



not belong in this Court. Additionally, Intervenor have not, and cannot, adequately plead or satisfy essential standing elements required under the UDJA. Because Intervenor's plea cannot be cured by amendment, their plea should be dismissed with prejudice for lack of jurisdiction in its entirety.

## Background

### Intervenor's Claims under Article VII § 1 of the Texas Constitution

Unlike the various plaintiffs' claims in this case, Intervenor do not focus on the provision of sufficient and equitable financial resources to enable all Texas schoolchildren to receive an adequate, efficient and suitable education—rights guaranteed under the Texas Constitution.<sup>2</sup> Instead, Intervenor seek, under the guise of “qualitative efficiency,” orders from the Court requiring the State to enact “structural” changes prescribing different educational choices that would, in their opinion, improve education. *See* Plea ¶ 8.

A simple review of Intervenor's allegations demonstrates that they are requiring this Court to “prescribe the structure of the school system:”

- a. The current statutory cap<sup>3</sup> on the number of charter schools<sup>4</sup> (numbered at 215) “breeds inefficiency in the system of public free schools.” *See id.* ¶ 11.
- b. Traditional public schools should operate more like public charter schools with fewer statutory and regulatory burdens. *See id.* ¶ 12.
- c. The Texas Education Agency has little expertise to develop a system to rate financial accountability of the education system and such evaluation should be

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<sup>2</sup> Article VII, section 1 of the Texas Constitution, states in relevant part, “a general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”

<sup>3</sup> Tex. Educ. Code Ann. § 12.101(b).

<sup>4</sup> “Charter schools” are those to whom the State Board of Education has granted a charter on the application to operate in a facility of a commercial or nonprofit entity, an eligible entity, or a school district, including a home-rule school district. Tex. Educ. Code Ann. § 12.101 (a).

conducted by a “third party,” and not the agency that controls the funds.<sup>5</sup> *See id.*

¶ 13.

- d. “Many provisions in the Texas Education Code, chapter 21 make the system inefficient and therefore are unconstitutional,” especially those related to personnel decisions. *See id.* ¶ 15.
- e. Twenty-three regulations related to the Home-Rule School District Charters, described by Intervenors as “very restrictive regulations,”<sup>6</sup> that should be removed to “make this program more efficient.” *See id.* ¶ 16.
- f. The Public Education Grant Program<sup>7</sup> and how regulations have “watered-down” the statute because the receiving district can arbitrarily reject an attempt to transfer a student from an underperforming district. *See id.* ¶ 17.
- g. Other “inefficiencies in the system not tied directly to any specific statute or regulation.” *See id.* ¶ 18.

As a remedy, Intervenors request this court to declare that the current system of public free schools violates the Education Clause of the Texas Constitution because it fails the “qualitative efficiency test.” *See id.* ¶ 21. They further seek a judgment declaring that Chapter 21 of the Texas Education Code is not efficient under article VII, sec. 1, as well as similar declaratory relief pertaining to the following sections of the Education Code: 12.101(b); 25.111-112; 12.013(b)(3)(F)-(S); 21.402; 39.082; 42.102, 29.203(d); over twenty (20) subparts of Chapter 21<sup>8</sup> and all corresponding regulations in the Texas Administrative Code. *See id.* ¶ 22.

<sup>5</sup> Tex. Educ. Code Ann. § 39.082(a).

<sup>6</sup> Tex. Educ. Code Ann. § 12.013(b)(3)(F)-(S).

<sup>7</sup> Tex. Educ. Code Ann. § 29.201.

<sup>8</sup> These include Tex. Educ. Code Ann. §§ 21.402 *et seq.*; 21.031; 21.401; 21.207, 21.209, 21.251, 21.252, 21.253, 21.254, 21.255, 21.256, 21.257, 21.258, 21.259, 21.301, 21.302, 21.304, 21.3041, and 21.307, 21.206, 21.057, 21.355, 21.351 *et seq.*

They request a permanent injunction prohibiting Defendants from giving any force and effect to Chapters 41 and 42 of the Texas Education Code. *Id.* As described further below, however, these and other complaints belong at the Legislature's doorstep, not in this Court. Additionally, even if the claims were justiciable, Intervenors lack standing necessary to bring suit.

## Argument

### I. Standard of Review for Plea to the Jurisdiction

A plea to the jurisdiction challenges the court's subject matter jurisdiction. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex.2000); *State v. Holland*, 221 S.W.3d 639, 642-43 (Tex. 2007). Whether a court has subject matter jurisdiction is a question of law. *Miranda*, 133 S.W.3d at 226. The determination of whether a trial court has subject matter jurisdiction begins with the pleadings. *Id.* The pleader has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Id.* The purpose of a plea to the jurisdiction is to “defeat a cause of action without regard to whether the claims asserted have merit.” *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d at 554.

Subject matter jurisdiction requires, among other things, that the case be justiciable. *The State Bd. of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). Thus, a plea to the jurisdiction is proper to challenge subject matter jurisdiction for lack of a justiciable issue. An issue is nonjusticiable if there is no real controversy that will be resolved by the judicial relief sought. *Id.*

If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *See Hendee v. Dewhurst*, 228 S.W. 3d. 354, 366 (Tex. App. Austin 2007) *review denied*; *Miranda*, 133 S.W.3d at 227.

