams, again, you need to consider those standards in the context of the legislature's goals which are to advance college readiness which is to be the long-term goal of ranking among the top states.

You also need to look at other measures to review if we're talking about college readiness, look at Texas' ACT scores, we're at the national average. Is that where we wanna be? No, we wanna be better than that. But that doesn't indicate a system that is so deficient that it's constitutionally inadequate.

Our graduation rates -- you mentioned those, Justice Guzman -- are some of the best in the country, and there's some dispute about what that means. But surely that's not evidence of a system that is constitutionally inadequate.

JUSTICE EVA M. GUZMAN: Going back to the ACT scores, we're at the national average, but what percentage of our children could choose to take the ACT as compared to other states, do they have a higher percentage of their graduates taking the ACT versus -- versus ours?

ATTORNEY RANCE CRAFT: It -- the, I mean, the percentage is -- is going up and of course there's, you know, some states are SAT states, some are ACT states, and students in Texas take both. We are below the national average on SAT. We admit that, and so those -- those are mixed results. But again that doesn't show a system that is so deficient that it's constitutionally inadequate.

JUSTICE EVA M. GUZMAN: And back to the burden of proof that -- that I was asking you about because you said



the state had to come into court and prove that funding was adequate, but actually when you talk in the -- have you spoken you can let me know -- but they have the -- the plaintiffs have the burden to prove the system is unconstitutional.

ATTORNEY RANCE CRAFT: That's right. They have -- they have the burden, but what -- what Mr. Trachtenberg described was the state -- if you affirm, coming back after they presume the legislature has acted, and the state coming back to the trial court and saying you need to lift your injunction because of change of circumstances, and then it would be on us to say all this extra money is change in circumstances. All of these, you know, whatever the legislature does, these are change in circumstances so you should lift the injunction.

But again, that puts the court in the position of judging, you know, is -- is that money enough? That's not the proper role for a court --

CHIEF JUSTICE NATHAN L. HECHT: It seems to me that the state's position though believes Article VII Section 1 unenforceable basically. It's just a dead letter.

ATTORNEY RANCE CRAFT: It -- we don't agree with that. I mean, we do -- we -- our position is that we ask the Court to reconsider whether, you know, it is a plausible question --

CHIEF JUSTICE NATHAN L. HECHT: Why does it make that provision dead letter?

ATTORNEY RANCE CRAFT: If you reach the merits?

CHIEF JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY RANCE CRAFT: It doesn't -- it does not make it a dead letter --

CHIEF JUSTICE NATHAN L. HECHT: Well, how does it -- how -- how is it left with any effect?

ATTORNEY RANCE CRAFT: I'm sorry?

CHIEF JUSTICE NATHAN L. HECHT: How is it left with any effect? It just -- it's like me saying, I wanna be a saint and then going on about my business just doing whatever I wanna do. It doesn't do anything.

ATTORNEY RANCE CRAFT: A few responses, it -- it -- the court has said it's a very deferential standard.

CHIEF JUSTICE NATHAN L. HECHT: Sure. But it's -- but we -- we said that when we were acting in the case.

ATTORNEY RANCE CRAFT: Yes. And so -- and so, I mean, if the question is, if you reach the merits, does our position mean that essentially there's nothing they could do to win? That's what I understand the question to be. And, yes, we do think that there are -- there would be some level of outputs that could be so deficient that the court would conclude you're not making a general diffusion of knowledge.

The tax gaps or the revenue gaps can be so wide that -- that the system is financially inefficient. Or, you know, if -- if we weren't requiring a general diffusion of knowledge, you know, or if it was inadequate and inefficient that may be proof of suitability, but not on this record. Again, it's a very deferential standard.

JUSTICE JEFFREY S. BOYD: So let me -- I -- I wanna ask you about the weights and adjustments that are 30 years old in the funding structure. And if I were you, and got asked the question, I think my response would be, well, but the inputs don't matter. The funding doesn't -- even if those are 30 years old, it doesn't matter because we look to outputs.

Assume this Court disagrees with you, and for the same reason your cocounsel argues that funding does matter for rightness, we conclude that funding matters for adequacy as well. Is there any defense to the arbitrary and capricious



argument that says is if, look, if you're gonna make adjustments and -- if the legislature is gonna try to make some effort to provide enough money to educate students who have a variety of needs, geographical income level needs, and special ed needs, and so on, can -- is that defensible at all? Is there any defense to the arbitrariness argument that says you can't keep relying on 30-year-old data?