**II. Intervenors' Article VII Claim Seeks to Usurp the Texas Legislature's Authority on the Design of the Public School System and is thus, Nonjusticiable**

**A. Legal standard under article VII section 1 of the Texas Constitution**

A system of public free schools must be both qualitatively efficient and financially efficient in order to survive a constitutional challenge. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 729 (Tex. 1995) (*Edgewood IV*). Financial efficiency focuses on the “direct and close correlation between a district’s tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.” *Id.* Financial efficiency requires that “[c]hildren who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.” *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753 (Tex. 2005) (*West Orange-Cove II*), (quoting *Edgewood I*, 777 S.W.2d at 397).

The qualitative component of the efficiency clause (i.e., an “adequate education”) is “simply shorthand for the requirement that public education accomplish a general diffusion of knowledge.” *West Orange-Cove II*, 176 S.W.3d at 753. Qualitative efficiency requires the school finance system to provide the resources necessary for school districts to provide a general diffusion of knowledge to every child. See *Edgewood IV*, 917 S.W. 2d at 736. An adequate education is accomplished when districts are able to provide:

“[r]easonable] access to a quality education that enables all Texas children to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. Districts satisfy this constitutional obligation when they provide all of their students with a [reasonable] *opportunity* to acquire the essential knowledge and skills reflected in . . . curriculum requirements. . . such that upon graduation, students are prepared to “continue to learn in postsecondary educational, training, or employment settings.”

*West Orange-Cove II*, 176 S.W.3d at 787 (citations omitted) (emphasis in original).

In providing a public school system, the State must provide an “efficient” system, not one that is “cheap,” “inexpensive,” or even “economical.” *Edgewood I*, 777 S.W.2d at 395. The means adopted by the Legislature must be “a suitable regime that provides for a general diffusion of knowledge...” *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (*West Orange-Cove I*). The Legislature has the right to determine the “methods, restrictions, and regulations...” of the educational system. *Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931)). The Supreme Court of Texas has stated unequivocally that in discharging its review of article VII claims, it will “not dictate to the Legislature how to discharge its duty. . . [nor will it] judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing.” *West Orange Cove I*, 107 S.W. 3d at 563-564 (citation omitted).<sup>9</sup>

However, “[w]hile the Legislature has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds.” *Edgewood IV*, 917 S.W.2d at 730, n.8 (citation omitted). “[I]f the Legislature substantially defaulted on its responsibility such that Texas school children were denied access to that education needed to participate fully in the social, economic and educational opportunities available in Texas, the “suitable provision” clause would be violated.” *Id.* at 736.

### **B. Legal Standard for Non-Justiciable Political Questions**

A political question is one involving “a lack of judicially discoverable and manageable standards for resolving it,” or (2) “a textually demonstrable constitutional commitment of the

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<sup>9</sup> While Intervenor’s claims are appropriately left to the Legislature, the claims of Yolanda Canales, Arturo Robles, Araceli Vasquez, and Jessica Romero are justiciable. The Court has long recognized that the three elements of a constitutional system of public schools provide measurable standards to review the Legislature’s actions and clearly has delineated its own judicial limitations. See *West Orange Cove II*, 176 S.W.3d at 777; *West Orange-Cove I*, 107 S.W.3d at 563; *Edgewood I*, 777 S.W.2d at 394; accord *Edgewood IV*, 917 S.W.2d at 736.

issue to a coordinate political department. . .” *Baker v. Carr*, 369 U.S. 186, 217 (1962)). This standard has been used by Texas courts as well. See *Hendee*, 228 S.W.3d at 369, *West Orange-Cove II*, 176 S.W.3d at 777-78.

Seventeen years ago, in *Edgewood IV*, the Supreme Court of Texas reviewed a similar intervention, where the Gutierrez Intervenors urged the court to prescribe a system that would permit their children to receive vouchers because the State’s system denied them an efficient education guaranteed by the Education Clause. Having failed to persuade the Texas legislature to allow private vouchers, for which the Gutierrez Intervenors believed to be the better course of action than public schools, Gutierrez turned to the courts. In granting the State’s special exceptions to the petition in intervention, the Court stated that the petition “prays for a political remedy rather than alleging a statutory or constitutional right.” *Edgewood IV*, 917 S.W.2d at 747. The Court went on to hold:

In *Edgewood I*, we held that article VII, section 1 provides “a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions.” 777 S.W.2d at 394. The Constitution gives to the Legislature, however, the “primary responsibility to decide how best to achieve an efficient system.” *Id.* at 399. Since then, we have consistently refrained from prescribing “the means which the Legislature must employ in fulfilling its duty.” *Edgewood II*, 804 S.W.2d at 498. Most recently, we explained our role as follows: We do not prescribe the structure for “an efficient system of public free schools.” The duty to establish and provide for such a system is committed by the Constitution to the Legislature. Tex. Const. art. VII, § 1. Our role is only to determine whether the Legislature has complied with the Constitution. *Edgewood III*, 826 S.W.2d at 523. The Gutierrez appellants now ask the Court to go beyond this role, and to prescribe the structure of this state’s public school system. For the reasons stated in our prior opinions, we decline to do so.

*Edgewood IV*, 917 S.W.2d at 747-48.

In *West Orange-Cove II*, the Supreme Court expressly addressed the judicial limitation doctrine when courts are asked to dictate educational policy beyond its Constitutional authority:

The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness. This is not to say that the standards in article VII, section 1 involve no political considerations beyond the judiciary's power to determine. We have acknowledged that much of the design of an adequate public education system cannot be judicially prescribed. Litigation over the adequacy of public education may well invite judicial policy-making, but the invitation need not be accepted. The judiciary's choice is not between complete abstinence from VII, section 1 issues, and being, in the State defendants' words, "the arbiter of education and policy, overseeing such issues as curriculum and testing development, textbook approval, and teacher certification". Rather, the judiciary's duty is to decide the legal issues properly before it without dictating policy matters. The constitutional standards provide an appropriate basis for judicial review and determination. ...[T]he standards of article VII, section 1—adequacy, efficiency, and suitability—do not dictate a particular structure that a system of free public schools must have. We have stressed this repeatedly. In *Edgewood I* we wrote: "Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes." In *Edgewood II*, we said: "We do not prescribe the means which the Legislature must employ in fulfilling its duty." In *Edgewood III*, we reiterated: "As before, we do not prescribe the structure for 'an efficient system of public free schools.' ... We have not, and we do not now, suggest that one way of school funding is better than another, or that any way is past challenge, or that any member of this Court prefers a particular course of action ..., or that one measure or another is clearly constitutional."

*West Orange Cove II*, 176 S.W.3d at 772-83 (footnote citations omitted).

### C. Application of Political Question Doctrine to Intervenors' Claims

Throughout their plea, Intervenors clearly and unequivocally ask this Court to direct the Texas Legislature to implement a particular system of public education through the prism of their own views of how the public educational system should work. Not one substantial constitutional claim has been made by Intervenors nor have they presented a proper case for this court to adjudicate. "Whether public education is achieving all that it *should*. . . involves political and policy considerations properly directed to the Legislature." *Id.* at 753 (emphasis in original). Defendants have singled out statutes and regulations for which they find disfavor but they have no constitutional right (certainly not under article VII, section 1) to: unlimited charters,

unregulated schools, uncertified teachers, unrestricted home-rule charter schools, and automatic transfers from low performing schools in a given year. By asking this Court to declare various, independent provisions of the Texas Education Code unconstitutional, Intervenor essentially ask this Court to dictate to the Texas Legislature the policy choices they prefer and such is not allowed under the political question doctrine.

**1. Charter school provisions.** Intervenor's strong preference for charter schools over traditional public schools is evident with the call for the removal of the statutory cap on the number of charter schools, as well as the rules and regulations imposed on traditional public schools and to which charter schools are not subjected. See Plea ¶¶ 11, 12. Intervenor is certainly free to draft proposed legislation and have it vetted publicly at the Capitol. However, asking this Court to do the same in the name of "efficiency" would violate the separation of powers. In addition, it ignores the Legislature's consideration of risks associated with charter schools, which have been deemed largely as experimental, have been criticized for their racially segregative effect,<sup>10</sup> and have been found to be no more effective than public schools.<sup>11</sup> This is not to say that all charter schools are failing and that affording students choice is an inappropriate policy decision, but it is just that: a policy decision for the Legislature to consider, not the courts.

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<sup>10</sup> See, e.g., Frankenberg, E., Siegel-Hawley, G., Wang, J. *Choice without Equity: Charter School Segregation and the Need for Civil Rights Standard*, The Civil Rights Project/Proyecto Derechos Civiles at UCLA 1 (Jan. 2010) available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf> (finding that charter schools are even more segregated than traditional public schools). (last visited June 21, 2012).

<sup>11</sup> See, e.g., Press Release, Charter Schools in Texas Perform Significantly Below Their Traditional Public School Peers (June 15, 2009) available at <http://credo.stanford.edu/reports/statepressreleases/Texas.pdf> (finding that 17 percent of charter schools reported academic gains that were significantly better than traditional public schools, while 37 percent of charter schools showed gains that were worse than their traditional public school counterparts, with 46 percent of charter schools demonstrating no significant difference), full report available at [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf). See also 2011 Accountability System State Summary (as of Nov. 2, 2011), Texas Education Agency available at: <http://ritter.tea.state.tx.us/perfreport/account/2011/statesummary.html> (last visited June 21, 2012) (showing 17.6% of Texas school schools as "Academically Unacceptable").

**2. Teachers.** Although the Texas Legislature has obviously balanced the due process rights of teachers against the need to terminate ineffective teachers in its creation of statutes concerning the employability of teachers, in the eyes of Intervenors, the end result is a system of arbitrary and inefficient rules and regulations concerning personnel. *See* Plea ¶ 15. Here, Intervenors complain of minimum salary schedules and state-mandated teacher salary grants under Tex. Educ. Code Ann. § 21.402. These statutes take into account important measures, for example, to avoid substantial teacher attrition, recruit teachers from other states and pay experienced teachers. Intervenors also complain of the teacher certification process under Tex. Educ. Code Ann. § 21.031, which is meant to ensure students have access to teachers who are properly trained and certified, but in Intervenors' eyes, these measures infringe on local authorities' discretion to hire the people Intervenors believe may be better-suited to teach. *Id.*

Intervenors further complain of various other provisions affecting teachers, arguing that each is inefficient: the minimum teacher contract under Tex. Educ. Code Ann. § 21.401, of ten months; the appeal process for non-renewal of teacher contracts set out in various statutes in Chapter 21 and rules in the Texas Administrative Code; the requirement to notify a teacher not later than the 10<sup>th</sup> day before the last day of instruction under Tex. Educ. Code Ann. § 21.206; the lack of public disclosure of teacher evaluations; and the teacher appraisal process in Tex. Educ. Code Ann. § 21.351, *et seq.*, as well as the failure to provide a meaningful measure of teacher performance that includes a value-added component. *Id.*

Each of these provisions are certainly debatable in the public forum but can find no recourse in the courts where such matters will be litigated endlessly without any judicially discoverable and manageable standards for resolving the matters. *See Baker v. Carr*, 369 U.S. at 217.