ATTORNEY RANCE CRAFT: I think the -- the -- my -- my primary line of defense would be *West Orange-Cove II*. Everything you're talking about was 20 years old then, but when -- but -- and that was in that record. But the court didn't look at that to decide whether the system was adequate, not suitable, inefficient. The court didn't look at those things. So we look at the -- the outputs that matter. We look -- we look at the numbers that matter. It's -- it's those behind the scenes things, haven't been adjusted now in 30 years instead of 20 years, it's -- it's harmless if it's not affecting the outcome, and our judgment is it's not.

I just wanna close with a couple of comments. First, on -- on the Charter Schools, the -- the primary argument is that we're discriminating against Charter Schools -- the state is. A fundamental tenet of any claim of discrimination is that you're treating similarly-situated entities differently. Charter schools are not the same as school districts. They're subject to different mandates. They're supposed to be more cost efficient that's why they get treated differently.

And finally, one of the things you heard today from the ISD is that the remedy in this case is to tell the legislature, shut it down or fix it. That's not judicial redress. That's not judicial redress at all, but if that's the message from this Court, we'll be right back here.

If there are no further questions, we ask that the Court render -- render judgment dismissing this case for lack of jurisdiction, or remanding it to the trial court for further consideration of -- of the recent legislative activity. If you do reach the merits, we ask that you render a judgment in favor of the state on all claims.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Craft.

Mr. Enoch, we'll hear rebuttal on the Efficiency Intervenors.

REBUTTAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE INTERVENOR ON APPEAL EFFICIENCY INTERVENORS

ATTORNEY CRAIG T. ENOCH: [inaudible] that, Chief, I see I think I'm next as it comes up.

A couple of things I'd like to address. You heard Mr. Craft say that's not our duty, that's the LBB's duty, and nobody sued them. Then you heard Ms. Bono say that the Efficiency Intervenors didn't prove that the school districts are wasting money. The duty, is the legislatures, it is nondelegable, and the biggest waste of money and assets producing no educational results is the fact that we're here in this courtroom today, and the fact that we've been here seven times -- not us, not the Efficiencies -- but the school districts suing the state over adequacy, over funding, over equity on the education system.

It reminds me of the computers when they were first built. If you bought a computer built by somebody else, you had to go get software from a third person. You put them together, your computer doesn't work. And then your computer manufacturer and your software builder point their fingers at each other and say it's not our fault. That's this case.

The system that the legislator -- legislature constructed, as you heard, requires the system to come periodically to this Court to force the legislature to fix the system. It is fundamentally flawed. It is massively wasteful. And the only people who have the real claim here are the Efficiency Intervenors who are talking about productive results with little



waste.

Billions of dollars are misallocated because of a cost of education index they refuse to update. Billions of dollars are wasted based on the legislature's determination how best we deal with teachers. Billions of dollars are wasted because the -- the system that the legislature created does not account for any teacher performance based on student performance.

We have no idea if the next dollar to the -- to the -- to any -- to any school district will actually produce a different result, and in fact the history before this Court is billions of dollars have been added. This Court has directed the legislature to go back and reconsider the taxation, and more billions have been added, and it literally has not moved the needle on performance.

Now, if adequate -- we're not an adequacy plaintiff. We're not a suitability plaintiff. We are a qualitative efficiency plaintiff, and that means it's got to be productive or results with little waste. It is undisputed -- it is not productive of results. Their only argument is it moved the needle a little bit. It is undisputed that the system has had billions and billions more dollars. We have proven that this is not productive results with little waste.

I appreciate the Court. It is really struggling with what the remedy is. I mean, I understand the state is saying, wait a minute, you can't order us to do stuff. Well, you didn't shut the school system down last time. You gave them 18 months to fix it before you shut it down. This Court does have the ability when it has the charge, and they've all come to you asking you to resolve their problems. The Court did not shirk from making a statement and providing relief to the very people that it serves.

Five million more kids have entered the system this fall. By the time this case is done, they will be in the first and second grade. They will have missed one year with a bad teacher is devastating for the child's education. This system is designed to come to you every seven years to have you resolve the problem that takes three years to litigate. By definition, it is not efficient. It wastes a lot of money, and it doesn't produce results.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions of Mr. Enoch?

Thank you.

And finally, the Texas Charter Schools, Ms. Pierce. You have the last word, Ms. Pierce.

REBUTTAL ARGUMENT OF DENISE PIERCE ON BEHALF OF RESPONDENT TEXAS CHARTER SCHOOLS ASSOCIATION

ATTORNEY DENISE PIERCE: May it please -- may it please the Court.

My name is Denise Pierce. I'm the general counsel of the Texas Charter Schools Association.

I know that I'm the last person standing between you and this very long morning, and I promise to be brief.