**3. Financial Rating Accountability.** Intervenors state that the financial accountability system currently in place is inefficient, though they cite to no authority when making statements such as “successful enterprises assure efficiency by also conducting unbiased third-party evaluations,” or “[I]ittle expertise is available within the Texas Education Agency to carry out this duty.” Plea ¶ 13. Intervenors seek to rewrite the current financial accountability legislation and go so far as to admit that their motives are political, stating that they wish to reform a system that “is a clear constitutional failure of public policy.” *Id.* Regardless of whether their proposed policy change has merit or not, the courthouse is not the place for a debate on a legislatively enacted financial accountability system. As the court has stated, “Deficiencies... in public education that fall short of a constitutional violation find remedy not through the judicial process, but through the political processes of legislation and elections.” *West Orange-Cove II*, 176 S.W.3d at 753.

**4. Home-Rule School District Charters.** Intervenors challenge the statutes governing Home-Rule School District Charters as outlined in Tex. Educ. Code §§ 12.011-12.013. *See* Plea ¶ 16. Intervenors state that § 12.013 (b)(3)(F)-(S) are “very restrictive regulations” and that removing the mandates therein could make the program more efficient. The Supreme Court has previously stated that its role, “though important, is limited to ensuring that the constitutional standards are met. [They] do not prescribe *how* the standards should be met.” *West Orange-Cove II*, 176 S.W.3d at 753. Because Intervenors explicitly seek to change the regulations detailed below, their request should be taken to the Legislature and not the Court.

Among these “restrictive regulations” are items such as subsection (G): elementary class size limits under Section 25.112. The relevant section, Tex. Educ. Code Ann. § 25.112, was added over 25 years ago and places a cap of twenty-two students for classes in grade K-4. It is

of such importance that notice of class size waivers must be provided to parents of affected children. *See id.* § 25.113. In performing its duties, the Legislature debated increasing class sizes in the most recent legislative session but such legislation failed to pass. *See* Terrence Stutz, *Texas Teachers Urge Senate to keep class-size limit*, Dallas Morning News, March 08, 2011; Mose Buchele, *Special Session Revives Texas Class-Size Debate*, The Texas Tribune, June 7, 2011. Additionally, the Legislature is already aware that the regulation may cause undue hardship on a district, and has enacted a procedure for requesting a waiver from the requirement. Tex. Educ. Code Ann. § 25.112 (d). It would be nonsensical to suddenly declare the courts are responsible for a regulation like this when the Texas Legislature is plainly already considering the issue during its sessions.

The Intervenors also complain about subsection (H): high school graduation under Section 28.025. This regulation states that “The State Board of Education by rule shall determine curriculum requirements for high school programs.” Tex. Educ. Code Ann. § 28.025 (a). The regulation goes on to state how many math, science, English, foreign language, etc., courses a student must take to graduate under the minimum, recommended, or advanced high school programs. Tex. Educ. Code Ann. § 28.025 (b-1). Asking the courts to debate whether or not this regulation is “very restrictive” for home-rule charters ignores considerations made by the legislative committees when establishing three different plans to meet the needs of Texas high school students.

Similarly, Intervenors take issue with subsection (J), which references bilingual education under Subchapter B, Chapter 29. This law was enacted in response to a prior court ruling holding that Latino English language learner (“ELL”) children were being denied educational opportunities under the Equal Educational Opportunities Act of 1974. *See U.S. v. Texas*, 680

F.2d 356, 371-372 (5th Cir. 1982) (Fifth Circuit noting that “the 1973 Texas bilingual program was pedagogically unsound, largely unimplemented, and unproductive in its results” and that the Texas Legislature’s enactment of the 1981 Bilingual and Special Language Programs Act tracked the lower court’s eventual remedial order, compelling bilingual education through the elementary grades in school districts with 20 or more students with limited English-speaking proficiency in the same grade, authorizing the Texas Education agency to adopt “standardized entry-exit criteria,” and compelling the TEA to take certain specific measures, including on-site monitoring, to ensure compliance). Many of these provisions remain in place today in order to ensure ELL students access equal educational opportunities, but Intervenor still want to present their case asking that home-rule charter schools be excused from implementing this section of the Education Code.

These statutes include those involving preschool programs for ELL students, evaluation of transferred students, teacher certification, and student enrollment and exiting criteria. *See* Tex. Educ. Code Ann. § 29.051-29.066. The importance of these statutes can be seen in the policy statement in the subchapter, which states, in part: “Experience has shown that public school classes in which instruction is given only in English are often inadequate...” Tex. Educ. Code Ann. § 29.051. Yet, Intervenor seek to exempt home-rule charters from these provisions under their definition of efficiency.

Another “restrictive regulation” for home-rule charters alleged by Intervenor in § 12.013 is subsection (K), concerning kindergarten and prekindergarten programs. Intervenor wish to remove these statutory mandates for home-rule charters, that require: “programs must at a minimum comply with the applicable child-care licensing standards adopted by the Department of Protective and Regulatory Services...” (Tex. Educ. Code Ann. § 29.1532 (b)), or that allow

the commissioner to “administer grants...in a manner that provides the greatest flexibility allowed under federal law.” Tex. Educ. Code Ann. § 29.1561 (b). Whether or not the Intervenor is correctly judging these regulations to be restrictive, the issue is not one to burden the courts with; instead, it is a nonjusticiable question.

Intervenor goes as far as to state that safety provisions relating to the transportation of students are among “special interest pressures” that “in effect, took away the very benefit of converting to a Home-Rule Charter.” Plea ¶ 16. Whether or not requiring that “each school district shall meet or exceed the safety standards for school buses...” under Tex. Educ. Code Ann. § 34.002 (b) is related to special interest pressures that make the educational system inefficient is not a question for the court.

Other statutes and regulations governing home-rule charter schools that Intervenor complains about include items such as special education, extracurricular activities, and other day-to-day matters that help make up the structure of the public school system. See Plea ¶ 16 (citing Tex. Educ. Code Ann. § 12.013 (3) (E)-(S)). The Texas Supreme Court has already declined to “prescribe the structure of this state’s public school system.” *Edgewood IV*, 917 S.W.2d at 747-48. Because the legislature makes the thousands of decisions that make up the state’s public school system, these issues should be taken to the legislature’s doorstep.

**5. Public Education Grants.** Intervenor likewise complains of Tex. Educ. Code § 29.201, which allows students to attend another public school campus, if for example, their present school had 50 percent or more of the students failing to perform satisfactorily on a state standardized test. The subchapter further provides that a district cannot accept or reject a student on the basis of a student’s race, ethnicity, academic achievement, athletic abilities, language proficiency, sex or socioeconomic status. *Id.* § 29.203(d). The chapter further provides that a

receiving school district with excess applications must give priority to students at risk of dropping out and requires the sending school district to provide transportation free of charge. *Id.* Despite these statutory protections, Intervenor complains of these policy decisions, claiming the statute has little or no effect.

### **III. Intervenor's Facial Challenge has no Merit**

Intervenor alleges that they raise a facial challenge to the public school system and the specific statutes with which they find disagreement but such a challenge fails as a matter of law. *See* Intervenor's Resp. to Plea to Jurisdiction and Mot. to Dismiss. Facial challenges to statutes are "the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid." *Ex parte Morales*, 212 S.W.3d 483 (Tex. App. Austin 2006), reh'g overruled, (Oct. 5, 2006) and petition for discretionary review refused, (Feb. 7, 2007). "To sustain a facial challenge, the challenging party must establish that the statute, by its terms, always operates unconstitutionally." *Barshop v. Medina Underground Water & Conservation Dist.*, 925 S.W.2d 618, 627 (Tex. 1996).

Additionally, facial challenges are disfavored and generally permitted only in the context of the First Amendment. *HCA Healthcare Corp. v. Texas Dept. of Ins.*, 303 S.W.3d 345, 349 (Tex. App.--Austin 2009). Claiming that the entire public school system is facially unconstitutional is not in the context of the First Amendment and exploring such a frivolous claim is a waste of judicial resources.

Over and over in the plea, Intervenor's take issue with various parts of the Education Code. However, disliking the current law is not enough to mount a facial challenge. There is no constitutional basis to attack items that do not always operate unconstitutionally, as is required for a facial challenge. For example, challenging specific provisions in the code that require a

minimum salary schedule for teachers could be constitutional because the statutes ensure teachers are paid a minimum salary for helping to teach our children and helps retain experienced teachers in the profession. As another example, their challenge to the due process procedures set in place for teachers can help ensure that good teachers are not wrongly targeted, which is what Commissioner Scott testified to during his deposition. *See* Ex. 1, Excerpt of Scott Dep. 430:23-431:6, June 28, 2012. In addition, their averment that poor quality teachers cannot be dismissed under the current system also finds no merit. As Commissioner Scott testified, “teachers can be dismissed. It’s done regularly.” *See id.* Dep. 444:5-7. Intervenors cannot show that any of the laws they attack always operate unconstitutionally, and this is the high burden that a party claiming facial unconstitutionality bears. As the Supreme Court has stated, “A mere difference of opinion between judges and legislators, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.” *Neeley v. West Orange-Cove Consol. Independent School Dist.*, 176 S.W.3d 746 (Tex. 2005) (internal quotes omitted).

In fact, Intervenors themselves admit that constitutional results within the current system are possible: “Some school districts are much more ‘productive of results’ than others.” Plea, ¶18. Additionally, Intervenors aim to state that “the near total absence of competition within the system,” Plea, ¶ 18, makes it facially unconstitutional. However, Intervenors do not state how the absence of competition renders the system facially unconstitutional, and that in no circumstance can be found constitutional. The remaining claims presented by Intervenors are equally lacking merit. Intervenors’ aim is to reform the system to meet their own standards, but such an argument cannot support a facial constitutional challenge.