The state makes the point that Charter schools are different, and they are. That's not the reason we're standing here. We're standing here because of the reasons we're the same. We're the same because the state legislature says that we are charged just like school districts to bring the primary implementers of the public school system in this state. We're the same because the state law says that Charter Schools are part of the public school system of this state. We have the same duty and obligation as the traditional school districts to deliver the curriculum, and to deliver graduated students that demonstrate a general diffusion of knowledge.



JUSTICE DEBRA H. LEHRMANN: I have a question. We're looking at output.

ATTORNEY DENISE PIERCE: Yes, ma'am.

JUSTICE DEBRA H. LEHRMANN: And I think earlier someone quoted that, I don't know, hundreds of thousands of parents want their students -- their children to go into Charter schools. Apparently, there's some pretty good output there, why are those parents wanting that?

ATTORNEY DENISE PIERCE: Our schools are schools of choice. And our schools are designed to meet the legislative design which was to create dropout prevention and dropout recovery campuses, smaller learning communities. Schools that were -- are related to arts and sciences. And so parents seek out the schools because they offer some special curriculum, some smaller school design that's in the best interest of their student.

JUSTICE DEBRA H. LEHRMANN: And is -- is well beyond something that's just adequate, right?

ATTORNEY DENISE PIERCE: Yes, ma'am. All of the data that has been introduced in the record and talked to you today about the outputs of student performance include Charter school students. When you isolate Charter school students from that data you find that 11 percent of Charter school students are college and workforce ready. The same general diffusion of knowledge that's lacking throughout the whole system is particularly acute for Charter school systems. And our parents choose our schools, but what they don't choose is to be treated unconstitutional under its provisions.

JUSTICE PHIL JOHNSON: Well, of course, if the court is going to pick and choose and -- and the trial court is gonna supervise, it sounds like one of the first things they would do is shut down the Charter school system if all you're doing is 11 percent. Now, that's not -- that's not what you want.

ATTORNEY DENISE PIERCE: You're exactly right, your Honor, and the legislature has the privilege, the opportunity to shut down Charter Schools tomorrow. It also has that privilege to shut down traditional ISDs tomorrow. But as long as it affirms that it's gonna keep them open, it has a constitutional duty to fund them adequately. It's our position that so long as Charter Schools are here creating an opportunity for parents to have choice, that they have a duty to do more than what they've done now.

Our -- our claim is exceedingly modest. Consider this, the legislature has created two pots of funding for public schools. It creates a pot of funding for instruction, and it creates a pot of funding for facilities. And it says that the independent school districts are entitled to both sets of that funding, but it only allows Charter Schools to have access to the instructional piece.

And in doing so, it forces us to use that instructional money to cover the cost of facilities which drains our ability to pay teachers competitive salaries, drains our ability to have adequate facilities, and drains our ability to deliver on the educational outcome that the state is expecting us to deliver.

It would be like the legislature having the judiciary charged with administering these laws, and adjudicating the fairness between parties, but not giving you the facilities funding to have courthouses for these stuff to happen. You would have to cannibalize your salaries, and your resources in order to facilitate the duty that the constitution has set up for you to do.

JUSTICE DON R. WILLETT: Am I right to assume that you've sought facilities funding legislatively and had been denied?

ATTORNEY DENISE PIERCE: We have sought facilities funding repeatedly.

JUSTICE DON R. WILLETT: And who was your chief political obstacle?



ATTORNEY DENISE PIERCE: Pardon, your Honor?

JUSTICE DON R. WILLETT: Who was your chief obstacle to getting that done?

ATTORNEY DENISE PIERCE: Our -- our chief obstacle was an unwillingness by the legislature to make any funding decisions until this Court ruled in this case, and an unwillingness to -- to -- to make what we believe are appropriate and necessary appropriations for the public school system as a whole.

When you all retire to your chambers to draft your opinion for this Court, we want you to send a clear message to those legislators that we've been talking to for years. Tell them that the state cannot discriminate against Charter school students and parents. Tell them that they cannot continue to force Charter Schools to take money away from teachers' salaries and computers, and other educational resources as the only means for building their classrooms.

Tell them that they're funding us currently on faulty assumption that we can assume this primary responsibility of educating students and preparing them for the workforce while not preparing them or not providing an opportunity for our students to have a place to read, and write, and compute, and problem-solve, and think critically or to apply technology.

As Mr. Ho mentioned earlier, we know that we're not entitled to facilities funding per se, what we're entitled to is an adequate funding. And we believe that you all have the authority and the responsibility to render judgment in our favor.

And in sum, we certainly wish all the plaintiffs in this litigation well. We believe that all of our claims are meritorious, but make no mistake, if anyone should win in this case, it should be the Charter school students and parents that I'm so privileged to represent.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Ms. Pierce.

Case is submitted on the briefs and the arguments.

The marshal will adjourn the Court.

MARSHAL: All rise.