#### IV. Intervenor do not have Standing under the UDJA

The Uniform Declaratory Judgments Act (UDJA) is merely a procedural device for deciding cases already within a court's jurisdiction. V.T.C.A., Civil Practice & Remedies Code §§ 37.001–37.011; see *Texas Dept. of Public Safety v. Alexander*, 300 S.W.3d 62, 79 (Tex. App. Austin 2009), petition for review denied, (Oct. 12, 2010). It does not create or augment a trial court's subject matter jurisdiction; rather, it merely provides a remedy where subject matter jurisdiction already exists. See *id.* (“The UDJA does not extend a court's jurisdiction, and a litigant's request for declaratory relief does not alter a suit's underlying nature.”).

A court cannot decide a case without subject-matter jurisdiction over it, and standing is a component of subject-matter jurisdiction. See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443–45 (Tex.1993); see also *Farmers Tex. County Mut. Ins. Co. v. Romo*, 250 S.W.3d 527, 532 (Tex.App.-Austin 2008, no rev.) (“A plaintiff must have standing for the court to have jurisdiction and decide the merits of the claims”). The requirement that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides courts access only to a “person for an injury done him.” *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008).

The general test for standing is whether there is a real controversy between the parties that will be actually determined by the judicial declaration sought. See *Texas Ass'n of Bus.*, 852 S.W.2d at 445. In Texas, there are three elements necessary to satisfy standing: the plaintiff must have suffered an injury in fact, there must be a causal connection between the injury and the conduct complained of, and it must be likely, as opposed to speculative, that the injury will be “redressed by a favorable decision.” *Heckman*, 2012 WL 2052813. Injury-in-fact is

conceptually different from the question of whether or not the plaintiff has a viable cause of action on the merits--a legal injury. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 927 (Tex. App.--Austin 2010).

Standing to assert a constitutional violation depends on whether the claimant asserts a particularized, concrete injury. *See Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 774 (Tex. 2005). In the area of public education, deficiencies and disparities that fall short of a constitutional violation find remedy not through the judicial process, but through the political processes of legislation and elections. *Id.* at 753.

**A. Standard of Review for UDJA Claims Challenging Government Action**

For a party to have standing to challenge a governmental action, as a general rule, it “must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.” *Id.*, quoting *South Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex.2007). When the plaintiff, as a private citizen, asserts a public, as distinguished from a private, right, and his complaint fails to show that the matters in dispute affect him differently from other citizens, he does not establish a justiciable interest. *See Stop the Ordinances Please*, 306 S.W.3d at 926 (internal citation omitted).

**B. Intervenor’s Allegations Fall Far Short of any Particularized Interest Necessary for this Court to Assert Jurisdiction**

Intervenors include private citizens who have not demonstrated this “particularized interest.” Instead, they have listed various statutes for which they disapprove, but fail to state what harm, if any, they have suffered from the statutes. For example, they state that the current cap on the number of charter schools breeds inefficiency in the system. Plea ¶11. However, they do not allege suffering any harm caused by the cap to Intervenors from this perceived “inefficiency,” instead choosing to fabricate hypotheses like, “it is more probable that even more

students would apply if they thought that they had a chance to win the attendance lottery for charter schools,” *Id.* Additionally, Intervenor ignores the fact that the cap is on the number of charters, not on charter schools; the TEA website has a dedicated application for New School Amendments, which are “...expansion amendment[s] that permit a charter holder to establish an additional charter school under an existing open-enrollment charter...” See Texas Education Agency, Charter Schools--Charter Amendments, <http://www.tea.state.tx.us/index2.aspx?id=3507> (last visited July 17, 2012). In fact, it has been reported that there are over 500 charter schools currently in operation in Texas. See Morgan Smith, *Charter Schools, Students to File School-Finance Suit*, The Texas Tribune, June 26, 2012. In spite of this, Intervenor complains that the “liberties and rights of the people” are being restricted by this cap (though they fail to make any mention of how they are being restricted, or why their plaintiffs suffered any specific harm as a result). Plea ¶11.

Furthermore, Intervenor alleges that “if the charter system...is “suitable” and “efficient”--i.e., constitutional--every district should be allowed to operate under those more efficient regulatory burdens.” Plea ¶12. Intervenor again conjectures a conclusion without any underlying facts--they simply state outright that “charter schools provide for a ‘suitable’ system of public free schools,” *id.*, and consider that proof enough for the notion that all schools should operate under the charter model. Even if this conjecture were true, which it is not (*see* Plea to Jurisdiction and Mot. to Dismiss, nn 10-11), Intervenor does not allege any specific harm that any party has suffered because of the limitation of what they perceive is a more “suitable” system. Because standing requires a “particularized, legally protected interest that is actually imminently affected by the alleged harm,” Intervenor must show an actual harm, and not a hypothetical one.

*Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 882 (Tex. App.-- Austin 2010), review denied (Aug. 20, 2010).

Again without stating more, Intervenors aver that “[l]ittle expertise is available within the Texas Education Agency to carry out” the duty of rating financial accountability. Plea ¶13. It makes further sweeping statements, such as “efficiency requires that such evaluation be conducted by an independent third party,” *id.*, yet fails once again to state how foregoing this perceived “requirement” has harmed their plaintiffs in a personal, concrete way. As the Supreme Court has stated:

“The plaintiff must be *personally* injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury. After all, our Constitution opens the courthouse doors only to those who have or are suffering an injury. As for the injury itself, it “must be concrete and particularized, actual or imminent, not hypothetical.”

*Heckman*, 2012 WL 2052813.

As such, Intervenors have not met the requirement for standing.<sup>12</sup>

Intervenors find especially distasteful Chapter 21 of the Texas Education Code, stating that the Chapter “in its entirety drives millions of dollars in waste every year.” Plea ¶ 15. Intervenors state that they perceive many flaws with the system, for example, that teacher evaluations are confidential. *Id.* Yet, they make no statement regarding the effect of this rule on

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<sup>12</sup> Intervenors TREE and TAB also do not have standing to sue for the claims they aver. An association has standing to sue on behalf of its members if: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993). At least in the case of the first prong, TREE and TAB fail the associational standing test and thus do not possess standing.

Additionally, Intervenors cannot claim taxpayer standing; that exception is “strictly limited to cases of illegality of the proposed expenditure.” *Osborne v. Keith*, 142 Tex. 262, 265 177 S.W.2d 198, 200 (1944). As the Supreme Court of Texas has stated: “[G]overnments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official’s public acts under judicial review.” *Williams v. Lara*, 52 S.W.3d 171, 180 (Tex. 2001) (quoting *Osborne*, 142 Tex. at 265). Intervenors have not, and cannot, make any allegations supporting such a rigid standard.

any intervenor. Once again, they fail to allege any “concrete and particularized” injury from the alleged violation to any of the intervenors. The same applies to Intervenor’s allegations that “[i]t is inefficient to notify a teacher during the school year that the teacher’s contract will not be renewed,” or that “a school district has little flexibility in the length of teacher contracts.” *Id.* Plaintiffs do not allege that they are harmed by any of these measures; they only repeat several times that the measures are inefficient.

In the past, the Supreme Court has stated that deciding whether or not efficiency is met under Article VII, Section 1 requires “considering the system as a whole, not a system with efficient components.” *W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d at 790. Intervenor’s complain about select pieces of legislation (many, as listed above, with only a remote tie to the school finance system) and ask the Court to consider them individually. Avoiding this piecemeal approach is exactly what the Supreme Court intended to do when holding that the system as a whole must be considered.

The point of requiring standing is to ensure that the plaintiff has a “sufficient personal stake in the controversy so that the lawsuit would not yield a mere advisory opinion or draw the judiciary into generalized policy disputes that are the province of the other branches.” *Stop the Ordinances Please*, 306 S.W.3d at 927. Intervenor’s plainly lack standing, and their claims are not justiciable. Intervenor’s have not carried their burden of establishing that this court has jurisdiction over their claims; they have only asserted a vague, broad dissatisfaction with the school finance system currently in place and have failed to affirmatively plead the necessary allegations under the UDJA.

Furthermore, Intervenor’s plea is wrought with structural policy choices it prefers and amounts to nothing more than their own personal legislative “reform” agenda. If this Court

entertains the merits of the Plea and allows it to go forward, undoubtedly there will be no end to potential issues that persons may raise in the courts under the “efficiency” provision after failing in the legislature, including challenges to the no-pass/no-play rule, statutes governing Adult and Community Education Programs, the Texas Troops to Teachers Program, specified curriculum decisions made by the State Board of Education, or any other infinite challenges that could be created.<sup>13</sup> Certainly this is not what the courts envisioned as enforceable rights under the Education Clause.

### Conclusion

WHEREFORE, Yolanda Canales, Arturo Robles, Araceli Vasquez, and Jessica Romero respectfully request that this Court grant this motion and dismiss with prejudice the Plea in Intervention filed by Intervenors and grant any other relief that this Court deems proper.

DATED: July 27, 2012

Respectfully Submitted,

**Mexican American Legal Defense and  
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By: /s/ David G. Hinojosa  
David G. Hinojosa

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<sup>13</sup> Interestingly, Defendants have yet to file a plea to the jurisdiction on Intervenors’ claim. Never slow to challenge the viability of a claim, such silence may reflect Defendants’ own desire to establish reforms that they themselves support but are unable to pass in the Texas Legislature. *See, e.g.*, Plea ¶ 11 (reporting that Defendant Commissioner has successfully sought to circumvent the charter cap).

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Training and Advocacy, Inc.**

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\*Pro Hac Vice Application Filed

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**Certificate of Service**

I also certify that on July 27, 2012, I served the foregoing document via facsimile to

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By: s/David G. Hinojosa  
David G. Hinojosa

# Exhibit

# 1

Unofficial copy Travis Co. District Clerk Velda L. Price

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NO. D-1-GN-11-003130

TEXAS TAXPAYER & STUDENT § IN THE DISTRICT COURT  
FAIRNESS COALITION, §  
et al., §

Plaintiffs, §

v. §

EDGEWOOD INDEPENDENT §  
SCHOOL DISTRICT, et al., § TRAVIS COUNTY, TEXAS  
(consolidated) §

Plaintiffs, §

v. §

ROBERT SCOTT, in his §  
official capacity as §  
Commissioner of Education, §  
et al. §

Defendants. § 200th JUDICIAL DISTRICT

VIDEOTAPED ORAL DEPOSITION OF ROBERT SCOTT  
VOLUME 1  
Austin, Texas  
Thursday, June 28, 2012

JOB NO. 51184

Reported by:

MICHAEL E. MILLER, FAPR, RDR, CRR, CSR

1 get a job in this district again"?

2 A. You could say that, but I don't know how you  
3 would enforce it.

4 Q. Okay. Let me shift now to a different issue  
5 that you brought up, the litigation that's driven the  
6 Chapter 21.

7 Isn't it true that there's a multilevel  
8 appeal process that goes all the way up to hearing to the  
9 Education Commissioner for the nonrenewal of a teaching  
10 contract?

11 A. Yes.

12 Q. And to be clear, it's not an appeal process --  
13 I'm not talking about the appeal process for, in the  
14 middle a contract, you terminate the contract. I'm  
15 talking about there's an appeal process that, when the  
16 contract has run its course and it ends and there's a  
17 decision made not to renew that contract, there's a  
18 multilevel appeal, correct?

19 A. You can appeal that, yes.

20 Q. Is there anything about that appeal process  
21 that you believe that inures to the benefit of children?

22 MR. HINOJOSA: Objection, form.

23 A. To the extent that a nonrenewal was completely  
24 inappropriate and a qualified teacher was inappropriately  
25 dismissed and -- the example I gave yesterday was the

1 teacher was dismissed allegedly for academic performance.  
2 An examination of the record concluded that the  
3 discipline at the school was horrendous and that no  
4 teacher, even the best of teachers, could have adequately  
5 taught on that campus. I overruled the termination of a  
6 teacher based on that fact.

7 I believe that benefitted the students in  
8 that instance. In many instances, you're right, it  
9 probably inures to the benefit of the adult and not  
10 necessarily kids, but I have seen instances where it  
11 does.

12 BY MR. DIAMOND:

13 Q. Okay. Do you see more or less which way?

14 A. I think the vast majority benefit the adults  
15 on it, but on occasion, and probably more than we like --  
16 maybe even know, but I think that it could benefit the  
17 kids.

18 MR. DIAMOND: Okay. Let me show you what  
19 I'm going to mark as Exhibit 32.

20 MS. DAHLBERG: Exhibit 33.

21 MR. DIAMOND: Exhibit 33.

22 (Scott Deposition Exhibit 33 marked.)

23 BY MR. DIAMOND:

24 Q. Are you familiar with Exhibit 33?

25 A. I have not seen this document before.

1 dismissal of ineffective teachers.

2 What do they mean by "facilitate"?

3 MS. DAHLBERG: Objection, form.

4 MR. HINOJOSA: Objection, form.

5 A. I can't speak to their intent in what they  
6 wrote. I can say that, you know, teachers can be  
7 dismissed. It is done regularly. But because of due  
8 process and contract rights, that sometimes it gets  
9 messy.

10 BY MR. DIAMOND:

11 Q. But with a nonrenewal, it's not a contract  
12 right issue, is it?

13 A. No, but they still have the appeals process.

14 Q. And the appeals process that's currently in  
15 place for nonrenewal goes well beyond due process,  
16 correct?

17 A. It goes to a whole series of --

18 MS. DAHLBERG: Objection, form.

19 A. -- case law.

20 BY MR. DIAMOND:

21 Q. Right. But it goes beyond what any other  
22 public employee has, correct?

23 MR. HINOJOSA: Objection, form.

24 A. I can't speak to the rights of other public  
25 employees.

1 I further certify that I am neither counsel  
2 for, related to, nor employed by any of the parties or  
3 attorneys in the action in which this proceeding was  
4 taken, and further that I am not financially or otherwise  
5 interested in the outcome of the action.

6 Further certification requirements pursuant to  
7 Rule 203 of TRCP will be certified to after they have  
8 occurred.

9 Certified to by me on July 11, 2012.

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\_\_\_\_\_  
13 MICHAEL E. MILLER,  
Texas Certified Shorthand Reporter 5417  
Expiration Date: 12/31/13

14  
15 NCRA Registered Diplomate Reporter  
NCRA Certified Realtime Reporter  
Certified LiveNote Reporter

16  
17 TSG REPORTING INC.  
Texas CRF Registration 615  
747 Third Avenue, 28th Floor  
18 New York, New York 10017  
Phone: (212) 702-9580  
19 Fax: (212) 207-3111  
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FURTHER CERTIFICATION UNDER RULE 203 TRCP

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The original deposition was( ) was not( )  
returned to the deposition officer on \_\_\_\_\_;

If returned, the attached Changes and  
Signature page contains any changes and the reasons  
therefor;

If returned, the original deposition was  
delivered to J. David Thompson, Custodial Attorney;

That \$ \_\_\_\_\_ is the deposition  
officer's charges to the Fort Bend Independent School  
District, et al. for preparing the original deposition  
transcript and any copies of Exhibits;

That the deposition was delivered in  
accordance with Rule 203.3, and that a copy of this  
certificate was served on all parties shown herein on  
\_\_\_\_\_ and filed with the Clerk.

Certified to by me this \_\_\_\_\_ day of  
\_\_\_\_\_.

\_\_\_\_\_  
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